European Federation for Investment Law and Arbitration

**Public consultation on the prevention and amicable resolution of disputes between investors and public authorities within the single market**

**Website: https://ec.europa.eu/eusurvey/runner/investment-protection-mediation-2017?surveylanguage=en**

The European Federation for Investment Law and Arbitration (EFILA) is an independent Brussels-based think tank that serves as a platform for a merit-based discussion on all aspects of European and international investment law, including arbitration.

EFILA is a non-profit international association under Belgian law (AISBL). More information about EFILA and its activities and projects: www.efila.org

Executive Summary

1. EFILA considers that mediation may be an effective tool to prevent certain disputes with public authorities to develop from full-blown legal disputes such as investor-state international arbitration disputes or legal disputes before domestic courts. However, EFILA considers that it is important to clarify the notion of mediation, as it is not mechanism to prevent dispute resolution; instead, mediation is itself a mechanism to resolve disputes, which potentially could prevent parties to go to arbitration with public authorities. EFILA generally welcomes the possibility of study further how mediation could be used for intra-EU investment disputes. Bearing in mind that mediation is already part of the procedural structure of international investment disputes, it could be possible that mediation can be a more successful tool at supporting dispute resolution in international investments.

2. Moreover, the greatest disadvantage of mediation is that is a legally non-binding and non-enforceable solution, which makes it impossible for either side to force the other side to stick to the agreed solution. Again, states and its authorities may feel tempted to ignore or disregard the agreed solution knowing full well that there are no tools to force the other party to act in accordance with the agreed solution. These disadvantages make mediation a tool that is only suitable in very limited cases for the solution of disputes, certainly not when a lot of money is at stake or where the relations between both sides are soured.

3. EFILA submits that it should be emphasized that ISDS and BITs provide exactly for a framework for the resolution of disputes between investors and public authorities. If the aim is to replace BITs and ISDS with mediation, it would be necessary to create a similar framework for the resolution of disputes within the EU. This means the creation of a fully independent and impartial body (court/tribunal) that is specialized in resolving disputes between investors and states. This body must be easily accessible for all investors, including SMEs and natural persons, cheap and deliver legally binding decisions that are fully enforceable within the EU.

4. Also, specific procedures, such as emergency procedure and sole arbitrator/judge for small claims and for mass claims should be included. This system should be established at the EU level and mirrored by a similar system in each Member State. Obviously, the Rule of Law deficiencies in many Member States would require additional elements in order to ensure full independence, impartiality and functionality of such a body. Moreover, it would be necessary to ensure that the investor/claimant will always have the freedom to choose at which level he wants to bring the case.

5. EFILA submits that there are fundamental aspects that need to be considered when designing national points of contact. First, these points of contact need to have very clear the scope of their competences as well as the type of economic sectors where mediation could be engaged as a dispute resolution method. Secondly, as explained earlier, issues such as the discretionary competences to negotiate a financial settlement need to be clearly specified for the government officials representing the interest of the disputing MS. Third, there are economic sectors that are still part of the exclusive competence of each MS, as well as there are many economic sectors which are now part of the shared competences between the MS and the EU. Therefore, it might be impractical the level of interference from the EU especially if the disputed issue concerns an economic sector which is exclusively competences of a MS. Lastly, there are standards of protection that are unclear at a EU level, where the input of the EU is it not necessary as developed as in national and international practices. This is the case of fair and equitable treatment, property rights, and standards of compensation in case of expropriation.

**Introduction**

The creation of a more predictable, stable and clear regulatory environment to incentivise investments is one of the key objectives of the third pillar of the Commission's Investment Plan for Europe. The Capital Markets Union (CMU) action plan is part of this third strand. The Mid-term review of the CMU action plan further emphasises that a stable investment environment is crucial for encouraging more investment within the EU.

As indicated in priority action 8 of the Mid-term review communication, the Commission will launch an impact assessment to explore whether an adequate framework for the amicable resolution of investment disputes should be set up. In parallel, the Commission is working on an Interpretative Communication to provide guidance on existing EU rules for the treatment of cross-border EU investments.

