



Mrs. Mairead McGuinness

Commissioner for Financial Stability, Financial
Services and Capital Markets Union
European Commission
Rue de la Loi 200
BE-1049 Brussels
BELGIUM

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Dear Commissioner, dear Mairead,

I am writing to you in the context of the European Commission's current work on protecting and facilitating intra-EU investments. This is of particular importance at a time where the EU is recovering from the COVID-19 pandemic and is seeking to develop policies to become more resilient. In this regard, we need to make sure that all the necessary conditions are in place to boost intra-EU investments.

BusinessEurope appreciates the efforts of the European Commission to clarify and supplement EU rules. We have had a number of constructive exchanges with the European Commission services over the past years and we have formally contributed to the public consultation on an intra-EU investment protection and facilitation initiative. We understand that the preparations on this matter are accelerating and that the European Commission is expected to publish its proposal before the end of the year.

I would like to take this opportunity to reiterate our key concerns and considerations, which are concentrated both around substantive investment protection questions within the EU and the enforcement of investors' rights.

Divergencies at the level of investment protection within the EU

The provisions that allow the protection of investments are scattered in the large pool of primary and secondary EU law. The European Commission's Communication of July 2018 on the protection of EU investments is helpful in clarifying the rights of investors. Nevertheless, the lack of codification in one, single legal source, means that different interpretations will continue to occur. In our reply to the public consultation, we particularly express our concerns on the protection against indirect expropriation or the legitimate expectations of investors, for instance. Having one, common source of reference for the protection of investments in the EU is necessary as it would significantly facilitate investors and authorities alike to better understand the legal framework. Moreover, it will level the playing field between intra-EU investors and foreign investors in the EU, which may have recourse to higher levels of investment protection under international agreements.

**Better enforcement of investors' rights**

Establishing a unified framework will also ensure better implementation and enforcement of investment protection in the EU. It is our understanding that the termination of intra-EU BITs means that the enforcement of investors' rights will be guaranteed by national courts with the Court of Justice of the EU (CJEU) as the final arbiter. However, our practical experience so far shows important problems in the protection of investors' rights by national courts. Intra-EU investors are often faced with different interpretations of rules and increased administrative burden, denial of access to justice and well documented problems of rule of law. It is therefore of critical importance to ensure a more effective and efficient enforcement of investment protection in the EU.

We believe that the European Commission should remain open to exploring solutions under EU law that guarantee uniform, impartial and effective enforcement of investors' rights. In our reply to the public consultation, we supported the option to create an EU investment court on the model of the Unified Patents Court. For us, a legally binding instrument is the best option to ensure the highest level of investment protection, transparency and predictability in the system.

Discussing about the option to create an EU ombudsman-like body, which could act as a mediator in cases where investors would like to file complaints against EU Member States, it is our view that it would not be enough. We recognise the merits of mediation as a means to promote amicable resolution. However, mediation does not provide for final and binding decisions and, although it can be a step in the dispute resolution process it should not be the final one, as it does not address the problems that we have discussed above.

For BusinessEurope, effectively addressing these concerns will significantly contribute to increasing legal certainty and the confidence of investors in the Single Market. We thank you for your attention and would be happy to discuss with you and your services further on this important issue.

Yours sincerely,

Markus J. Beyrer