

## Investor workshop on Investment Protection in the EU, Brussels, 17.12.2018

### Flash report

#### *Summary*

*The workshop was organized by DG FISMA with the aim of presenting the Communication on intra-EU investment to investors and collecting practical feedback on their experiences with application of EU law. Overall, a very well-attended event, providing a forum for exchange on intra-EU investment protection with 100 participants from 18 MS, including key EU umbrella associations (e.g. BusinessEurope, Eurocommerce, SMEUnited, EFAMA, EBF) and FDI and portfolio investors from various sectors. Constructive discussion with many questions focusing on pending arbitration cases, the level playing field for EU investors compared to 3<sup>rd</sup> countries, enforcement of EU rights by national administration and courts (including judicial independence, preliminary ruling procedure, efficiency and administrative practices). Multiple calls for EU action to codify and complement investors' rights and introduce a neutral dispute settlement mechanism ensuring a level playing field for EU investors.*

#### In detail:

In his keynote speech, Sean Berrigan (DDG FISMA) sent three messages: 1) investments are important to address key priorities in the EU; 2) investments are already effectively protected under EU law; 3) the Commission is open to developing its dialogue with EU investors. He also highlighted that investors consider legal protection of investments as an important factor in their investment decisions. Sean also touched upon the *Achmea* judgment and its consequences for intra-EU bilateral investment treaties (BITs) and the intra-application of the Energy Charter Treaty (ECT).

#### **Panel I: Substantive protection EU law:**

█ (FISMA █) presented substantive protection under EU law, already addressing issues raised by investors during the registration process. █ demonstrated that EU law ensures investment protection throughout the investment life-cycle, noting the *SEGRO* case, which covers the post-establishment phase.

█ explained rights investors have under EU law comparing them to standards under intra-EU BITs. █ from BusinessEurope called for a comprehensive investment policy of the EU (both intra-EU and external) and said that EU law is currently not enough for investment protection (e.g. in terms of legal certainty and enforcement) and stressed the lack of a level playing field between investment protection for EU investors compared to investors from third countries, the latter being better placed. █ (University of Liege) outlined different practical avenues for invoking investment rights under EU law, noting the growing relevance of the procedure for damages for breaches of EU law by the state. █ from EFAMA pointed out the cross-border nature of investments by asset managers and highlighted remaining barriers, notably in the taxation field. █ indicated that EU secondary legislation could solve them, but recently focused on the final consumer/investor rather than on the investment/assets.

In the discussion, investors asked about the fate of pending cases before arbitral tribunals and whether investors could still rely on the substantive rights provided by intra-EU BITs before national courts. LS stated that the BITs were illegal from the moment both parties became EU Member States. WindEurope made a statement stressing the legal uncertainty for the renewables energy sector in recent years, and the loss of level playing field under the ECT compared to 3<sup>rd</sup> country investors following *Achmea*. █ noted that the EU expected a huge increase in future investment in the sector, but the premium on the cost of capital differed substantially among EU countries. In some MS the price of investments in renewables could become prohibitive. Several participants echoed the

concerns about the loss of a level playing field compared to 3<sup>rd</sup> country investors also in other sectors. Many questions referred to enforcement, which was discussed in panel II.

## **Panel II: Enforcement of rights under EU law**

██████████ (COM LS) spoke about remedies for investors, including conflict prevention, out of court dispute resolution and judicial redress. ██████████ (JUST) presented the Commission policy on effective justice, including the EU Justice Scoreboard, European Semester and European funds.

██████████ presented the survey of businesses making cross-border investments made by German Federation of Industry and Trade (DIHK). The issues identified included discrimination, expropriation, lack of legal certainty due to legislative changes with negative retroactive effects on investments, lengthy administrative proceedings and problems in national courts (independence, reluctance to make preliminary reference and set aside national rules incompatible with EU law). ██████████ welcomed out-of-court settlement, but also called for a dispute resolution mechanism replacing BITS, noting concerns about the loss of level playing field internationally and potential diversion of EU investments via 3<sup>rd</sup> countries. ██████████ (CCBE) presented the legal practitioners' view on the enforcement of investors' rights. ██████████ (Network of EU Supreme Court Presidents) emphasized that the national courts were the natural forum for investment litigation and explained that the courts had the necessary tools ensuring appropriate specialization to deal with investment cases. ██████████ (ACA-Europe) explained the role of administrative courts in the investment protection in the EU, including administrative review and touched upon the areas of public procurement and the role of independent administrative authorities. Both ██████████ and ██████████ mentioned about EU level work of EU judicial networks.

In the discussion, investors raised again the issues of pending arbitrations, the difficulties of enforcing EU rights before national administrations and courts. **On administration**, investors mentioned concerns about administrative practices targeting foreign investors (discriminatory or more frequent inspections, higher fines, retaliatory administrative actions when a case is brought to court, as well as lengthy administrative proceedings). **On courts**, the issues focused in particular on concerns about independence and rule of law, functioning of preliminary ruling procedure, as well as lengthy proceedings and lack of effective remedies. Several interventions noted the benefits of **out-of-court dispute resolution** and favoured its further development, as investors wished to avoid conflicts and maintain a good relationship with national authorities (AT business representatives). There was also the idea of giving arbitral tribunals a right to refer to the CJEU.

Both participants and panelists repeatedly called on the Commission to propose a **replacement of intra-EU BITS**: e.g. via codification of investment protection rights in a "Charter" (as some crucial aspects, covered by general law principles were not very clear and were difficult to enforce) and/or the introduction of an alternative dispute settlement body detached from national governments.

Mario Nava (Dir FISMA B) concluded that at this stage, the Commission was here more to listen and offer a forum for exchange in order to gather evidence for issues investors are still facing in the EU. This would help collect practical feedback and evidence which would be very timely for developing ideas on investment protection in the EU for the next Commission .

*Many thanks to ██████████ for the possibility to include a cocktail for the participants, which gave an opportunity for fruitful informal exchanges after the workshop.*