The focus of this public consultation is to inform the Commission's impact assessment work on the need to develop amicable resolution and prevention methods for disputes between investors and public authorities. In addition, some questions will contribute to the work on the Interpretative Communication on existing EU rules for the treatment of cross-border EU investments.

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**Please note**: In order to ensure a fair and transparent consultation process **only responses received through our online questionnaire will be taken into account** and included in the report summarising the responses. Should you have a problem completing this questionnaire or if you require particular assistance, please contact fisma-investment-protection-mediation@ec.europa.eu.

**1. Information about you**

*Are you replying as: an organisation
*Name of your organisation: European Federation for Investment Law and Arbitration (EFILA)
Contact email address:
**The information you provide here is for administrative purposes only and will not be published**

g.alvarez@efila.com

*Is your organisation included in the Transparency Register?
Yes
*If so, please indicate your Register ID number: 877607714842-74

*Type of organisation:
Think tank

*Where are you based and/or where do you carry out your activity?
Brussels, Belgium.

*Field of activity or sector (*if applicable*):
*at least 1 choice(s)*
Legal and Consultancy
*Contributions received are intended for publication on the Commission's website. Do you agree to your contribution being published?

Yes, EFILA agrees that its response is published under the name of European Federation for Investment Law and Arbitration (EFILA).

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**2. Your opinion**

## 2.1 Need for an EU framework on amicable dispute prevention and resolution

Question . Do you have any personal experience with using amicable dispute resolution methods such as mediation to prevent or resolve the following disputes with public authorities?

| | Yes | No | Don't know / no opinion / not relevant |
|---|---|---|---|
| Disputes with public authorities based on a contract and concerning an investment | | | ✓ |
| Disputes with public authorities based on an international treaty and concerning an investment | | | ✓ |
| Other disputes with public authorities concerning an investment | | | ✓ |

Do you believe that mediation is/can be effective to prevent disputes with public authorities?

From 0 (not effective) to 5 (very effective)

0 (not effective)
1
2
3 x
4
5 (very effective)

Question. Please explain why you selected this answer:

EFILA considers that mediation may be an effective tool to prevent certain disputes with public authorities to develop from full-blown legal disputes such as investor-state international arbitration disputes or legal disputes before domestic courts. However, mediation requires good faith, open communication channels by both side, but states and their authorities often are not able or willing to communicate in good faith with investors after the relation has soured. In order to prevent disputes, mediation would have to be applied at a very early stage, but often the dispute has already escalated.

EFILA considers that it is important to clarify the notion of mediation, as it is not mechanism to prevent dispute resolution; instead, mediation is itself a mechanism to resolve disputes, which potentially could prevent parties to go to arbitration with public authorities. Most of the modern forms of investment agreements already include certain methods for amicable settlement, including mediation and conciliation, sometimes referred as 'cooling off' periods. Nonetheless, under investment arbitration, disputing parties have frequently been unsuccessful at reaching an agreement during these types of procedural mechanisms. Among the reasons as to why mediation is perhaps failing at preventing investment disputes to be resolved is because two aspects. First, at the outset of the dispute, often, governments are unresponsive. Secondly, some national laws are unclear about the extent in which government officials have a discretionary power to reach financial settlements with foreign companies. An additional aspect is the finality of the mediation settlement. While in international arbitration, it is clear the advantages and disadvantages of the finality of an award (under ICSID and under New York Convention), the nature of a mediation agreement differs from an arbitration award. Therefore, given the obstacles explained above, EFILA generally welcomes the possibility of study further how mediation could be used for intra-EU investment disputes. Bearing in mind that mediation is already part of the procedural structure of international investment disputes, it could be possible that mediation can be a more successful tool at supporting dispute resolution in international investments.

