

# Position Paper

February 2020

## EUROCHAMBRES position on Investment protection in the Single Market after the termination of Intra-EU Bilateral Investment Treaties

### The Need of an Easily Accessible and Enforceable Mechanism for EU Investors

#### RECOMMENDATIONS

- Set up a binding and enforceable dispute settlement mechanism which is simple, fast, effective, cost-efficient and SME-friendly, in conformity with EU law and which facilitates access for all investors from the EU Member States
- Introduce national contact points as supporting structures, including best practices from existing support services (e.g. SOLVIT, EEN, investment agencies)
- Strengthen cost-effective amicable dispute resolution mechanisms such as negotiation, conciliation, mediation and make them more accessible
- Improve the investment climate and the implementation of EU law on establishment and free movement of capital, e.g. via more cooperation and exchange of Best Practices on effective judicial protection as well as strengthening the Rule of Law and infringement proceedings
- Pending procedures must find an appropriate completion granting investors effective protection against unfair treatment and expropriation and compensation of damages
- EU investors must not be disadvantaged when it comes to legal protection compared to investors from third countries: investments that are not made within the EU due to non-conducive conditions are very likely to go elsewhere

In order to improve the enforcement of EU Single Market law and in order to improve the protection of investors against discrimination and unfair treatment a binding and enforceable dispute settlement mechanism is urgently necessary. National courts, unfortunately, do not provide sufficient protection in many EU Member States. Furthermore, EU investors must not be disadvantaged when it comes to legal protection compared to investors from third countries: investments that are not made within the EU due to non-conducive conditions are very likely to go elsewhere. The new mechanism must be simple, fast, effective, cost-efficient and SME-friendly, in conformity with EU law and facilitate access for all investors from the EU Member States.

### The need of better investment protection after terminating the intra-EU BITs

Freedom of establishment and free movement of capital are key features of the European Single Market. Next to the fundamental freedoms foreseen in the EU Treaties and the fundamental rights

of the Charter of the EU, Intra-EU bilateral investment treaties (intra-EU BITs) have been playing an **important role** over years, promoting and offering legal protection for direct investment by foreign natural or legal persons in a number of Member States via an alternative binding dispute settlement mechanism through Investor-State arbitration tribunals (ISDS).

Figures underpin this: the total number of all known treaty related arbitration proceedings commenced by an investor from one EU Member State against another one ("intra-EU" arbitration proceedings) amounted to a total of 174 cases in mid-2018. This represents approximately 20 percent of the 904 known cases of investor-state disputes worldwide (cf. Fact Sheet on Intra-European Union Investor-State Arbitration Cases by the United Nations UNCTAD, December 2018).

Nevertheless, after the *Achmea* ruling of the European Court of Justice (ECJ), the EU Member States committed to terminate their intra-EU BITs in a coordinated manner by means of a plurilateral treaty in 2020. According to the judgment a clause in an intra-EU BIT offering ISDS violated EU law.

Investors and also some Member States expressed their doubts about the termination of the system: the judgement has a major impact on current and future cross-border investments in the Single Market, implying that this **efficient remedy to resolve disputes outside the domestic courts will not be available anymore**. New procedures in case of upcoming disputes cannot be initiated and ongoing ones must be terminated and solved via mediation (the termination agreement of the Member States talks about a "structured dialogue") or before national courts.

As a result, in the future European investors can only turn to **domestic courts** through a lawsuit, when seeking for compensation e.g. for unfair treatment or expropriation. National tribunals are urged to decide about such claims respecting not only national legislation but also EU secondary law, freedom of establishment, free movement of capital as well as fundamental rights, e.g. the right to property, the freedom to conduct a business and the right to an effective remedy and a fair trial.

However, it is a fact that **deficiencies remain concerning the implementation of EU law as well as judicial protection** in a number of Member States. There are problems e.g. with legal certainty because of sudden and unexpected legal changes, sometimes deliberately directed against companies from other Member States, breaches of national and EU law, as well as direct and indirect expropriation, discrimination and bureaucracy that do not meet the requirements of EU or international law. Furthermore, investors face lengthy administrative and judicial proceedings while dealing with politically driven courts, whereas corruption cannot be excluded.

According to the EUROCHAMBRES Single Market Survey 2019 60.5% of **businesses are concerned** about resolving commercial or administrative disputes, also because of deficits in legal protection before national or European authorities and courts. 81.6% request better legal protection before national and European authorities and courts in case of breaches of EU rules.

