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**MEETING DOCUMENT**

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From:	European Commission
To:	Working Party on Competitiveness and Growth (Internal Market - Attachés) Working Party on Competitiveness and Growth (Internal Market)

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Subject:	Presentation by the Commission on Investment Protection and Facilitation Framework
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# Investment Protection and Facilitation Framework

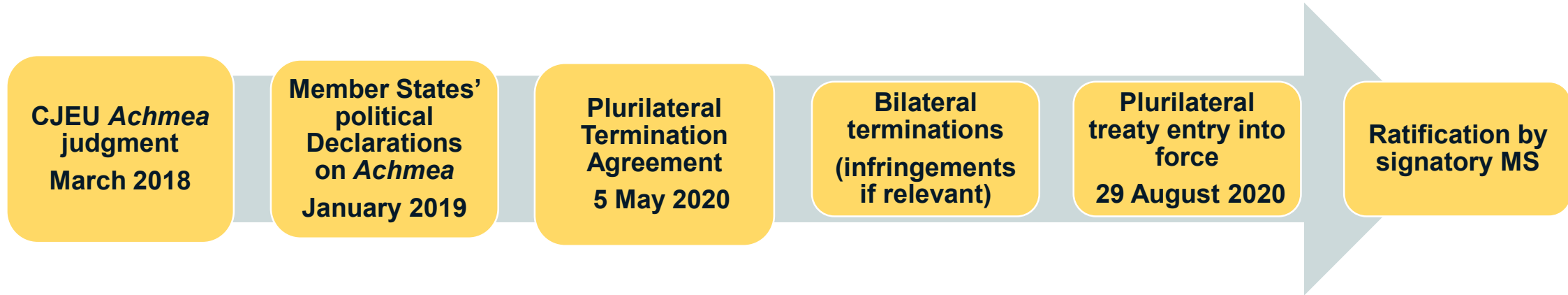
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DG FISMA

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# Recent developments and policy context

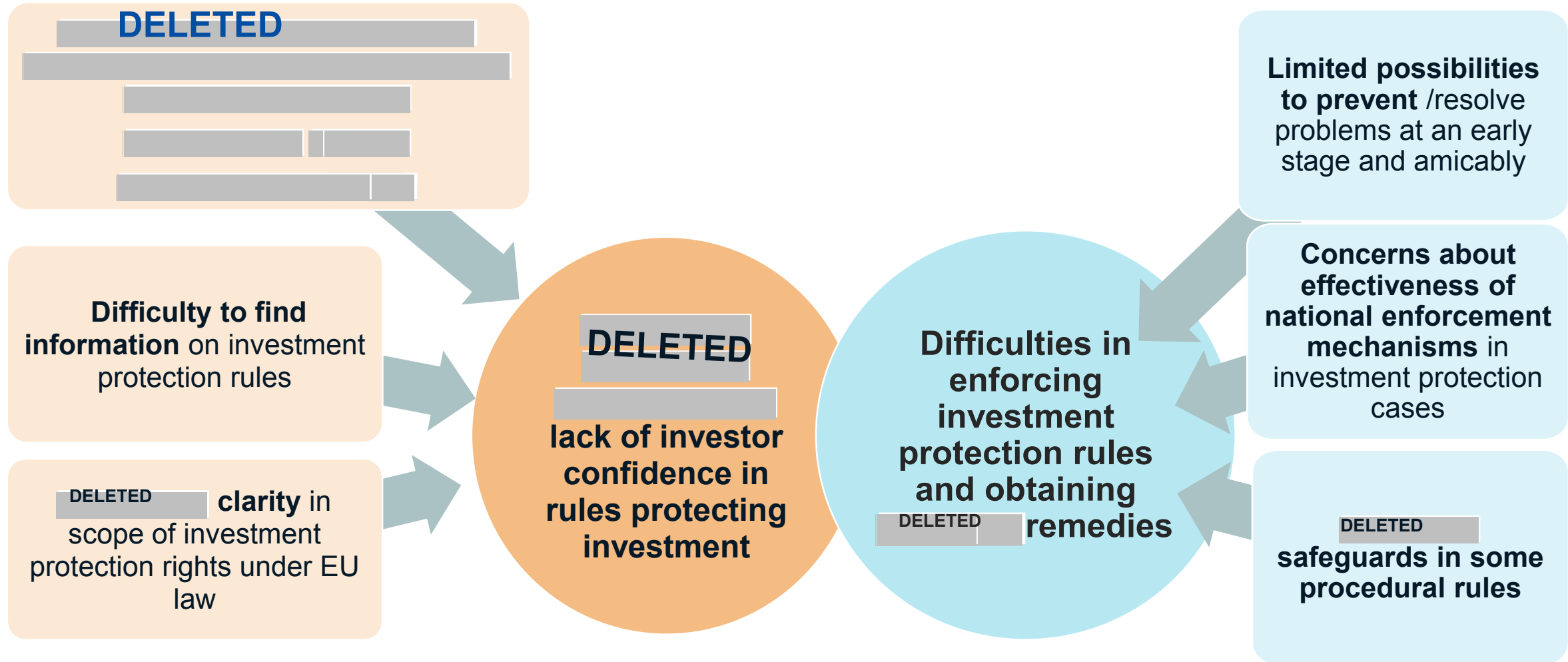
- Termination of intra-EU Bilateral Investment Treaties