In the EU, there is already a significant activity of prevention of disputes with public authorities, albeit this is taking place in a less structured manner. For example, energy regulators among different MS meet regularly with their energy industry to discuss issues related to changes of licences, state-aid, possible changes in their regulatory framework, etc. However, among the public authorities, there is no uniformity on the practices to prevent dispute as each MS give different powers and competences to their national authorities. For example, the level of competences and discretion of the UK energy regulator might differ from the Italian or the Spanish energy regulator, and therefore it is essential to ensure that the national practices for amicable settlement are taken into account when considering mediation as EU tool to administrate dispute resolution.

Question. Do you believe that mediation is/can be effective to solve disputes with public authorities? From 0 (not effective) to 5 (very effective)

0 (not effective)
1
2
3 X
4
5 (very effective)
Don't know / no opinion / not relevant
Question. Please explain why you selected this answer to question:

Mediation is a flexible and usually not expensive and faster tool. However, meditation requires that both sides of a dispute are in good faith prepared to find an amicable solution but often the state and its authorities are not open anymore to a different solution after they have adopted a certain position or measure. Moreover, the greatest disadvantage of mediation is that is a legally non-binding and non-enforceable solution, which makes it impossible for either side to force the other side to stick to the agreed solution. Again, states and its authorities may feel tempted to ignore or disregard the agreed solution knowing full well that there are no tools to force the other party to act in accordance with the agreed solution. These disadvantages make mediation a tool that is only suitable in very limited cases for the solution of disputes, certainly not when a lot of money is at stake or where the relations between both sides are soured.

Question. If you have any further comment on the use of mediation in preventing/resolving disputes between investors and public authorities, please include it here:

Mediation can only evolve into an effective tool for dispute resolution if it is backed up with instruments that enable the parties involved to enforce the agreed solution and to force their other side to implement the agreed solution in good faith. Without such instruments, which are currently lacking, mediation does not prevent a real option for investors to resolve their disputes with public authorities.

Question. Do you think that the options for mediation between public authorities and investors available in your Member State are:

NOTE: This question does not relate to cases in which there is a prior contract between an investor and a public authority that foresees an amicable dispute resolution method for disputes that arise under this contract or when the dispute can be qualified as a commercial dispute

| | Fully sufficient | A good basis but could be further improved | Not sufficient | Don't know / no opinion / not relevant |
|---|---|---|---|---|

| | | | | |
|---|---|---|---|---|
| As regards scope of disputes covered | | | x | |
| As regards clarity of conditions for the recourse to mediation | | | x | |
| As regards clarity of the mediation procedure to be followed | | | x | |
| As regards the freedom of choice by the parties of the mediator | | | x | |
| As regards the possibility to receive compensation for losses according to a mediated settlement agreement | | | x | |
| As regards the time needed to conclude the procedure and receive compensation | | | x | |
| As regards transparency to third parties/public | | | x | |

Question. On average, if you have experience investing and have been faced with a dispute in another Member State, do you think that the options for mediation between public authorities and investors available in other Member States are:

Please specify the Member State(s) where you faced a dispute:

| | | | |
|---|---|---|---|
| Austria | Belgium | Bulgaria | Croatia |
| Cyprus | Czech Republic X | Denmark | Estonia |
| Finland | France | Germany | Greece |
| Hungary | Ireland | Italy | Latvia |
| Lithuania | Luxembourg | Malta | Netherlands |
| Poland | Portugal | Romania | Slovak Republic |
| Slovenia | Spain | Sweden | United Kingdom |

| | Fully sufficient | A good basis but could be further improved | Not sufficient | Don't know / no opinion / not relevant | It depends on the Member State |
|---|---|---|---|---|---|
| As regards scope of disputes covered | | | X | | |
| As regards clarity of conditions for the recourse to mediation | | | X | | |
| As regards clarity of the mediation procedure to be followed | | | X | | |
| As regards the freedom of choice by the parties of the mediator | | | X | | |
| As regards the possibility to receive compensation for losses according to a mediated settlement agreement | | | X | | |
| As regards the time needed to conclude the procedure and receive compensation | | | X | | |
| As regards transparency to third parties/public | | | X | | |

Question. Do you believe that minimum rules for a framework on prevention and amicable resolution of disputes between investors and public authorities should be designed at EU or at national level?

