

Follow-up Questions Regarding the Public Consultation on Investment Protection:

- 1) Your contribution reads: *“In a majority of Member States, judicial proceedings are slow in comparison with business cycles, depriving investors from a timely compensation. In addition, a number of Member States still do not guarantee a fair and equitable treatment to investors originating in another Member State. Litigations are often treated in a biased manner since the judicial system is exposed to interferences by the executive branch. As explained above, national courts prove often insufficiently specialised in this type of litigation”.*

We understand that in your practice the concerns about independence and impartiality have been limited to some Member States, while concerns relating to the length of proceedings and specialization of judges in this field seem relevant to the “majority of” Member States. **Could you please confirm if this understanding is correct? Could you also specify if possible concrete issues relating to efficiency and specialization you have faced in practice?**

Answer:

Yes, your understanding is correct. This remark is based on our general observations on cross-border business in the EU, and especially our business presence in the CEE region for the last 20-25 years. From Commerzbank’s concrete experience we can primarily point towards our major investment in Poland and the related investment protection cases regarding the biased treatment of the FX-mortgage loan agreements since 2015. Initially, the administration was pursuing plans for aggressive legislation which would have resulted in immense losses mainly for foreign-owned Polish banks. Fortunately, these plans were abandoned not at least due to the threat of seeking litigation under the bilateral investment treaty. Later and up until now, we see a rapid increase of single court cases (counted in thousands), for which proceedings are already expected to last on average five years or longer.

The current jurisdiction clearly shows very different verdicts, interpretations of EU law, proceeding patterns and underlying economic logic although all lawsuits are fairly similar. In the end, it is a very strong sign of the possible politicisation of courts, bias towards more government-friendly national institutions, insufficient specialisation of some politically appointed judges to perform proper litigation and so forth.

The lack of specialisation can in general be attributed to the fact that courts often do not have dedicated chambers or staff capacities that deal with investor-state disputes.

In conclusion, we have serious doubts about fairness and effectiveness regarding the use of legal remedies on national level to defend our interests in unbiased legal proceedings, especially in the CEE region. The specific situation in Poland and Hungary is well known and reflected in the current discussions and proceedings relating to the Rule of Law.

- 2) Your contribution states: *“It would thus be helpful to put in place a harmonised and specified notion of the extent to which measures interfere with the distinct and reasonable expectations of investors and how this relates to claims for compensation.”*

Can you point to positive examples in this respect based on your practice?

Answer:

Our statement is based on general observations and cannot be linked to particular examples from our practical experience.

- 3) You state that: *“The principle of good administration is regularly used in broad terms without reference to concrete rights stemming thereof. Thus, we believe that specifications could help investors to better benefit from the general clause. This relates e.g. to the treatment of requests of investors before national administration.”*

Could you please specify the type of request and administrative procedures that are particularly relevant in your practice (e.g. authorisations, enforcement activities such as inspections, etc.)?

Answer:

In general, we believe that there is strong merit in a uniform application and interpretation of the principle of good administration throughout the whole EU. Our statement is based on general observations and cannot be linked to particular cases. These observations were made for example in relation to information requests, the request to be heard in administrative procedures (before a decision is taken) as well as authorisation procedures.

- 4) Your contribution refers to *discrepancies that arise from diverging legal opinions of national courts.*

Can you point to specific areas where you have identified such discrepancies in case-law in different MS?

Answer:

One specific example is the different interpretation of the ECJ judgement regarding CHF loans in Poland from October 2019 (Case C-260/18). This case law has not been interpreted consistently by courts leading to significantly different outcomes depending on the local court’s particular interpretation.

Another specific example is the notion of indirect expropriation. Its interpretation differs from one Member State to another.

- 5) You state that the below *“remedies have been recognised either at the EU level via the case law of the CJEU or/and in Member States legal order. Unfortunately, it can be observed that in practice, not many of those remedies are being applied by Member States courts.”*

(Provisional measures (interim relief) | Annulment of national measures | Request to interpret national law in a way that is consistent with EU law | Disapply national provisions that are contrary to EU law | Award damages | Restitution (e.g. of the claimed good)

Could you please specify which remedies in your experience have not been effectively applied in practice?

Answer:

The most striking examples of remedies that have not been properly applied in practice are the request to interpret national law in a way that is consistent with EU law and to invalidate national provisions that are contrary to EU law. Unfortunately, those requests are often being ignored – either because of a lack of expertise in EU law or intentionally, resulting in a breach of EU law. The refusal to remedy the situation that is non-compliant with EU law often leads to discrimination.

Consequently, in those cases, investors are often deprived from being awarded damages and/or restitution.

- 6) You refer to difficulties in finding information more specifically, stating:

“While the main EU initiatives contain enough information to facilitate investments in general, it is difficult to find any references to specific FDI laws and regulations regarding public administration in the respective Members States (e.g. in YourEurope portal) as well as procedures for circumstances negatively affecting existing investments.”

We understand that in your view further information is necessary (on Your Europe portal) than that provided in the Communication on protection of intra-EU investment. **Could you please specify what kind of procedures and circumstances should also be specified (e.g. examples of how the rules are relevant in specific situations?)**

Answer:

The answer does not refer to a lack of information on EU level. It rather refers to a lack of information provided by the administration of the host state. It relates for example to legal requirements for setting up branches, being granted authorisations, rights in administrative procedures etc.

In terms of improving the current Your Europe Portal, we recommend introducing a specific section on Investment Protection. This section could summarize the current legal situation and thus provide a useful overview to investors in the case that a state-investor dispute arises.

- 7) Your contribution states: *“For some common issues of institutional investors, SOLVIT is not able to give relevant guidance.”*

Are you referring to issues in relations with the government or private operators? What limitations in the SOLVIT service have prevented you from using it in practice in disputes with national authorities?

Answer:

We are referring to issues in relations with governments, which are generally at the core of our concerns. In our understanding, SOLVIT is particularly geared towards small-scale disputes but not apt for large-scale issues. These usually involve court proceedings, for which SOLVIT is not an adequate solution by design (see below quote from the SOLVIT website). An example for a larger-scale dispute with a national government is the envisaged but finally abandoned proposal by the Polish governments for a tax on foreign-owned financial institutions, which we have already referred to in our answer to the first question.

“SOLVIT cannot help:

- if your company is having problems with another company
- if you have a consumer-related problem
- if you are seeking compensation for damages
- if you take your case to court (due to its informal nature, SOLVIT cannot run in parallel with formal or legal proceedings).”