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Contact :

25 June 2020

To:

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FROM:

SUBJECT: BusinessEurope feedback to European Commission's inception impact assessment on an investment protection and facilitation framework

Feedback

We welcome the initiative of the European Commission to clarify the rules related to the protection of investments in the EU and to take appropriate action to ensure consistency in their application and enforcement. We believe that facilitating cross-border investment within the EU contributes to the creation of jobs, economic growth, as well as to the promotion of research and innovation, thus enabling the EU to lead in key areas of the economy. This becomes particularly important at a time when the EU focuses its efforts on the recovery from the COVID-19 pandemic and on achieving the Green Deal and the digitalisation of the economy.

As we prepare our more detailed contribution to the European Commission's public consultation on an intra-EU investment protection and facilitation initiative, we would like to already share a few thoughts.

- 1) Looking at the regulatory and non-regulatory policy options to address divergencies in 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 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.

- 2) Looking at the regulatory and non-regulatory policy options to address concerns about the enforcement of investors' rights:

It is our understanding that once intra-EU BITs are terminated, 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, 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.

Following the CJEU ruling on the Achmea case, it has been our view that the termination of the intra-EU Bilateral Investment Treaties (BITs) should not take place before an alternative mechanism is established to settle disputes between investors and states, replacing the traditional Investor-to-State Dispute Settlement (ISDS) mechanism. This is crucial in order to maintain the competitiveness as well as attractiveness of the EU Single Market for investments and to avoid the discrimination of EU-investors vis-à-vis those from third countries. Now that 23 EU Member States have signed an agreement on the termination of intra-EU BITs, it is pertinent to ensure that this takes place in a coordinated manner and that the discussion on creating the right framework for the resolution of disputes is accelerated.

We understand that developing such a mechanism can be developed in accordance with EU law and that it should respect a number of principles:

- Impartiality – to ensure the legitimacy of the mechanism
- Effectiveness – in terms of the application of law and the delivery of rulings and / or awards that can be implemented and / or collected
- Efficiency and accessibility – to ensure that disputes are settled in a timely manner and that costs are manageable for users, including SMEs
- Transparency – to ensure that information on the disputes is publicly available