EU level X
National level X
Don't know / no opinion / not relevant

Question. Please explain why you selected this answer:

EFILA submits that it should be emphasized that ISDS and BITs provide exactly for a framework for the resolution of disputes between investors and public authorities. If the aim is to replace BITs and ISDS with mediation, it would be necessary to create a similar framework for the resolution of disputes within the EU. This means the creation of a fully independent and impartial body (court/tribunal) that is specialized in resolving disputes between investors and states. This body must be easily accessible for all investors, including SMEs and natural persons, cheap and deliver legally binding decisions that are fully enforceable within the EU.

Also, specific procedures, such as emergency procedure and sole arbitrator/judge for small claims and for mass claims should be included. This system should be established at the EU level and mirrored by a similar system in each Member State. Obviously, the Rule of Law deficiencies in many Member States would require additional elements in order to ensure full independence, impartiality and functionality of such a body. Moreover, it would be necessary to ensure that the investor/claimant will always have the freedom to choose at which level he wants to bring the case.

EFILA submits that the creation process on rules on prevention and amicable resolution of disputes between investors and public authorities could be benefited from the input of the EU. However, it is essential that mediation rules are drafted at a national level, there are general and particular reasons. At a general level, each MS have different legal traditions and different approaches to dispute resolution and it is essential that mediation rules are created in accordance with the legal principles and procedures of each legal system (i.e. rights and remedies). A particular example of this is that arbitration laws have been created at a national level by each MS and this have been successful, although the procedural rules vary among different MS (i.e. French Civil Procedure, English Arbitration Act).

### 2.2 Options for a framework on prevention and amicable resolution of disputes between investors and public authorities

Without prejudice for the outcome of the Impact Assessment, the following options to provide effective tools for the (i) prevention and (ii) amicable resolution of disputes between EU investors and Member States with the help of an independent third party could be envisaged at this stage:

*Option 1: Establishing an EU network of investment contact points within national administrations*

Such contact points could be used by investors before any formal dispute with national public authorities arises, in order to prevent the escalation of any issues and to inform the investors about their rights and existing remedies.

*Option 2: Creating an EU framework for mediation between investors and public authorities*

This Option aims to create an EU framework for mediation, which could be of a legislative or non-legislative nature. It could provide a basic legal framework that would allow mediation between investors and public authorities in all Member States. The Option would provide for rules for the appointment, qualifications, and independence, among other requirements, for the mediator; the scope of cases that can be subject to mediation; the enforcement of the mediated settlement; the rights of third parties; and the relationship with judicial proceedings.

*Option 3: In addition to a common framework regulating the procedure of mediation, creating permanent agencies in each Member State*

Option 3 would go further and envisage, in addition to the framework for mediation (Option 2), the creation of permanent agencies at the national level that would administer mediation services (for example, by establishing a registration system of mediators) or act as mediators.

*Option 4: In addition to a common framework, creating one EU wide Mediation agency*

Option 4 would envisage, in addition to the framework for mediation (Option 2), the creation of one EU-wide Mediation agency that would administer mediation services (for example, by establishing a registration system of mediators) or act as a mediator.

Question. Should an EU network of investment contact points within national administrations be established?

Yes X
No
Don't know / no opinion / not relevant

Question. Please explain how you would see the role of such contact points and of the EU network of these contact points:

The creation of such a network of investment contact points makes only sense if it is created in addition to the existing ISDS and BITs rather than as a replacement. The problem of all the above-mentioned options is that if investors/claimants are forced to use them before being allowed to start legal proceedings, this will further delay the solution of the dispute and increase the costs for the investors/claimants. In addition, it would enable states to act in bad faith by delaying the whole process.

EFILA considers that options 2, 3 and 4 should be considered together. As mentioned before, the full independence, impartially and functionality of such a system as well as the enforceability of any mediated solution is of utmost importance as well as easy accessibility and low costs.

