ESF10-17

Mr. Karel De Gucht
Member of the European Commission
Commissioner for Trade
European Commission
Rue de la Loi, 200
B - 1049 - Brussels

Brussels, 25 June 2010

RE: European Services Industry views on the EU new investment policy

Dear Commissioner,

European service industries are keen to support the EU's efforts at shaping a new EU-wide investment policy. Article 207, paragraph 1 of the Treaty of the European Union that entered into force on 1 December 2009 brought foreign direct investment (FDI) into the ambit of the EU's Common Commercial Policy. The European Services Forum notes the valuable opportunity that this development provides for the European Union to rationalise the policy of the Union and its member-states on investment questions, and to bring greater weight and comprehensiveness to EU FDI policy towards the rest of the world.

The European Union is by far the biggest investor in the world, as well as the biggest recipient of foreign direct investment in the world. It is less well known that more than 65% of all outward FDI (extra EU) is by European services companies (i.e. over €410 billion for the period 2002-2005), and even more surprisingly, more than 80% of all inward FDI (extra EU) is invested in EU services sectors (i.e. over €340 billions for the four year period 2002-2005)[1], creating a large number of jobs in the EU and strengthening Europe's competitiveness.

The WTO General Agreement on Trade in Services (GATS) is an investment agreement as well as a trade agreement, through its so-called "commercial presence abroad" provisions, also known as GATS Mode 3. As a result, services investment has in effect been part of the Union's Common Commercial Policy for the last fifteen years; and access to foreign markets for European services businesses through establishment overseas has been an element of EU negotiations on trade in services. Establishing a physical presence in a foreign country through a subsidiary or branch is indeed one of the favourite modes of supplying a service abroad. Commitments on establishment made by the EU's trading partners are therefore an important prerequisite for an increase in EU outward foreign direct investment.

[1] Source Eurostat – EU FDI Yearbook 2008 – NB : This includes construction and energy distribution.

However, this element of trade policy – which is very much welcomed and should be intensively pursued in future to improve market access for EU service providers – only provides *pre*-establishment protection. Our companies also need *post*-establishment protection for their investments against unfair expropriation or nationalisation. In this context, the European Services Forum strongly welcomes the adoption of a new European Union Investment Policy that will open the way for negotiations of bilateral investment treaties (BITs) at EU level, bringing uniform benefits to services businesses across all European countries.

Many European Union Member States – particularly those with long-standing outward investment interests - have already concluded a good number of BITs. Now that the Lisbon Treaty has entered into force, it is urgent to adopt all necessary arrangements for the transitional phase so as to reaffirm that the existing Member State BITs are compatible with the EU Treaty. While recognising Member States' rights to keep in place their existing agreements in accordance with the EU law, the European Union must provide a coherent framework within which investment treaties and agreements can be applied both across the EU and for the benefit of all EU investors overseas. This is absolutely essential if there is to be legal certainty for European investments and for foreign investors that have invested in the EU.

The new policy should also bring about steady elimination of the current differences between EU member-states - which particularly affect those member-states that have few or no BITs and which therefore appear to offer less protection for both outward and inward investors. In essence, a way needs to be found of extending the coverage of existing BITs to all EU member-states. This might entail negotiation of new EU agreements, taking into account the content of the existing BITs, with these trading partners so as to expand their coverage to the whole European Union.

In the framework of the new investment policy, the Commission should request ambitious negotiating mandates and seek the active support of the European Parliament. In line with its views on services negotiations, ESF strongly recommends that, as far as possible, investment negotiations should be run on a negative list approach, so that all sectors and eventualities are covered, and only exceptions are listed. This would provide optimum security and transparency for our companies.

As with most existing BITs, the negotiations should aim at securing fair and equitable treatment for European investments, with the clear objective of achieving national treatment for EU investors[2]. To this end, while recognising the effectiveness of the state-to-state dispute settlement system, the European Services Forum would urge that the new EU Investment Policy should enable all relevant enforcement mechanisms to be used under the new treaties, including an investor-to-state dispute settlement system.

[2] *To cover the possibility of a host country denying proper compensation to its own domestic investors in case of expropriation or nationalisation, ESF is of the view that EU BITs should provide for compensation to EU businesses in all circumstances, such compensation to be "adequate, effective, and prompt".*

Furthermore, ESF also recommends that the new investment protection agreements should also include provisions protecting portfolio investments, which are covered by the EU Treaty's provisions on freedom of capital movement.

The European Union should focus its new investment policy on partners with high economic growth potential, such as China or Russia, which present important value-added in terms of investment opportunities and protection. Furthermore, with a view to giving additional value to the agreements negotiated or still under discussion under the "Global Europe" strategy, we would encourage the Commission to seek a mandate for negotiations with all the countries covered by that strategy, including India, Korea, Canada, Singapore and ASEAN countries, as well as with Latin American countries, and with Brazil in particular. This would bring an added degree of coherence to EU trade and investment policy. The new agreements however should deal exclusively with investment-related issues: they should be investment-specific, and their conclusion should not be linked to other, more political, issues (e.g. social, environmental and human rights) whether or not these have already been covered in FTAs or association agreements.

Many of our company members have drawn attention to the potential benefits of the new EU policy for certain third countries. They point out that a large number of key developed and emerging countries have already concluded BITs with EU member states. They wonder therefore whether the *real* value added by the new policy, in terms of new protection, would accrue to those countries which do not yet have BITs with the EU or its member states, and where investment is not taking place due to lack of protection. We would welcome a deeper discussion on this important issue.

We should be grateful if the Commission would take account of the European service industry's priorities for the new Investment Policy. We look forward to analysing the forthcoming Communication on the issue and to working with the Commission on a forward-looking agenda for investment negotiations to give EU investors a maximum degree of protection.

Yours sincerely,

Christoffer Taxell
ESF Chairman

Cc: Mr. David O'Sullivan – Director General, DG Trade, European Commission