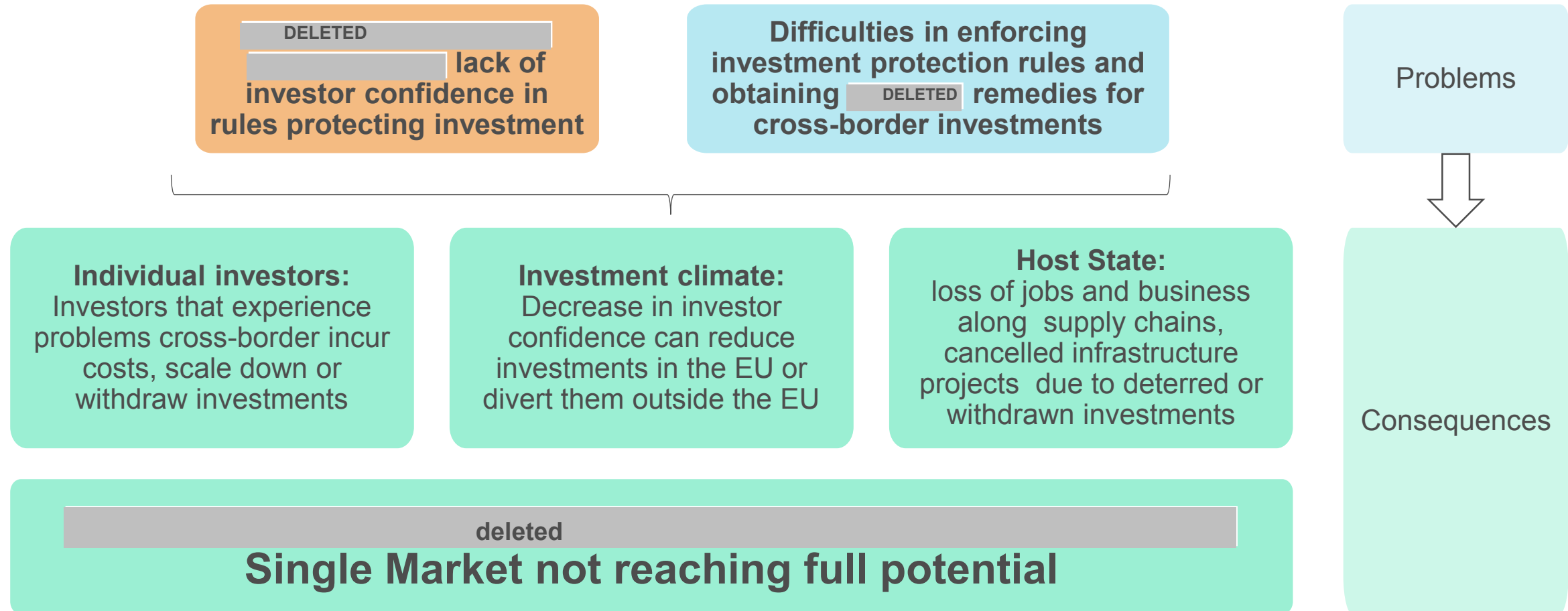
- Protection of intra-EU investment under EU legal framework



# Problems



# Consequences



# Policy response: Strengthening the EU investment protection and facilitation framework (Action 15, New CMU Action Plan)