EFILA submits that there are fundamental aspects that need to be considered when designing national points of contact. First, these points of contact need to have very clear the scope of their competences as well as the type of economic sectors where mediation could be engaged as a dispute resolution method. Secondly, as explained earlier, issues such as the discretionary competences to negotiate a financial settlement need to be clearly specified for the government officials representing the interest of the disputing MS. Third, there are economic sectors that are still part of the exclusive competence of each MS, as well as there are many economic sectors which are now part of the shared competences between the MS and the EU. Therefore, it might be impractical the level of interference from the EU especially if the disputed issue concerns an economic sector which is exclusively competences of a MS. Lastly, there are standards of protection that are unclear at a EU level, where the input of the EU is it not necessary as developed as in national and international practices. This is the case of fair and equitable treatment, property rights, and standards of compensation in case of expropriation.

Question. Which of the characteristics below would be the most important for consideration in the design of an EU mediation framework?

From 0 (not important) to 5 (very important)

| | 0 (not important) | 1 | 2 | 3 | 4 | 5 (very important) | Don't know / no opinion / not relevant |
|---|---|---|---|---|---|---|---|
| Ability of the parties to freely choose a mediator amongst qualified/registered mediators | | | | | | x | |
| Ability to choose a mediator from other Member States to help the parties communicate | | | | | | x | |
| Ability to choose a mediator experienced in the sector concerned by the dispute | | | | | | x | |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Ensuring mediators are properly qualified | | | | | | x | |
| High ethics/independence standards of the mediator | | | | | | x | |
| Existence of a specific agency providing mediation services at the national level | | x | | | | | |
| Existence of a specific agency providing mediation services at the EU level | | | | | x | | |
| Existence of a specific agency at national level that can administer mediation services | | | | | x | | |
| Existence of a specific agency at EU level that can administer mediation services | | | | | x | | |

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Question. Which of the characteristics below would be the most important for consideration in the design of rules for mediation? From 0 (not important) to 5 (very important)

| | 0(not important) | 1 | 2 | 3 | 4 | 5(very important) | Don't know / no opinion / not relevant |
|---|---|---|---|---|---|---|---|
| Clear rules on the types of disputes that can be covered by mediation | | | | | | x | |
| Clear rules stating conditions under which investors and public authorities are able to engage in a mediation process | | | | | | x | |
| Clear rules stating conditions under which public authorities are able to commit to a settlement agreement, including when compensation is agreed upon | | | | | | x | |
| Clear rules on confidentiality of the mediation procedure | | | | | | x | |
| Clear rules on how to preserve the public interest | | | | x | | | |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Clear rules on how long the mediation process should last | | | | | | x | |
| Rules on minimum public transparency requirements about initiation of a mediation procedure and its results | | | | x | | | |
| Involvement of concerned third parties in the mediation process | | | | x | | | |
| Rules on enforcement of mediated settlement agreements | | | | | | x | |
| Rules on relationship with court proceedings (such as impacts of starting a mediation on time limits to start litigation) | | | | | | x | |
| Judicial review of mediated settlements | | | | | | x | |

Question. Can you identify other desirable characteristics/options that you believe should be considered in the design of a possible EU mediation framework/rules for mediation?

EFILA submits that mediation is only desirable as a tool in addition to ISDS and not as a replacement. There must also be clear rules regarding the ability to challenge and remove an arbitrator for alleged bias, lack of independence and lack of qualifications. The timelines must be as short as possible and clearly defined as well as any associated costs. Also, investors/claimants (in particular when originating from different Member States) should have the right to request the consolidation of similar disputes involving the same Member State and the same measure.

EFILA considers that the characteristics mentioned above should be, in principle, the essential aspects that should be covered when discussing the potential creation of a dispute settlement mechanisms for investments which take place in the EU.

Question. For which types of disputes between investors and public authorities should mediation be available as a method of resolution/prevention of disputes?

