Future European international investment policy

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PURPOSE: to present a Communication in which it explores how the Union may develop an international investment policy that increases EU competitiveness

CONTENT: the Lisbon Treaty's attribution of EU exclusive competence on Foreign Direct Investment (FDI) integrates FDI into the common commercial policy. It also allows the EU to affirm its own commitment to the open investment environment which has been so fundamental to its prosperity and to continue promoting investment, both direct investment and portfolio investment, as a tool of economic development. This Communication explores how the Union may develop an international investment policy that increases EU competitiveness and thus contributes to the objectives of smart, sustainable and inclusive growth, as set out in the Europe 2020 Strategy.It looks at the main orientations of an EU investment policy for the future, as well as the main parameters for immediate action in this area.

In parallel to this Communication, the Commission has adopted a proposal for a Regulation that would establish transitional arrangements relating to investment agreements between Member States and third countries.The proposed Regulation and this Communication are only first steps in the development of a European international investment policy, which will be gradual and targeted and will also take into account responses to this Communication.

Until now, the Union and the Member States have built separately around the common objective of **providing investors with legal certainty** and a stable, predictable, fair and properly regulated environment in which to conduct their business. While Member States have focused on the promotion and protection of all forms of investment, the Commission elaborated a liberalisation agenda focused on market access for direct investment. In this respect, a clear and complementary division of labour in the field of investment has resulted in a rather large and atomised universe of investment agreements.

With a view to ensuring external competitiveness, uniform treatment for all EU investors and maximum leverage in negotiations, a common international investment policy should address all investment types and notably assimilate the area of **investment protection**. The Union should follow the best practices available to ensure that no EU investor would be worse off than they would be under Member States' Bilateral Investment Treaties (BITs).

A **key question relates to the substantive rules** the Union would seek to introduce in trade and investment agreements. Currently in investment negotiations, the Union relies mostly on the principle of non-discrimination, which is the cornerstone of the global trading system. Non-discrimination is usually implemented through two basic standards, ‘most-favoured-nation treatment’ and ‘national treatment’, which are both relative standards, because they involve making a comparison between the treatment provided based on origin, rather than defining an absolute standard of treatment. Consequently, their content is determined on the basis of the treatment that a country grants to its foreign investors and investments and to its own investors and investments

While non-discrimination should continue to be a key ingredient of EU investment negotiations, BITs employ other standards as well, such as “fair and equitable treatment” after admission and “full security and protection” treatment. These standards do not imply a comparison to the manner in which comparable investments are treated. Moreover, a number of Member State BITs provide for the protection of contractual rights granted by a host government to an investor ("umbrella clause"). They have been traditionally used in Member States BITs and are an important element among others that should inspire the negotiation of investment agreements at the EU level.

An important cornerstone of Member State best practices are clauses which place certain conditions upon the exercise of the host country's right to expropriate. While it follows from Article 345 TFEU that the Treaty does not affect a Member State's right to decide whether a given asset should be in public or private ownership, the Court of Justice's case law shows that this does not have the effect of exempting expropriation measures from the fundamental rules of the Treaty, including those on freedom of establishment and free movement of capital. Accordingly, expropriation measures in the EU should be non discriminatoryand proportionate to attain their legitimate objective (e.g. by providing for adequate compensation). Hence, the Union should include precise clauses covering this issue into its own future investment or trade agreements. A clear formulation of the balance between the different interests at stake, such as the protection of investors against unlawful expropriation or the right of each Party to regulate in the public interest, needs to be ensured. Similarly, EU clauses ensuring the free transfer of funds of capital and payments by investors should be included.

The communication goes on to recall that the Union's trade and investment policy has to fit with the way the EU and its Member States regulate economic activity within the Union and across our borders. Investment agreements should be consistent with the other policies of the Union and its Member States, including policies on the protection of the environment, decent work, health and safety at work, consumer protection, cultural diversity, development policy and competition policy. Investment policy will continue to allow the Union, and the Member States to adopt and enforce measures necessary to pursue public policy objectives.

A common investment policy should also be guided by the principles and objectives of the Union's external action more generally, including the promotion of the rule of law, human rights and sustainable development (Article 205 TFEU and Article 21 TEU). In this respect, the OECD Guidelines for Multinational Enterprises, which are currently being updated, are an important instrument to help balance the rights and responsibilities of investors.

While **investment protection and liberalisation become key instruments of a common international investment policy**, there will remain significant scope for Member States to pursue and implement investment promotion policies that complement and fit well alongside the common international investment policy. In general, a common policy will require more, rather than less, cooperation and coordination among the Union and Member States. Through investment negotiations, which in principle would be conducted as part of broader trade negotiations, the EU should seek to obtain binding commitments from its partners that guarantee and protect the free flow of all forms of investment. Stand-alone investment negotiations would also remain an option. In the short term, the Commission will seek the adaptation of negotiating directives to enlarge the scope of negotiations for a number of countries with whom trade negotiations are ongoing, where strong interests exist and where requests have been formulated. While the principles and parameters for such negotiations will be inspired by ‘best practices’ that Member States have developed, this Communication already submits some broad contours of the scope and standards the Union should be setting through international investment negotiations.