

Mr Olivier Guersent
Director-General
European Commission
Directorate-General for Financial Stability,
Financial Services and Capital Markets Union
Rue de Spa 2 / Spastraat 2
1000 Bruxelles / Brussel

5 June 2019

EU investment protection mechanism

Dear Mr Guersent,

Cross-border investments within the EU are a crucial cornerstone for the functioning of the Internal Market. For example, more than 3 million employees work for EU companies with German investors. Furthermore, foreign investments are the backbone of European value chains. Revenues generated by German companies in other EU countries through their investments by far exceed the German exports to these countries.

Unfortunately, according to studies by the European Commission itself, a number of Member States do not always fully respect and implement the legal standards as defined by EU law. There still occurs discrimination and unfair treatment against companies from other EU Member States. Furthermore, some Member States lack effective and independent judicial protection. For many investors, the resulting lack of legal certainty is a decisive obstacle for cross-border investments in Europe.

It is laudable that the European Commission has criticised such deficits. In its country-specific recommendations, it proposed to remove obstacles for investments, to better implement Internal Market Law and to improve the legal protection of investors and the national judicial systems. Indeed, it was even necessary for the EU Commission to launch Rule of Law and infringement proceedings against certain Member States and to use the cooperation and verification mechanisms for Bulgaria and Romania to require legal changes. Lastly, the EU Commission adopted in 2018 a communication on investor rights in order to give guidance to investors and public authorities.

As you are aware, Investor-State arbitration based on intra-EU investment agreements between Member States and the Energy Charter Treaty have provided legal certainty and effective investment protection in Europe. For example, more than half (56%) of all disputes between German investors and foreign states were conducted with EU Member States. Unfortunately, following the "Achmea" judgment by the ECJ, those agreements shall be terminated.

However, their termination without an effective replacement mechanism would leave investors without appropriate legal protection. Furthermore, the termination will also lead to a systematic discrimination of EU investors compared to third country investors, which continue to enjoy the protection of their BITs.

Therefore, to ensure a continuous protection of European investments and to strengthen the investment climate, the establishment of a binding dispute settlement mechanism based on EU law is of high importance. It would ensure a level playing field of European investors and those from third countries, such as the United States and, in the future, possibly the United Kingdom. Finally, the rule of law would be strengthened by protecting the fundamental rights of investors – an important sign against protectionism.

In view of the foreseeable termination of the BITs, the European Commission launched a consultation in 2017 concerning an amicable dispute resolution mechanism. The idea of national contact points – a kind of „SOLVIT plus“ – has been supported also by business federations. In certain cases, such a mechanism could be helpful particularly for small claims and SMEs. Another option could be an Ombudsman.

What is missing in the proposed model is a binding dispute settlement mechanism with enforceable decisions as a last resort. Such a mechanism is an indispensable element of an effective investor protection regulation. Infringement and preliminary proceedings before the ECJ do not suffice, given not only their length but mainly the fact that they depend on the capacities and willingness of the institutions concerned, placing investors at the whim of national courts which might be lacking political independence. This situation entails substantive difficulties for investors to enforce their rights via the judiciary. Furthermore, the last resort of a binding mechanism is necessary for amicable dispute resolution to be a success: The risk of judicial proceedings is an incentive for state parties to treat investors fairly, to respect EU and international law, to improve their legal systems and to engage in a dialogue with investors and the EU Commission.

The replacement mechanism should be one of the priorities of the Commission concerning the Single Market and an important aspect of the Action Plan of March 2020. The Council in its conclusions on the Capital Markets Union of 11 July 2017 as well as the Member States in their agreement to terminate the intra-EU BITs have already called on the Commission to assess the options of such a binding dispute resolution mechanism. Obviously, all options currently discussed inter alia the establishment of an EU investment court or a specialised chamber within the ECJ, need to safeguard the full respect of the principles of the „Achmea“ judgement. However, apart from these legal considerations, in the perspective of businesses the proceedings should be designed simple, fast, transparent, not too costly and suitable also for SMEs.

As the intra-EU BITs shall be terminated until the end of 2019, fast action is required. The immediate start of a dialogue with the Member States is necessary. In view of the profound changes of the overall conditions since the Roadmap and Inception Impact Assessment of 2017, the Commission is obliged to start a new impact assessment and consultation process as soon as possible.

We thank you for your consideration and are looking forward to your reply. Please do not hesitate to contact us should you require any further information.

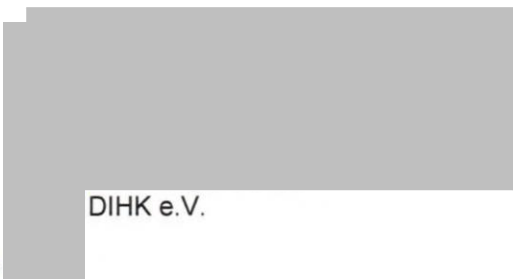
Yours faithfully



BDI



Deutsches Aktieninstitut



DIHK e.V.



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der Deutschen Wirtschaft e.V.

About the signatories

BDI (Bundesverband der Deutschen Industrie e.V., Federation of German Industries) conveys the interests of German industry to the political decision-makers and it provides support for business enterprises engaged in global competition. It is the umbrella organization of German industry and industry-related services and speaks for 35 trade associations and more than 100,000 enterprises with around 8 million employees. Membership is voluntary. BDI is registered in the transparency register of the European Commission (No. 1771817758-48). **Contact:**

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Deutsches Aktieninstitut represents the entire German economy interested in the capital markets. Its approx. 200 members are listed corporations, banks, stock exchanges, investors and other important market participants. Deutsches Aktieninstitut has offices in Frankfurt am Main, Brussels and Berlin. Transparency register No. 38064081304-25. **Contact:**

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Deutscher Industrie- und Handelskammertag (Association of German Chambers of Commerce and Industry, DIHK e. V.) is the umbrella organisation of the 79 Chambers of Commerce and Industry (IHK) in Germany and represents the collective interest of German business towards politics, administration and the public. Several million companies of all sizes and sectors such as commerce, industry and the services sector are by law members of a Chamber of Commerce and Industry – kiosk owners as well as listed groups. DIHK also coordinates the network of 140 chambers of commerce abroad, delegations and representative offices of German business in 92 countries worldwide (AHK). Transparency register No. 22400601191-42. **Contact:**

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Ost-Ausschuss – Osteuropaveroin der Deutschen Wirtschaft e.V. (German Eastern Business Association, OAOEV) is the major regional initiative of the German economy for 29 countries in Central Europe, Eastern and Southeastern Europe, in the South Caucasus and in Central Asia. The OAOEV supports its members in their projects, arranges contacts and answers questions about market entry. It is supported by six central associations of German business and has around 350 member companies. **Contact:**

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