EFILA submits that mediation seems most useful in small claims disputes and mass claims disputes. A good example are the mass claims against various car producers in the Diesel scandal or with regard to various financial products such as insurance and mortgages or other products where financial institutions have willingly misinformed their customers. But also, some of the renewable energy disputes involving SMEs and individuals as claimants could be a good example.

EFILA submits that mediation between investors and public authorities should be available for all types of economic sectors. This is the case in most of the modern international investment agreements, where cooling off periods (and the entire treaty itself) can be used by all typed of foreign investors. EFILA also bears in mind that there might situation where specific aspects of an economic sector might or can be excluded from mediation. Additionally, all types of dispute resolution should be available for the economic sectors where the EU has exclusive competence as well as for the economic sectors where the EU shares competences with their MS and also for those competences where MS retain competence. In this respect new rules, for any type of dispute resolution, need to be clear in relation to issues of attribution and responsibility in relation to the disputed measures.

Question. At what stage of proceedings should mediation procedures be available?

| | Yes | No | Not relevant |
|---|---|---|---|
| Before a decision/act is taken by the public authorities | x | | |
| At the stage of the internal review of the decision/act in case of appeal in front of the competent public authorities | x | | |
| Before undertaking litigation in court concerning the litigious decision/act taken by the public authorities | x | | |

| | | | |
|---|---|---|---|
| Once litigation has started and before the judgement | | | x |
| Once the litigious decision/act by the public authorities has been withdrawn (e.g. following a new decision/act or a court decision). In this case the objective of the mediation would to define the amount of compensation for losses, if any. | | | x |
| Other | | | |

**Potential impacts**

Do you consider that access to an EU network of investment contact points to prevent disputes with public authorities could? From 0 (not important) to 5 (very important)

| | 0(not important) | 1 | 2 | 3 | 4 | 5(very important) | Don't know / no opinion / not relevant |
|---|---|---|---|---|---|---|---|
| Allow for better understanding of complex legal and economic circumstances of the case before the decision/act is taken or at the stage of internal administrative review. | | | | x | | | |
| Improve the investment climate | | | | x | | | |
| Be particularly beneficial for SMEs | | | | | x | | |
| Reduce the likelihood of litigation in front of the courts | | | | x | | | |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Reduce expenditures by public authorities as fewer disputes might reach the litigation phase | | | | x | | | |
| Help preserve a long-term relationship between investors and Member States | | | | x | | | |
| Other reasons | | | | | | | |

Question. Do you consider that access to an EU mediation framework to solve/prevent disputes between investors and public authorities could?

From 0 (not important) to 5 (very important)

| | 0(not important) | 1 | 2 | 3 | 4 | 5(very important) | Not relevant |
|---|---|---|---|---|---|---|---|
| Reduce costs for investors linked to resolution of disputes | | | | X | | | |
| Reduce costs for public authorities linked to resolution of disputes | | | | X | | | |
| Allow for more flexibility when dealing with a dispute | | | | X | | | |
| Allow for better understanding of complex legal and economic circumstances of the case | | | | X | | | |
| Improve investment climate | | | | X | | | |
| Be particularly important for SMEs | | | | | X | | |
| Reduce the likelihood of litigation in front of the courts | | | | X | | | |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Ensure a consistent approach towards mediation between investors and public authorities across the EU | | | | X | | | |
| Reduce expenditures by public authorities as fewer disputes might reach litigation phase | | | | X | | | |
| Help preserve a long-term relationship between investors and Member States | | | | X | | | |
| Other reasons | | | | | | | |

Question. Under which option do you think the benefits mentioned above would be achieved in the most efficient manner?

From 0 (no impact) to 5 (strong impact)

| | 0(no impact) | 1 | 2 | 3 | 4 | 5(strong impact) | Don't know / no opinion / not relevant |
|---|---|---|---|---|---|---|---|
| EU mediation framework enabling mediation between investors and the relevant national authorities | | | | | x | | |
| Agencies at national level which could administer the mediation services or act as mediators | | | | x | | | |
| EU-wide mediation agency which could administer the mediation services or act as a mediators | | | | | x | | |

Question. For an action undertaken following one of the options above, no impacts on fundamental rights have been identified.