The **Commission confirms these deficits** concerning the implementation of EU Law and judicial protection in several Member States in its EU Justice Scoreboard, in many of its country-specific recommendations as well as in infringement and recent Rule of Law proceedings.

The preliminary reference procedure does not help where national courts do not respect EU law and do not refer the cases to the ECJ, whereas infringement proceedings do not offer

compensation for investors in the specific case. Furthermore, they often take years and the Commission decides politically which cases to pursue and which not.

The conclusion to be drawn from this is that **European law alone does not guarantee sufficient EU-wide protection of investments**. Consequently, a mere phasing out of the intra-EU BITs without an effective replacement of the dispute settlement mechanism risks to undermine the Single Market.

The ruling would lead to a fundamental reduction of legal protection for EU investors whereas foreign investors from third countries are still benefiting from ISDS in EU agreements or BITs with Member States. Also a **relocation of investment activities to non-EU countries**, with negative effects on the investment climate within the EU Single Market, cannot be excluded. The consequences could be significant: if an investor leaves a country, not only the investment is lost but also innovation, technology and, particularly, jobs. Also suppliers will be affected.

### Proposals for investment protection after termination of intra-EU BITs

EUROCHAMBRES welcomes the Commission's guidance to help EU investors invoking their rights before national administrations and courts as well as to support Member States in the correct application of EU law. However, this is not sufficient to keep up with the protection standards provided under the BITs, for the abovementioned reasons and, particularly, the deficits of domestic courts. The EU needs a more predictable, stable and clear regulatory environment that helps protecting and promoting investments in the Single Market. This is one of the cornerstones of the Commission's Investment Plan 2014 and is also mentioned in the Commission's working programme 2020.

EUROCHAMBRES believes that these goals cannot be reached without a rapid establishment of an **effective replacement mechanism**.

This is of particular relevance for **SMEs**, which do not have the financial means and manpower for lengthy judicial proceedings nor the market power in order to request commercial arbitration in their contracts. A new system could contribute to a better implementation of existing EU and national law, greater legal security and strengthening of the Single Market for investments.

The replacement mechanisms could be based on **several pillars**, however chambers believe that **the main pillar of the system should be a binding instrument** in order to enforce investors rights before an independent and effective court. Only such a mechanism guarantees effective legal protection and compensation of damages in case of violations of EU law. Furthermore, only a binding instrument as a last resort creates the incentive for Member States to implement EU law appropriately and to respect the investor's rights. A mere reference to domestic judicial protection is not enough because of the persisting deficits in many national systems and would implicate serious negative effects on the investment climate. The focus should be on a **simple, fast, effective, cost-efficient and SME-friendly system**, in conformity with EU law and facilitating access for investors from all EU Member States. All possible options according to the EU Treaties should be taken into consideration.

As an additional option for companies to supplement, an easy-accessible **cost-efficient amicable dispute resolution mechanism can be further developed**. A **network of national contact points**, supported by the EU Commission, could inform investors, particularly SMEs, of their rights and the available procedures and support the dialogue with the host State. Such a structured

exchange between investors and authorities helps the parties to better understand the specific circumstances of the case and make the interests at stake more tangible. The mechanism could include best practices from existing support services (e.g. investment agencies, SOLVIT, the Enterprise Europe Network EEN, the Chambers network). It must be well equipped and have sufficient and well-trained staff in order to deal with these complex cases.

Furthermore, voluntary **negotiations, mediation or conciliation** should be promoted in order to resolve the dispute before the company initiates arbitration or legal proceedings and to avoid the investor leaving the host State. If successful, they could reduce costs and the duration of proceedings and reduce the number of cases in which a court or conciliation procedure becomes necessary.

Moreover, the **national judicial systems** should be improved in order to strengthen the Rule of Law and the implementation of EU Law in the EU to protect cross-border economic activities and investments more efficiently.

Last but not least: the Commission needs to ensure proper implementation of EU Law via **infringement proceedings**.

Nevertheless, the implementation of all these proposals should not incur major and inadequate costs, e.g. by the creation of new institutions at European or national level, which would then be borne by entrepreneurs in their role as taxpayers.

With regard to **pending proceedings** initiated under existing intra-EU BITs agreements, EUROCHAMBRES asks for appropriate provisions which ensure an appropriate completion granting investors effective protection against unfair treatment, expropriation and compensation of damages.

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