Commission provides guidance on protection of cross-border EU investments – Questions and Answers

Brussels, 19 July 2018

Why is the Commission publishing this Communication?

The European Union's Single Market is a unique area for investment opportunities. A key objective in the Investment Plan for Europe is to create a more predictable, stable and clear regulatory environment to promote investments. As part of this strand of work, the Capital Markets Union (CMU) Action Plan and its Mid-term review emphasised that a stable business environment is crucial for encouraging more investment within the European Union. The Commission is committed to preserving and improving both a predictable, stable and clear regulatory environment and the effective enforcement of investors' rights. This Communication aims to provide guidance on existing EU rules for the treatment of cross-border EU investments.

Today's publication also aims to set out the protection enjoyed by investors under existing EU law, to increase awareness and confidence in the EU's investment environment. While not exhaustive, today's guidelines make existing intra-EU investors' rights more visible for national authorities and for investors.

It will also help prevent Member States from adopting measures which would infringe EU law, help investors to invoke their rights before administrations and national courts, and assist legal practitioners when applying EU rules. At the same time, the Communication clarifies that investors' rights under EU law are not absolute but need to be balanced with public policy objectives such as environmental concerns, in a proportionate manner, and in compliance with EU law.

The Communication also explains the implications of the *Achmea* judgment, in which the European Court of Justice ruled that investor-State arbitration contained in bilateral investment treaties (BITs) between Member States is not compatible with EU law. The European Court of Justice (ECJ) thus confirmed the Commission's view that there is no place for investor-State arbitration in the Single Market when it comes to intra-EU investments. The Communication illustrates the legal consequences of that judgment, which in the Commission's view also apply to the Energy Charter Treaty when it comes to cross-border EU investments.

Why are you publishing the Communication now?

Today's Communication aims to reassure investors that the absence of intra-EU investment treaties does not mean that investors within the EU are not protected. In fact, the Communication shows that EU law protects investors when problems occur. At the same time, effective and adequate protection does not entail unlimited protection for investors because other legitimate interests must be taken into account by public authorities.

How does EU law protect investors within the single market?

EU law enables, encourages and protects investments in many ways. First, EU investors benefit from the Single Market fundamental freedoms [link]. The free movement of capital under the Treaty guarantees that capital can circulate freely throughout the EU. Investors enjoy the freedom to establish a business, to invest in companies and to provide services across borders. Second, investors can also rely on the fundamental rights protected by the Charter of Fundamental Rights of the EU (for instance: the right to property, access to justice, non-discrimination), as well as on the applicable general principles of EU law, such as the principle of proportionality, legal certainty and the protection of legitimate expectations. Third, investors are protected through a large body of sector-specific legislation covering areas such as financial services, transport, energy, telecommunications, public procurement, professional qualifications, intellectual property or company law.

The enforcement of those rights is guaranteed by national courts and, through preliminary rulings or infringement proceedings, by the ECJ. Furthermore, it is also guaranteed by the Commission through the infringement procedure.

At the same time, EU law allows for markets to be regulated to pursue legitimate public interests such as public security, public health, social rights, consumer protection or the preservation of the environment, which may have consequences also for investments. Public authorities of the EU and of

the Member States have a duty and a responsibility both to protect investment and to regulate markets. Therefore, the EU and Member States may legitimately take measures to protect those interests, which may have a negative impact on investments. However, they can do so only in certain circumstances and under certain conditions, and in compliance with EU law.

What is the role of the Commission?

The Commission has been entrusted by the Treaty with the responsibility for the effective application, implementation and enforcement of EU law. In this role, the Commission can review national measures and act to ensure compliance with EU safeguards protecting investors. The Commission is committed to act firmly on infringements of EU law which obstruct the implementation of important EU policy objectives or which risk undermining the four fundamental freedoms, which are essential for investors. The Commission gives high priority to infringements that reveal systemic weaknesses and in particular to those which affect the capacity of national judicial systems to contribute to the effective enforcement of EU law.

At the same time, the Commission strives to increase the effectiveness of the enforcement system in the EU, including actions to support administrative capacity building or to strengthen justice systems, and to tackle breaches of EU law by national authorities.

