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MEETING DOCUMENT

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

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

DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC (13.08.2021)
Investment Protection and Facilitation Framework

*These slides are for presentational and information purposes only. They do not reflect the views of the European Commission. The positions expressed therein do not prejudge the official position of the European Commission
Recent developments and policy context

• **Termination of intra-EU Bilateral Investment Treaties**

- **CJEU Achmea judgment**
  - March 2018

- **Member States’ political Declarations on Achmea**
  - January 2019

- **Plurilateral Termination Agreement**
  - 5 May 2020

  - Bilateral terminations (infringements if relevant)

- **Plurilateral treaty entry into force**
  - 29 August 2020

  - Ratification by signatory MS

• **Protection of intra-EU investment under EU legal framework**

- **Communication Protection of intra-EU investment**
  - July 2018

- **Stakeholder workshops on intra-EU investment**
  - December 2018 & 2019

- **CWP 2020**
  - Communication A New Industrial Strategy for Europe
  - March 2020

  - Spring economic forecast: COVID-19 crisis severe impact on investment

- **IIA/ Public consultation**
  - May 2020

- **New CMU Action Plan**
  - 23 Sept. 2020
Problems

- Difficulty to find information on investment protection rules
- Lack of investor confidence in rules protecting investment
- Clarity in scope of investment protection rights under EU law
- Difficulties in enforcing investment protection rules and obtaining remedies
- Limited possibilities to prevent / resolve problems at an early stage and amicably
- Concerns about effectiveness of national enforcement mechanisms in investment protection cases
- Safeguards in some procedural rules
Consequences

Individual investors:
Investors that experience problems cross-border incur costs, scale down or withdraw investments

Investment climate:
Decrease in investor confidence can reduce investments in the EU or divert them outside the EU

Host State:
loss of jobs and business along supply chains, cancelled infrastructure projects due to deterred or withdrawn investments

Single Market not reaching full potential

Difficulties in enforcing investment protection rules and obtaining remedies for cross-border investments

Problems

Consequences
| I. | Substantive rules to ensure consistent and predictable protection of intra-EU investments |
| II. | Improving dispute resolution mechanisms at national and/or EU level while guaranteeing access to national courts |
| III. | Consolidation of information on rights and opportunities for investors in a single access point (for example on the InvestEU portal) |
|     | Mechanisms for preventive and amicable dispute resolution |
Policy options examined

Baseline/Current EU Legal Framework

- Communication on protection of intra-EU investment
- Your Europe, Single Digital Gateway, InvestEU, SOLVIT
- EU instruments on Justice and rule of law
- Infringements

Options on level of protection

- Increase visibility of existing rules without changing content
- Specify and improve rules – targeted approach
- Specify and improve rules – more comprehensive approach

Options on enforcement of rights

- Create specialised SOLVIT Invest
- Improve proceedings in national courts in investment cases
- Create an EU « Investment Ombudsman » body
- Create specialised Investment Court
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?

- 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?

### Investor (n=29)

- Poor: 0%
- Rather poor: 20%
- Neutral: 40%
- Good: 60%
- Very good: 80%
- Don’t know / no opinion / not relevant: 100%

### Other (n=2)

- Major impact, cancellation of planned or withdrawal of existing investments: 0%
- Significant impact: 20%
- Medium impact: 40%
- Small impact: 60%
- No impact: 80%

### Public authority...

- Major impact, cancellation of planned or withdrawal of existing investments: 0%
- Significant impact: 20%
- Medium impact: 40%
- Small impact: 60%
- No impact: 80%

### Civil society (n=7)

- Major impact, cancellation of planned or withdrawal of existing investments: 0%
- Significant impact: 20%
- Medium impact: 40%
- Small impact: 60%
- No impact: 80%

### EU citizen (n=27)

- Major impact, cancellation of planned or withdrawal of existing investments: 0%
- Significant impact: 20%
- Medium impact: 40%
- Small impact: 60%
- No impact: 80%
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:

- Right to good administration
- Legitimate expectations
- Right to regulate
- Compensation
- Expropriation

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

- Right to good administration
- Legitimate expectations
- Right to regulate
- Compensation
- Expropriation

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[Bar charts showing responses to the questions, with categories like 'Yes', 'No', 'Don’t know / no opinion / not relevant']
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?**

![Bar chart showing the results of the public consultation on enforcement.](chart)

- **Investors (n=28)**: 60% Yes, 20% Not always, 20% No, 0% Don’t know / no opinion / not relevant
- **Other (n=2)**: 100% Yes, 0% Not always, 0% No, 0% Don’t know / no opinion / not relevant
- **Public authority (n=2)**: 50% Yes, 50% Not always, 0% No, 0% Don’t know / no opinion / not relevant
- **Civil society (n=8)**: 25% Yes, 25% Not always, 25% No, 25% Don’t know / no opinion / not relevant
- **EU citizen (n=26)**: 46% Yes, 23% Not always, 15% No, 16% Don’t know / no opinion / not relevant
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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• Civil society organisations:
  • EU MS offer a reliable judicial system for investors – no need for action
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 - Enforcement

- Investors (n=24)
- Other (n=2)
- Public authority (n=1)
- Civil society (n=2)
- EU citizen (n=18)

- Yes, it would address all enforcement concerns
- No, it would only partially address enforcement concerns
- Don’t know / no opinion / not relevant

- Investors (n=29)
- Other (n=2)
- Public authority...
- Civil society (n=8)
- EU citizen (n=26)

- Yes
- No
- Don’t know / no opinion / not relevant
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?

![Bar chart showing public consultation results](chart.png)

- EU ombudsman-like body
- EU investment court
- Other
- Don’t know / no opinion / not relevant
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?

- Investor (n=27)
- Other (n=2)
- Public authority...
- Civil society (n=6)
- EU citizen (n=24)

Yes | To some extent | No | Other
---|---|---|---
40% | 60% | 0% | 0%

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?

- Investor (n=25)
- Other (n=2)
- Civil society (n=5)
- EU citizen (n=23)

- Yes, there is a mechanism to provide structured feedback to authorities and follow-up, accessible to all stakeholders
- Partially: There is a mechanism for dialogue, but they are not accessible to all stakeholders.
- To some extent: There is no established mechanism for dialogue but it is possible to provide feedback on an informal basis
- No and there is need for changes in this field
- Other
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