## I. **deleted** rules protecting investment

**deleted**

- Substantive rules to ensure consistent and predictable protection of intra-EU investments

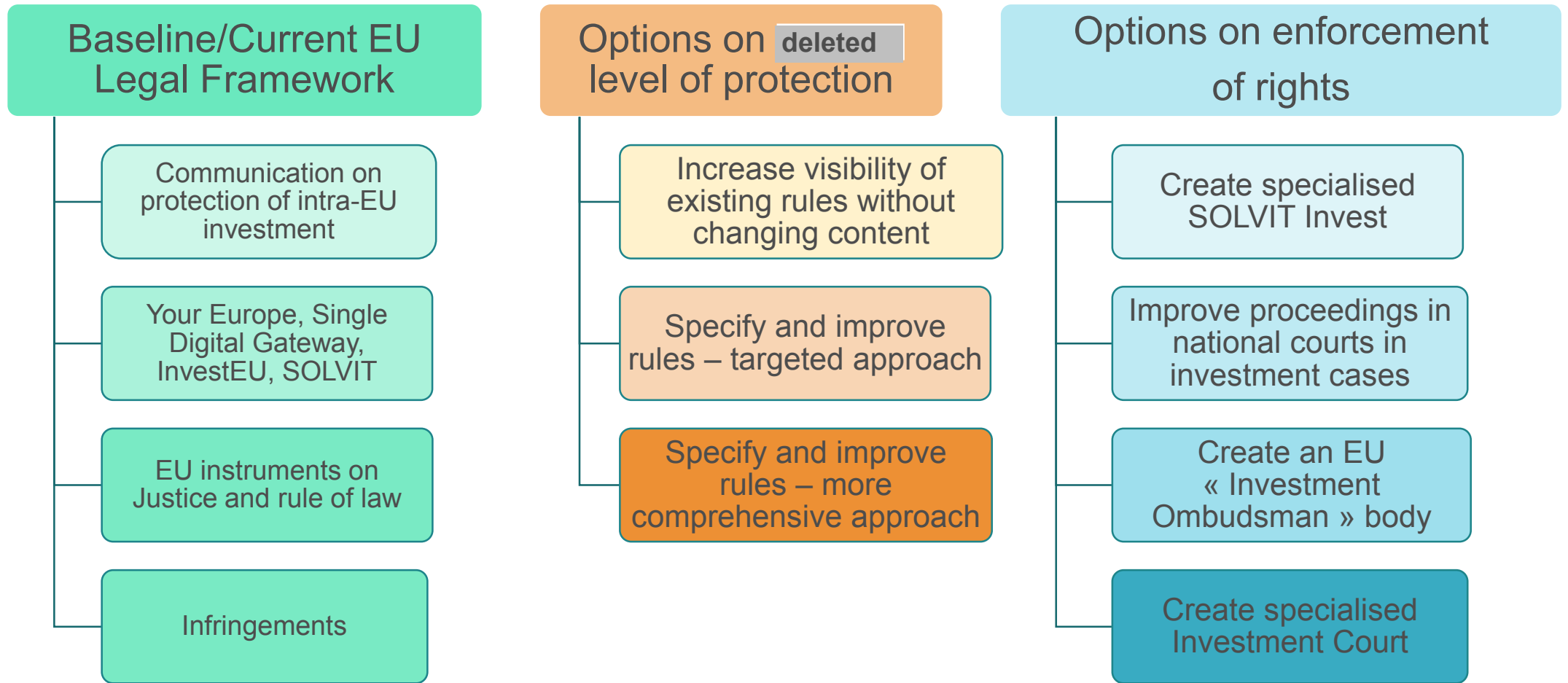
## II. **deleted** enforcement mechanisms for investment cases

- **deleted** improving dispute resolution mechanisms at national and/or EU level while guaranteeing access to national courts

## III. Investment facilitation

- Consolidation of information on rights and opportunities for investors in a single access point (for example on the Invest EU portal)
- Mechanisms for preventive and amicable dispute resolution

# Policy options examined



# Link with Rule of Law and Justice Field

**Some investment problems are addressed by EU tools in the justice field:**

- EU Justice Scoreboard (data on independence, quality and efficiency of courts)
- European Semester (annual country reports and country specific recommendations)
- Rule of Law mechanism and report (country reports and general EU report on rule of law)

