

The Consumer Voice in Europe

BEUC'S KEY CONCERNS ABOUT THE INVESTMENT COURT SYSTEM PROPOSAL



Contact: Léa Auffret – trade@beuc.eu

BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS AISBL | DER EUROPÄISCHE VERBRAUCHERVERBAND
Rue d'Arlon 80, B-1040 Brussels • Tel. +32 (0)2 743 15 90 • www.twitter.com/beuc • consumers@beuc.eu • www.beuc.eu
EC register for interest representatives: identification number 9505781573-45



Co-funded by the European Union

Ref: BEUC-X-2015-103 - 22/10/2015

Following the heated debate about the Investor to State Dispute Settlement (ISDS) mechanism proposed in the Transatlantic Trade and Investment Partnership (TTIP), the European Commission has finally recognised that it lacks transparency and that its arbitrators are prone to conflict of interests.

BEUC has consistently denounced the flaws in ISDS and therefore welcomes the fact that the Commission is now proposing to step away from private arbitration. In a context of widespread public mistrust over secretly negotiated trade deals, it is positive that the Commission intends to address citizens' legitimate concerns by proposing an Investment Court System (ICS) – and allowing for civil society and public feedback by immediately publishing the proposal.

Nevertheless, the ICS proposal fails to address some of the core flaws in ISDS, and therefore will not convince consumers that it is the appropriate way forward. The most worrying aspects for consumers are¹:

1. The right to regulate is not protected strongly enough:

the ICS proposal includes a specific article on the right to regulate, which is encouraging, but it does not entirely prevent the regulatory chilling effect deriving from investor claims. Indeed, under the new proposal, foreign investors will still have the opportunity to threaten to sue governments for compensation when governments, for example, adopt an ambitious law to enhance consumer protection. While the regulation would be upheld as intended, compensation might need to be paid to the investor. This could deter governments from introducing the new protection (i.e. regulatory chill). BEUC recommends that a proper balance is found between protecting investors and making sure that claims against measures designed to meet public policy objectives will not be allowed.

2. Conflicts of interest remain a problem:

the proposal includes provisions on ethics and a code of conduct for judges and members of the court system but fails to guarantee real independence. In particular, it allows judges to still work as corporate lawyers. To make sure that judges are truly independent and to prevent conflict of interests from arising, the Commission should further reinforce the code of conduct and the ethics provisions in its proposal. It is, for example, not acceptable that a judge can be linked directly or indirectly to one of the parties in a dispute for a certain period of time surrounding a dispute.

3. The costs and the impact of establishing ICS have not been evaluated:

it is alarming that in this 'era of better regulation' the Commission is proposing a brand new bilateral court system, which is likely to be multilateralised in the future, but has not carried out a proper impact assessment. We urge the Commission to evaluate the costs and the administrative impacts of its proposal.

Most importantly, **there is still no evidence proving the need for a parallel judicial system** between the two most developed legal systems in the world. Existing levels of protection in the EU and the US are surely enough to guarantee legal security for investors².

¹ This document is based on a collective analysis of the ICS, submitted to the European Commission by some of the TTIP's Advisory Group's civil society members (BEUC & TACD; T&E; EPHA; EHN & EASL).

² This is also the conclusion of the opinion on the 2015 TTIP resolution of the Legal Affairs committee of the European Parliament, the committee responsible for the interpretation of EU and international law.



This publication is part of an activity which has received funding under an operating grant from the European Union's Consumer Programme (2014-2020).

The content of this publication represents the views of the author only and it is his/her sole responsibility; it cannot be considered to reflect the views of the European Commission and/or the Consumers, Health, Agriculture and Food Executive Agency or any other body of the European Union. The European Commission and the Agency do not accept any responsibility for use that may be made of the information it contains.