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Dear Vice-President,

I am writing to you on the occasion of the on-going Public Consultation of the European Commission on the "prevention and amicable resolution of disputes between investors and public authorities within the Single Market".

This letter accompanies BusinessEurope's contribution to the questionnaire and attempts to provide a more comprehensive position on the matter.

Mediation should not be the end of the road

Amicable resolution of disputes between investors and public authorities is a recognised method, incorporated in the legal system of many EU Member States. We agree with the Commission's view that mediation as a useful platform of communication and understanding between disputing parties. It can be used to clarify the cases under dispute and simplify complex cases, such as those where multiple claims are made or those that include claims of different types – expropriation, limitations in the free movement of capital, administrative wrongdoings.

Nevertheless, mediation is by nature a voluntary process, which requires the good will of the parties in order to achieve an effective and viable resolution of the dispute. There are often problems related to the enforcement of the decision. Furthermore, mediation is not a suitable mechanism in certain types of disputes, such as those that risk to be politicised. In this framework, we believe that mediation can be an option for the disputing parties but under a framework that gives access to a consolidated dispute resolution mechanism.

A potential EU framework on prevention and amicable resolution of disputes

In the context of the Public Consultation, the Commission offers five options for a framework on prevention and amicable resolution of disputes, starting from the establishment of an EU network of contact points within national administrations to creating one, EU-wide Mediation agency.

There are differences among Member States in the sense that some of them have in place mediation mechanisms while others do not, and, even those Member States that



have mediation mechanisms may follow different approaches. Nevertheless, the need for an EU framework at this stage is not clear to BusinessEurope and its Members. We need to explore and better showcase the value-added of such an EU-wide framework. Key questions need to be answered in this context:

- Does the mere fact that there are different approaches among Member States make an EU initiative on mediation necessary?
- Does the number of cases justify a solution at EU level?
- Given the clear interlinkages with the on-going debate on the legality of intra-EU BITs under the Single Market, is the timing to establish such an EU framework right?
- What would be the scope of an EU mediation mechanism? This has to be clarified as many – if not all – intra-EU BITs already contain provisions on amicable resolution of disputes between investors and states. In other words, if the legality of intra-EU BITs under the Single Market is confirmed, what type of disputes would a potential EU mediation mechanism facilitate?
- Although the questionnaire offers useful ideas and insight on the principles that a potential EU framework would follow, important aspects are not clarified. For instance, what would the process and criteria be for the selection of mediators? Furthermore, how can we ensure the enforceability of the decisions of mediation processes? Would recourse to Courts be foreseen in cases of lack of non-compliance? How the allocation of costs take place?
- Beyond prevention and amicable resolution, how will access to an effective and impartial mechanism on the protection of investments in the context of the Single Market be ensured? In other words, how would the provisions that allow the protection of investments within the Single Market be codified in a way that is clear? Will there be alternative instruments that will guarantee the current high level of protection for intra-EU investments?

We understand that this Public Consultation is part of a broader impact assessment conducted by the European Commission. We hope that this process will shed light on the different issues raised above. I would like to reiterate BusinessEurope's engagement in the discussion and readiness to contribute to the development of balanced and value-added solutions.

Yours sincerely,



Markus J. Beyrer