**DG FISMA integrates the investment dimension in these instruments**



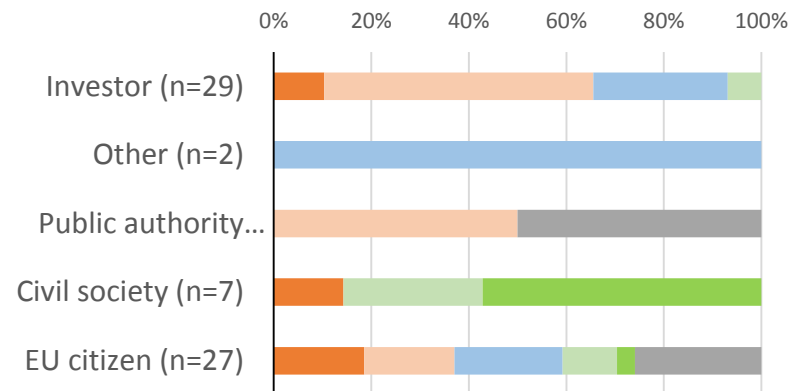
# Public consultation results

- Total number of replies: 75
- Business associations:
  - Represent around 10m businesses in the EU
  - Represent trillion in investment
- In this presentation, 'civil society' refers to respondents of the following categories: academic institution, consumer organisation, NGO and trade union



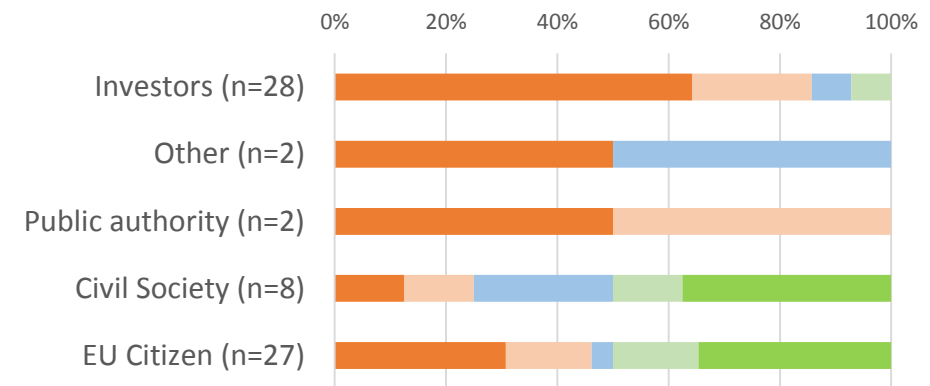
# Public consultation results

- What is your overall assessment of the investment protection framework provided by EU law when investing in another Member State?



- 1 - Poor
- 2 - Rather poor
- 3 - Neutral
- 4 - Good
- 5 - Very good
- Don't know / no opinion / not relevant

- Do you consider that the protection offered by the investment regulatory framework within the EU has a negative impact on the decision to make a cross-border investment?



- Major impact, cancellation of planned or withdrawal of existing investments
- Significant impact
- Medium impact
- Small impact
- No impact

