

Deutsches Aktieninstitut

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Mr
John Berrigan
Director-General
European Commission - DG FISMA
1049 Bruxelles
Belgium

26 July 2021

EU Investment Protection

Dear Mr Berrigan,

Cross-border investments are crucial for the financing of Europe's economic post COVID-19 recovery, particularly in countries most hit by the crisis and where the investment needs therefore are the largest. This is not only true for public projects, but also for the recapitalisation of companies.

However, investors are only encouraged to invest in the EU if their investments are sufficiently protected against arbitrary state measures that unfortunately still occur within the EU. This applies to companies of all sizes, be it small, medium or large companies.

Unfortunately, the recent termination of the existing bilateral investments treaties within the EU (so-called intra-EU BITs) has led to a significant decrease in investment protection. To enforce rights against discriminatory measures of a host state, EU investors are now obliged to take recourse before the national courts of the host state. However, in our opinion, some Member States lack effective and independent judicial protection to enforce investors' rights, depriving EU investors of protection of their rights.

Thus, we welcome the Action Plan "A Capital Markets Union for people and businesses", in which the EU Commission announced to strengthen the investment protection and facilitation framework in the EU.

For the measure to be successful, we ask the EU Commission to include the following issues:

1. Codification of EU investor rights

We are glad that the EU Commission intends to create a single rulebook to codify and specify investor rights. EU law tends to be less specific than rules enshrined in bilateral investment treaties concluded with third countries. This needs to change.

Codification is needed in particular as to:

- the definition of what constitutes expropriation by the host state
- the right for compensation

- procedural and substantive rights for investors vis-à-vis public policy changes

- the extent to which measures interfere with the distinct and reasonable expectations of the investors arising out of the investment
- the specification of the principle of good administration

2. Enforcement of investor rights

Even more important than codification and specification of investors rights is reliable, efficient, and independent enforcement of those rights vis-à-vis the host state. If they cannot be efficiently enforced, they do not properly serve their purpose.

To be clear: Relying on national courts for the enforcement of investor rights cannot be the solution. It is questionable whether national courts in several Member States can be regarded as capable to deliver independent, swift, and uniform proceedings in EU cross-border investment cases.

We thus believe that only a mechanism on EU level binding to national jurisdictions will lead to the urgently needed improvements in enforcement of EU investor rights:

- It would guarantee independence from executive interference of the host state.
- As the conclusions of such a mechanism would be binding, no margin to avert the enforcement of rightful claims of EU investors would be given to national jurisdictions.
- A dedicated mechanism would involve experts for investment disputes, who will provide profound knowledge in EU law when it comes to EU cross-border investment protection cases.
- The mechanism would establish harmonised standards for investment protection proceedings that would have to be applied on an EU wide basis. It would thus remedy discrepancies that arise from diverging legal opinions of national courts in a much more efficient way than via preliminary rulings or lengthy infringement procedures.
- Last, a binding EU mechanism would guarantee that the requirements of the ECJ in its "Achmea" judgement are respected.

Ideas of establishing an EU Dispute Settlement Board to provide non-binding legal assessments of cases a national court entrusted with a state investor dispute will not bring the needed relief: As legal assessments are not binding, the ultimate decision remains with national courts. The threat of infringement proceedings by the EU Commission in case it deems rulings by national courts to deviate from assessments by the EU Dispute Settlement Board not to be valid, will not be of much help either: the decision to launch an infringement procedure is often considered political and thus does not provide the required legal predictability. Last, the establishment of an EU Dispute Settlement Board does not remedy the issue of overly lengthy procedures investors face before national courts. It could even lead to longer procedures, if not implemented correctly.

We are aware of the various legal and political challenges the EU Commission faces to improve investment protection in Europe. However, the efforts are necessary for the sake of the European economic recovery as well as for the strengthening of the European Single Market.

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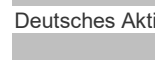
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The undersigned associations trust in the power of the European Single Market to overcome the crisis we currently face. We will stand alongside the EU Commission and lend our support wherever possible to improve and protect the Single Market.

Yours faithfully








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Ost-Ausschuss der Deutschen Wirtschaft e.V.
German Eastern Business Association



AFEP - Association Française
des Entreprises Privées



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