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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

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DG FISMA

^{*}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

Protection of intra-EU investment
July 2018

Stakeholder workshops on intra-EU investment December 2018 & 2019 **CWP 2020**

A New Industrial Strategy for Europe March 2020

economic forecast: COVID-19 crisis severe impact on investment

Spring

IIA/ Public consultation
May 2020

New CMU Action Plan 23 Sept. 2020



Problems

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Difficulty to find information on investment protection rules

scope of investment protection rights under EU law

DELETED

lack of investor confidence in rules protecting investment

Difficulties in enforcing investment protection rules and obtaining DELETED remedies

to prevent /resolve problems at an early stage and amicably

Concerns about effectiveness of national enforcement mechanisms in investment protection cases

DELETED

safeguards in some procedural rules



Consequences

DELETED

investor confidence in rules protecting investment

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

Problems



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

Consequences

deleted

Single Market not reaching full potential



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



II. enforcement mechanisms for investment cases

III. Investment facilitation

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

- deleted

 improving
 dispute

 resolution mechanisms at national and/or EU level while guaranteeing access to national courts
- 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

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 deleted 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:

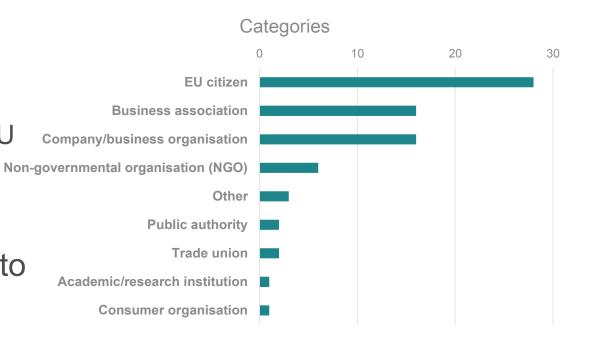
- EU Justice Scoreboard (data on independence, quality and efficiency of courts)
- European Semester (annual country reports and country specific recommendations)
- Rule of Law mechanism and report (country reports and general EU report on rule of law)

DG FISMA integrates the investment dimension in these instruments



Public consultation results

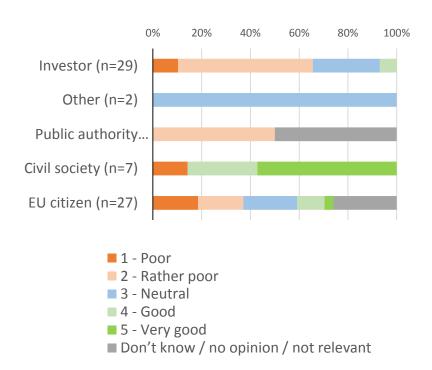
- Total number of replies: 75
- Business associations:
 - Represent around 10m businesses in the EU
 - Represent trillion in investment
- In this presentation, 'civil society' refers to respondents of the following categories: academic institution, consumer organisation, NGO and trade union



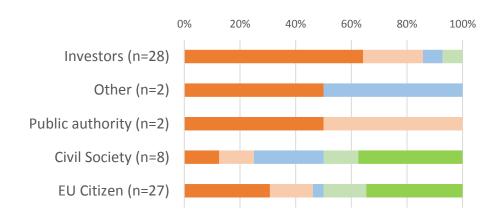


Public consultation results

 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?