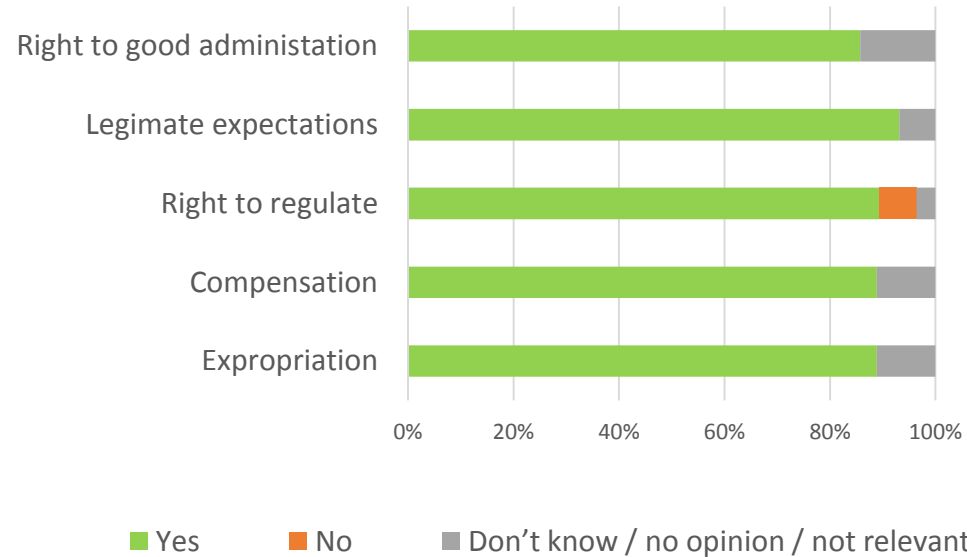
# Public consultation results

- Investors
  - Lack of an effective enforcement mechanism
  - Codify in one, single legal source
  - Case law does not clarify all questions
    - rules not sufficiently specified
  - Bias against non-domestic investors
  - Large differences between MS
  - Comparison with the situation in third countries outside the EU
- Civil society organisations
  - EU is one of the most protective regions for investors
  - Problems should be solved by strengthening EU cooperation in order to improve the situation for all citizens
  - No ad hoc tribunals for a few economic foreign actors only

# Public consultation results - Investment protection rights

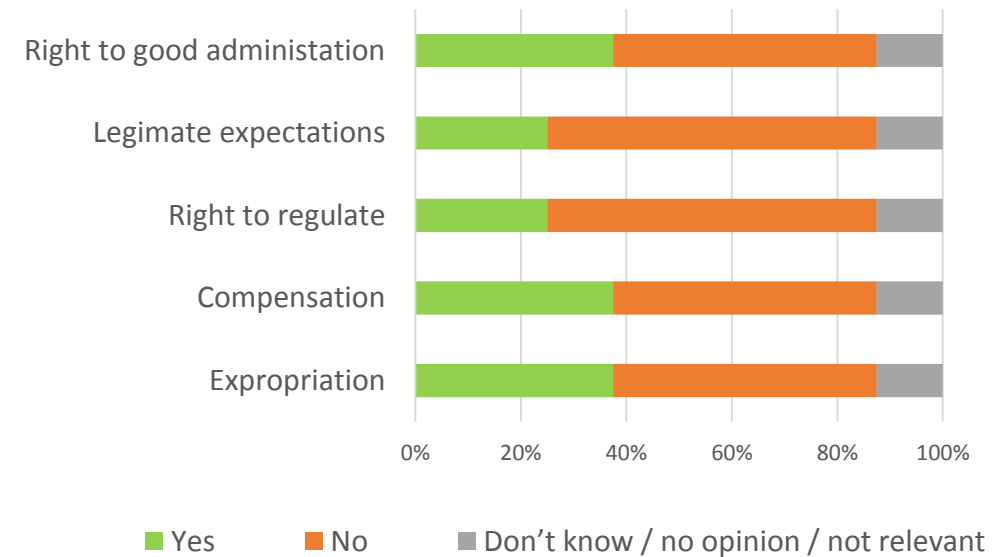
## Investors

Do you think it would be useful to specify further the following:



## Civil society

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# Investment protection rights – Investors

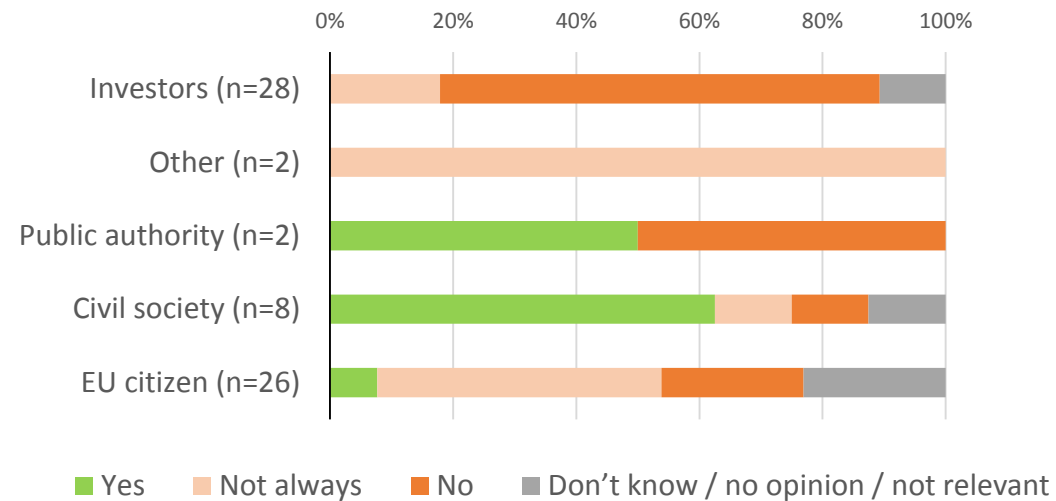
- Harmonisation of the different implementations of EU principles at national level would decrease divergences and imbalances in the single market
- Follow more closely EU investment agreements, directly applicable rules
- Call to define precisely what constitutes *indirect* expropriation
- Clarity on the extent of Member States' policy space and on the level of investment protection in case of policy changes would increase legal certainty
- Sudden and retroactive changes destroy the investors' confidence