What are bilateral investment treaties (BITs)?

Bilateral investment treaties are international agreements which typically grant protection to investment by nationals and companies of one State in another one. These treaties focus on investor protection, for example by means of compensation for expropriation and provide for a system that allows the settlement of investment disputes between investors and the country where the investment is made.

Some EU Member States had concluded BITs with some countries in Central and Eastern Europe before those countries had joined the EU in 2004 (CY, CZ, EE, HU, LT, LV, MT, PL, SI, SK), 2007 (BG and RO) and 2013 (HR) respectively. The central and Eastern European countries also concluded such agreements amongst themselves. From the date of EU accession, the agreements concerned thus became treaties among EU Member States ("intra-EU"). Slightly less than 200 intra-EU bilateral investment treaties still formally exist to date between the Member States, though some Member States, such as Ireland and Italy no longer have any bilateral investment treaties at all.

What did the ECJ rule in the Achmea judgment?

In its judgment of 6 March 2018 in the *Achmea* case, the ECJ confirmed the Commission's view that investor-to-State arbitration in an agreement concluded between Member States is not compatible with EU law. The ECJ ruled that these clauses do not have legal effect. It explained that, when applied in an intra-EU context, such a mechanism undermines the system of legal remedies foreseen in the EU Treaties for resolving such disputes. It therefore poses a threat to the autonomy of EU law and the principle of mutual trust between the Member States. The treaties should therefore be legally terminated in order to ensure legal certainty.

The *Achmea* judgment is also relevant for the application of the Energy Charter Treaty between EU Member States. In the Commission's view that Treaty cannot be used as a basis for dispute settlement between EU investors and EU Member States.

What has been the Commission position on intra-EU BITs?

The European Commission has consistently taken the view that intra-EU BITs are incompatible with EU law and that the Energy Charter Treaty does not apply between EU Member States.

Intra-EU BITs constitute a parallel system overlapping with Single Market rules. In addition, intra-EU BITs conflict with the principle of non-discrimination among EU investors within the Single Market by conferring rights on a bilateral basis to investors from some Member States only. Furthermore, intra-EU BITs may constitute the basis for the award of unlawful state aid in violation of the level playing field in the single market.

Finally, intra-EU BITs entrust disputes dealing with EU law to non-permanent and private arbitral tribunals who are not State organs. They are thus outside the mechanisms of dispute resolution which is laid down in the Treaty. They are unable to ensure the correct and uniform application of EU law, in the absence of the judicial dialogue with the ECJ.

The Commission has launched infringement procedures against 5 Member States for failure to terminate intra-EU BITs. Following the *Achmea* judgment, the Commission has intensified its work with the Member States concerned in order to ensure that the judgment is fully implemented.

Does the Achmea judgment have consequences for agreements with third countries?

No, the Court's judgment only concerns intra-EU disputes. The Commission has been very clear that

different legal considerations apply to external EU investment policies. In any event, the Court is also currently considering legal issues relating to the EU's external investment policy. This happens in the framework of the procedure triggered by Belgium to obtain the Court's opinion concerning the Investment Court System under the recent EU-Canada trade agreement (CETA). The question of the impact of the *Achmea* judgment has been discussed in the Court hearing in that case.

What is the EU approach to investment dispute resolution in agreements with third countries?

For the Commission, investor-to-State arbitration in EU trade and investment agreements is a thing of the past and has been replaced by the Investment Court System (ICS), already included in CETA, the EU-Singapore, EU-Viet Nam and EU-Mexico agreements and the negotiation basis for negotiations with 3rd countries. ICS offers the guarantees of independence and impartiality of a permanent court.

The Commission is also actively promoting the initiative of developing a Multilateral Investment Court - work which is also being pursued in the context of UNCITRAL, the United Nations Commission on International Trade Law. The EU's overall objective is to set up a permanent multilateral body to decide investment disputes.

Both within the EU as well as in its trade policy towards third countries EU policy aims to depart from a system of investor-to-State dispute settlement (ISDS) based on ad hoc arbitration.

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