



Mr. Jean-Claude Juncker
President
European Commission
Rue de la Loi 200
BE-1049 Brussels
BELGIUM

5 March 2019

Dear President,

We would like to raise your attention to an issue that is of significant importance to businesses in the EU, especially at a time when attracting investments is crucial to increase employment, innovation and growth. We are referring to the termination of the so-called intra-EU Bilateral Investment Treaties (BITs) and the need to develop an alternative mechanism for the settlement of disputes between investors and States in the context of the Single Market.

Following the Opinion of the Court of Justice of the EU on case C-284/16 *Slowakische Republik v Achmea BV*, which found that the Investor-to-State Dispute Settlement included in the Agreement in question is incompatible with EU law, we understand that the intra-EU BITs will be terminated.

However, we believe that the termination should take place in a coordinated and harmonised manner. A most serious concern is that, unless an alternative mechanism for the settlement of disputes between investors and States within the EU is established before intra-EU BITs are terminated, the effective protection that EU investors will receive will be inferior to the protection they benefited from in the previous system and the broader investment climate in the EU risks to be considerably deteriorated. Moreover, there is already legal uncertainty over the large number of currently on-going cases.

Ensuring a vibrant investment environment and pursuing a solution that does not reduce the protection afforded to EU investors is also particularly important as we may end up in a situation where foreign investors that maintain Free Trade Agreements with the EU and Bilateral Investment Treaties with individual Member States will receive better protection than EU investors within the Single Market.

From the perspective of substantive protection, the provisions that allow the protection of investments are scattered in the large pool of primary and secondary EU law. The recent European Commission Communication on the protection of EU investments is helpful in clarifying the rights of investors. Nevertheless, it does not codify them in one, single legal source. It is our view that this is necessary as it would significantly facilitate investors and authorities alike to better understand the legal framework for the protection of investments in the EU as well as implement it and enforce it more effectively and efficiently.



This leads us to the importance of addressing the gaps in the procedural aspect of investment protection. It is understood that once intra-EU BITs are terminated, the enforcement of investors' rights will be guaranteed by national courts with the CJEU as the final arbiter. However, due to the lack of a unified framework, in practice we see that EU Member States tend to interpret and implement investment protection provisions in different ways. This often leads to differentiated treatment of investors and to different levels of protection within the Single Market. At this point, we would also like to mention the well-known and documented rule of law problems in some EU Member States.


For many years, BusinessEurope has been actively promoting a thorough discussion on addressing these concerns in a timely and effective manner. Our argument is not against the termination of the intra-EU BITs and in favour of the preservation of an old dispute settlement system which is incompatible with EU law, but rather supportive of the creation of a new, alternative one, which will be impartial, effective in terms of process and costs, enforceable and transparent. Working on the development of such a mechanism in the context of EU law should be possible.

Nevertheless, we have the impression that our views are met with a certain reluctance from the part of the European Commission services that are dealing with this issue. As intra-EU BIT terminations are imminent – by the end of the year – we are convinced that the current Commission still needs to look at this issue before the end of its mandate and come up with solutions that are workable and enforceable.


We understand the concerns of the current European Commission before launching an initiative towards the end of its mandate. However, as time is pressing, we would like to invite the European Commission to organise at the earliest possible an impact assessment, including a public consultation, on this subject. This will help gain time and prepare the ground for the work of the upcoming European Commission.

We thank you for your attention and for taking into consideration the concerns raised in this letter. BusinessEurope stands ready to further engage constructively on this issue with you and the services of the European Commission.

Yours sincerely,



Pierre Gattaz
President



Markus J. Beyrer
Director General