# Investment protection rights – Civil society organisations

- 2018 Commission communication is sufficient
- Most cross-border investors are international companies with sufficient resources to analyse EU legal framework
- EU foreign investors would potentially benefit from more guarantees than national operators
- Would negatively impact the right to regulate of Member States
- Oppose alignment with international law

# Public consultation results - Enforcement

- Do you think the current system of enforcement of EU investment rules in Member States works adequately?



# Public consultation results - Enforcement

- Issues reported by investors:
  - Lack of impartiality towards non-domestic investors
  - Serious concerns related to the respect of rule of law in some MS
  - Lack of homogeneity of the quality of enforcement across MS
  - Judicial proceedings that are excessively slow in comparison with business cycles
  - National courts do not always have the specialisation in and knowledge of intra-EU investment rules
  - Loss of protection following Achmea
- Civil society organisations:
  - EU MS offer a reliable judicial system for investors – no need for action

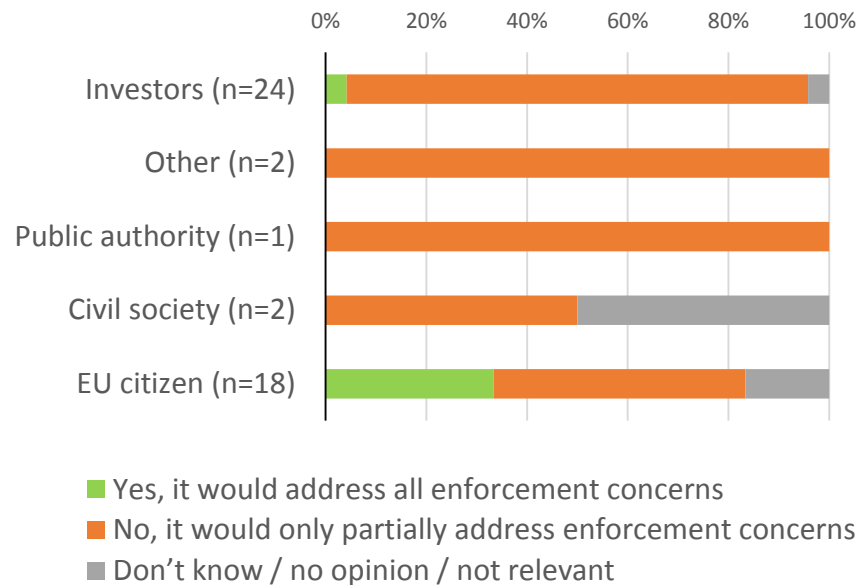


# Public consultation results - Enforcement

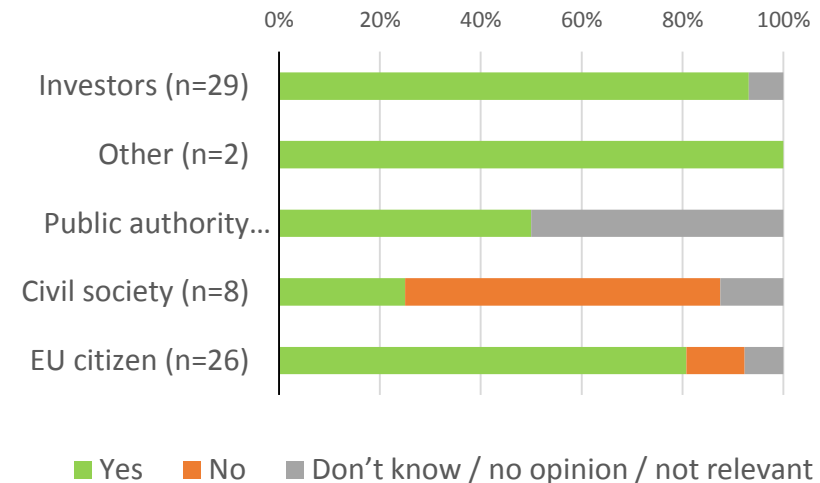
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# Public consultation results - Enforcement

- If not, do you think that better enforcement by the authorities and courts of the Member State where the investment is located would help to completely address the issue?



