

Annex 2

Summary of the 2017 questionnaire on the substantive national standards of protection for cross-border intra-EU investments

A first questionnaire on the substantive standards of protection for cross-border intra-EU investments was sent to the EU Member States via the expert group on intra-EU investment environment in 2017.

17 Member States (AT, BG, CY, CZ, DE, DK, EL, ES, FI, FR, LT, LV, PT, RO, SI, SK, SE) replied to that 2017 questionnaire. Therefore, the following summary only refers to the legal systems of those 17 Member States. It only summarizes Member States' replies to those questions which are deemed relevant for the current assessment (i.e. questions 1, 5, 6, 8 and 9).

Question 1: Does your Member State have specific laws giving substantive rights to investors or are you aware of important national jurisprudence which would discuss the rights of investors?

To this question three Member States replied that they do have specific investment laws (BG, EL and LT). Two Member States (RO and SI) replied that they have specific laws on FDI.

Most other Member States explained that while they do not have specific national laws on investments, the rights of cross-border investors, like the right of any other EU citizen on their territory, are protected under their constitutional law. This includes non-discrimination, the rule of law, the principle of legality (every act of the administration must be based on law), the right to property, and the freedom to conduct a business. Hence for those Member States, the scope of their national frameworks set out in their replies to the following questions apply not only to investors, but to all protected individuals.

Question 5: Could you explain the application of the right to good administration in your Member State in relation to investments?

All replying Member States have set out the limits to the powers of administrative authorities and the rights of individuals in their national legislations on administrative procedures. While the national administrative laws diverge, those rights usually comprise: the right to be heard before the authority, the right of non-discrimination, the right to receive an administrative decision within a given deadline, the right to appeal the administrative decision before a higher ranked administrative body and/or before an administrative court, the obligation of the administration to give a reasoning for its decision.

Question 6: Could you explain the application of the right to property and rules on expropriation in your Member State in relation to investment?

The right to property is protected under all the constitutions of the replying Member States. Formal or "direct" expropriations (state measures that include a formal transfer of ownership/title from the individual to a state authority) must be based on law, must be proportionate and justified in the public interest, and the expropriated owner must receive a "fair" or "just" compensation.

It appears from most replies that the regulated cases of “direct” expropriation are applicable to expropriation of privately owned land, for example for the building of infrastructures such as motorways or airports.

Question 8: How is the principle of legal certainty applied in your Member State in relation to investments?

The principle of legal certainty, closely linked to the principle of rule of law, is a constitutional principle in all responding Member States.

In all responding Member States this implies that in principle, there should be no retroactive legislation, with some possible narrow exceptions for overriding reasons of public interest.

In many Member States, (see for example reply from Latvia), the national courts have developed this idea further and established that while the principle of legal certainty doesn’t preclude the state from changing the legal environment, but it imposes on the state the obligation to ensure stability of established legal relationships, and requires to take into account already established rights and interests of the individual. The state needs to balance the interests of the individual against the necessity to change the applicable legal environment.

Also, in most responding Member States, the general principle of legal certainty is set out in more detail in their general administrative law, that further specifies under what (exceptional) conditions an administrative act may be retroactively changed or annulled.

Question 9: How is the principle of legitimate expectations for investors framed in your national legal system?

In most replying Member States, the principle of “legitimate expectations” is a corollary of the principles of legal certainty, and of legality/rule of law.

See for example the reply of Lithuania, *“the constitutional principles of the protection of legitimate expectations, legal certainty and legal security imply the obligation of the state to secure the certainty and stability of the legal regulation, to protect the rights of individuals, to respect the legitimate interests and legitimate expectations.”*

It is meant to protect an individual’s justified/good faith reliance in the validity of acquired rights (see e.g. DE reply). In many MS this concept aims at protecting rights/legal positions individuals in good faith have acquired in the past, hence the different denomination of the concept in many MS (e.g. *Vertrauensschutz*, *principe de confiance légitime*).

All responding Member States seem to have more detailed rules on “legitimate expectations” in their administrative laws. Those rules set out that in principle, an administration cannot take back an administrative decision once it has become valid, especially if the decision was favorable for the individual/the investor (prohibition of *reformatio in peius*).

Also, an individual/investor is entitled to rely on a clear and unequivocal statement made by a public entity (see e.g. the reply of Latvia).