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



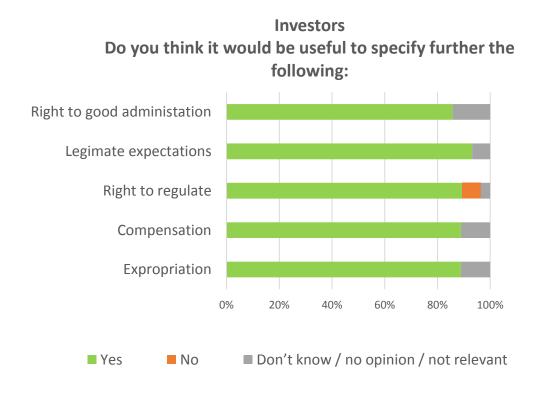
Public consultation results

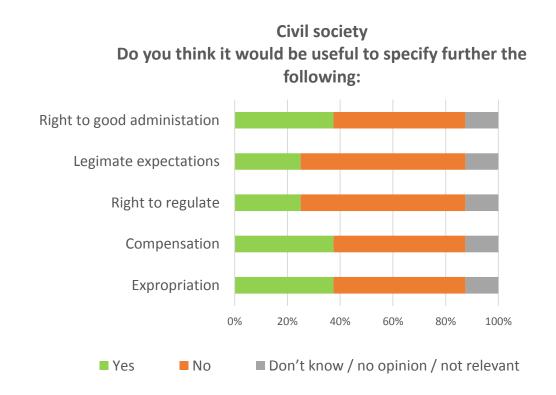
- Investors
 - Lack of an effective enforcement mechanism
 - Codify in one, single legal source
 - Case law does not clarify all questions
 rules not sufficiently specified
 - Bias against non-domestic investors
 - Large differences between MS
 - Comparison with the situation in third countries outside 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







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

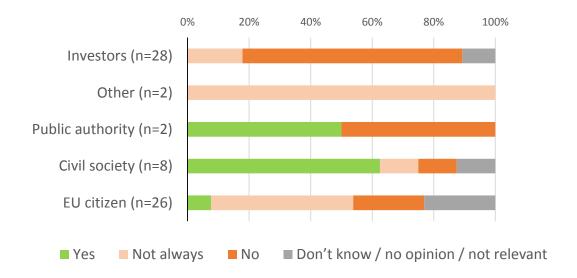


Investment protection rights – Civil society organisations

- 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



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





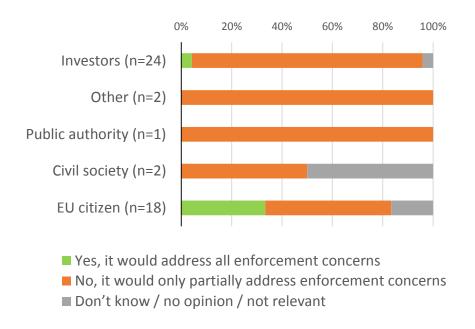
- Issues reported by investors:
 - Lack of impartiality towards non-domestic investors
 - Serious concerns related to the respect of rule of law in some MS
 - Lack of homogeneity of the quality of enforcement across MS
 - Judicial proceedings that are excessively slow in comparison with business cycles
 - 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

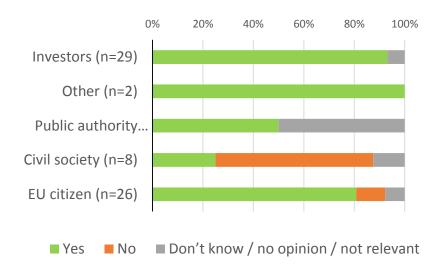


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- If not, do you think that better enforcement by the authorities and courts of the Member State where the investment is located would help to completely address the issue?
- Or do you think that improving enforcement mechanisms at EU level would also be needed?







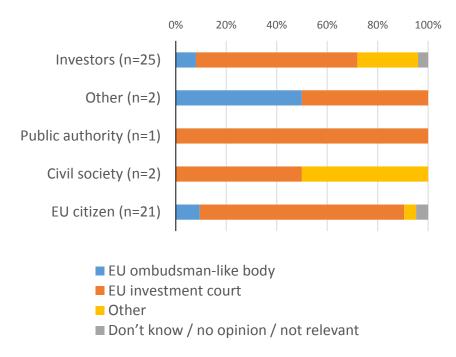
Public consultation results - Improving enforcement at EU level

- 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 crossborder investment disputes?





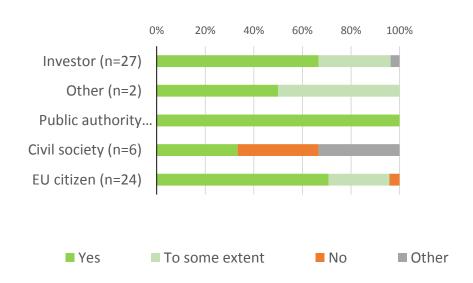
Public consultation results – Enforcement options at EU level

- 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 deescalate disputes at an early stage
- Investor support for Ombudsman-like body, either as standalone or in combination with a specialised court

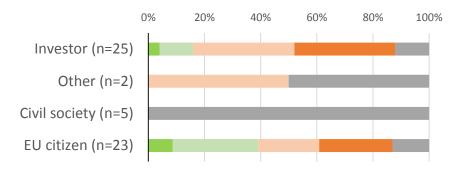


Public consultation results - Investment facilitation

 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?



- 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





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