- Or do you think that improving enforcement mechanisms at EU level would also be needed?

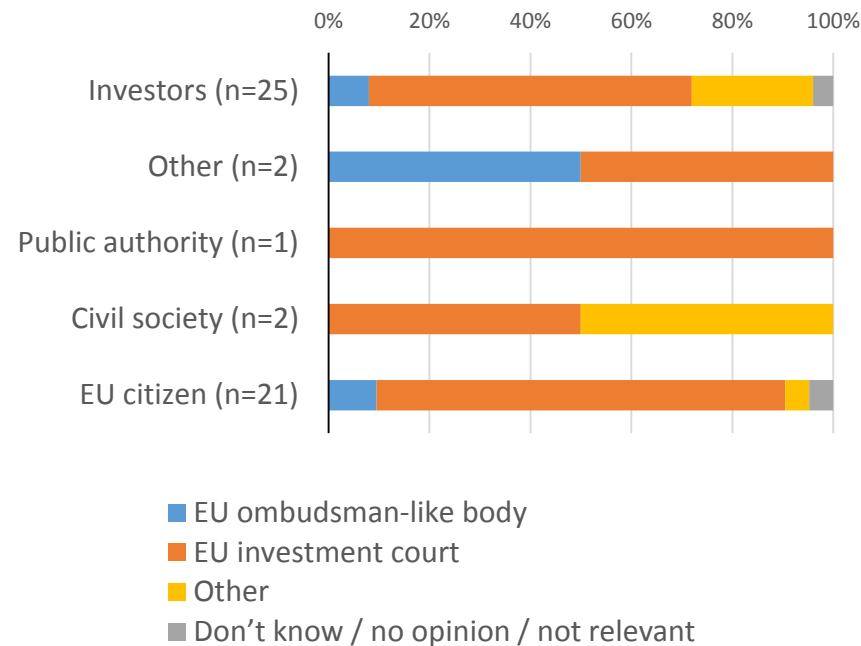


# Public consultation results - Improving enforcement at EU level

- EU infringement not enough: too long, politicised character of the process
- Preliminary reference procedure is not sufficient:
  - Some national courts are reluctant to refer questions
  - Too long
- Improving the efficiency and effectiveness of the infringement procedure and the EU Pilot: make them faster, more automatic and transparent, including by making more explicit the criteria to pursue or close a case
- Power of injunction for the Commission when there is a clear breach of the four freedoms

# Public consultation results - Enforcement of investment rules

- What type of EU body or mechanism would be suitable to settle cross-border investment disputes?

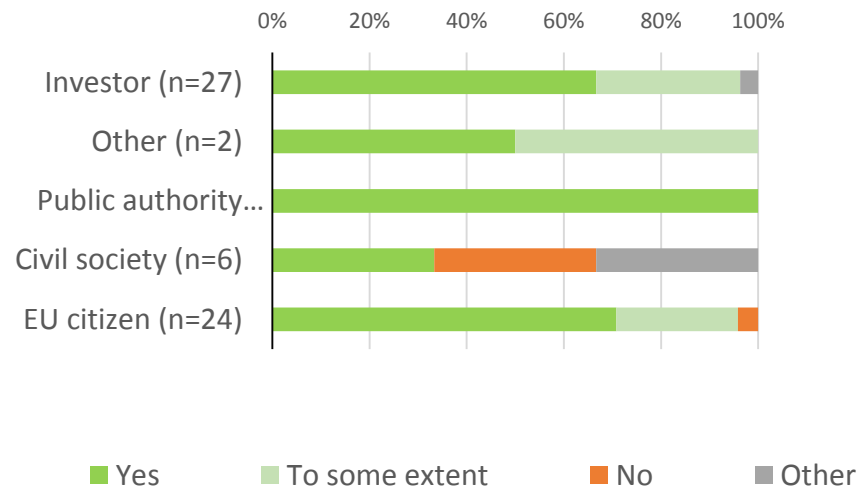


# Public consultation results – Enforcement options at EU level

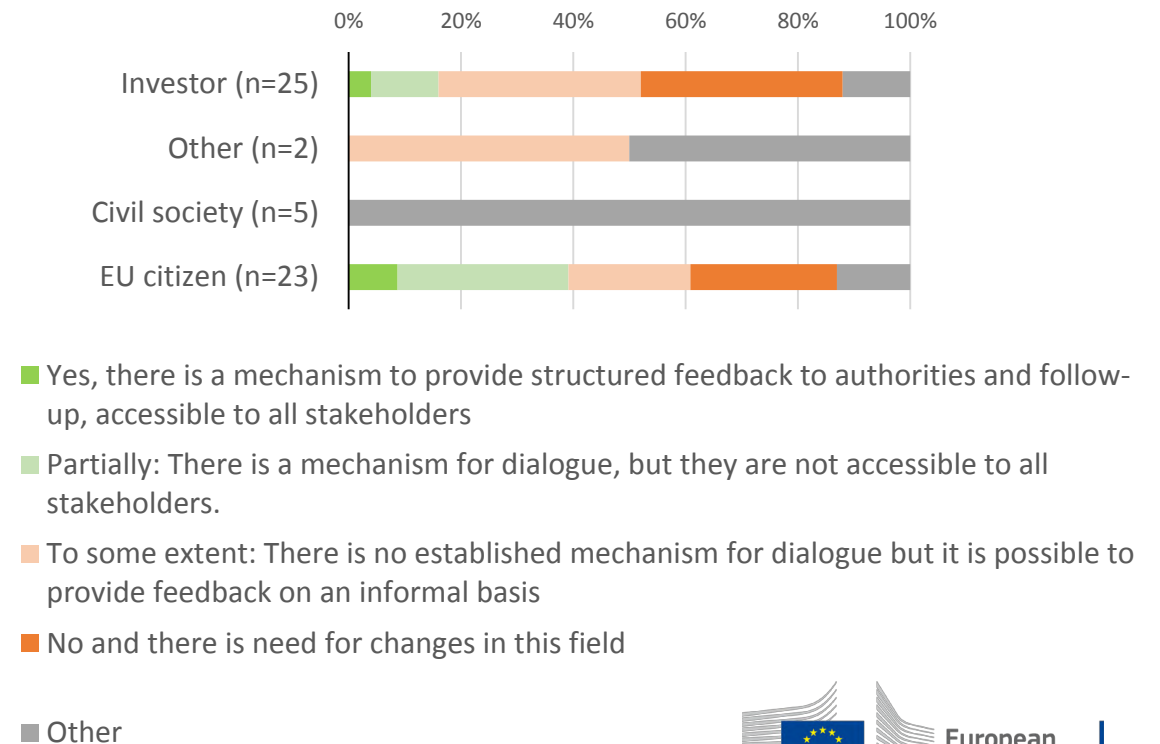
- Investor support for a dedicated court, capable of issuing binding decisions:
  - neutral, transparent and non-discriminatory
  - level-playing field between EU and third country investors
- Complement with an appeal system against decisions of the specialised investment court before the Court of justice of the EU
- Out-of-court settlement mechanisms, such as mediation, could help de-escalate disputes at an early stage
- Investor support for Ombudsman-like body, either as standalone or in combination with a specialised court

# Public consultation results - Investment facilitation

- Do you think it would be useful to have specific measures focusing on cross-border investment facilitation?



- Do you think it is easy to provide feedback on problems of general relevance to the investment environment for follow-up by the competent authorities at EU or national level?



# Public consultation results - Investment facilitation

- Information is scattered, no “one-stop-shop” on investment protection rules and regulations
  - Particularly important for SMEs, helpful also for large investors
- Additional facilitation measures: many already in place, but more can be done
  - advice, help from business representatives, match-making tools and targeted events, digitalisation, including use of electronic tools by national administration
- Feedback mechanisms accessible to some extent
  - Use the Single Market Enforcement Task Force (SMET) to follow-up on feedback
- Use of SOLVIT or other amicable dispute resolution tools very limited