Do you consider that there could be an impact on fundamental rights?

Yes x
No
Don't know / no opinion / not relevant

Question. If you do consider that there could be an impact on fundamental rights, please specify which one, identifying it in relation to each specific option:

EFILA submits that the use of any mediation process should not affect the existing rights of investors/claimants to access international arbitration and/or domestic courts. Any use of mediation should be made voluntary and should not be imposed on the investors/claimants. Non-discrimination and equal access for all investors in all Member States must be guaranteed.

EFILA submits that there are procedures and substantive aspects that need to be taken into account when discussing the potential creation of mediation rules to resolve disputes arising from investments within the EU. From a procedural perspective, it is fundamental that any dispute resolution mechanism gives an equal opportunity to both disputing parties to present their case, parties should also have the opportunity to freely chose the mediator which needs to be independent and impartial. Most importantly, the EU is cannot be simultaneously in charge of the meditation agency and a disputing party. It is essential that any alternative method for dispute resolution respect the procedural principles of due process, independence and impartiality.

As discussed above, EFILA also considers that there are rights under investment law which do not exist under EU Law, this represent a major risk for investors in the EU as they can be potentially deprived of legal certainty if the EU dismantles and replace international arbitration with a centralised type of mediation process. EFILA considers that it is essential to offer to the investors clarity in regard to certain standards of protection such as fair and equitable treatment, protection to the right to property and clear compensation standards in case of expropriation. EFILA believes that the replacement of international arbitration, as a neutral forum to resolve investment disputes, by a dispute resolution mechanism controlled by the EU can potentially run the risk of not taking into account the important substantive rights and protections that are currently available under the majority of modern investment agreements. In the same manner, it would be essential that the mediator has fully understanding of principles of public international law as well as investment law and substantive standards of investment protection.

Question. For an action undertaken following one of the options above, no clear environmental impacts have been identified.
Do you consider that there could be any environmental impacts?
Yes
No x
Don't know / no opinion / not relevant

Do you consider that there could be any social impacts?
Yes
No x
I don't know

### 2.4. Clarification of existing rights of cross-border EU investors in EU law

The Interpretative Communication planned by the Commission will bring together and explain the existing EU standards for the treatment of cross-border EU investments. These standards include the rules on free movement of capital, freedom of establishment, and the principle of non-discrimination, as well as on the fundamental rights of investors and the general principles of EU law.

The Communication will help prevent Member States from adopting measures which would infringe EU law relevant for investments. At the same time, the Communication will help investors to invoke their rights before administrations and courts and will enable legal practitioners to consistently apply EU rules.

The purpose of this section is to identify the areas on which the communication should focus, either because they are where investors face biggest problems or because the existing rules are complex.

Question. What are the most important problems facing intra-EU investors that should be addressed in a guidance document? (e.g. difficulties in accessing the market, treatment after establishment, discrimination, expropriation, administrative wrongdoings, sudden and unexpected changes in the legal environment).

EFILA submits that the most important problem that intra-EU investors are facing are issues related to the lack of legal certainty; regulatory certainty and predictability, significant deficiencies in the administration and courts regarding the Rule of Law principles (as is also annually identified by the European Commission in its Judicial Monitor); lack of Fair and Equitable Treatment, indirect expropriation measures, often with retro-active effect, corruption and political interference in the administration and the courts. In short, the European Commission should acknowledge the existing differences in the various Member States as to the Rule of Law level and address them effectively. The internal market and fundamental rights are still far from being guaranteed effectively in many Member States.

More precisely, EFILA considers that there are policy and legal problems faced not only by intra-EU investors, but also by the MS as hosting parties of the investment and posteriorly as disputing parties when disputes arise. First, it seems that the expansive regulatory scope of the EU into new commercial policies such as foreign direct investment, has created the impression of a conflict between investment law and EU Law. EFILA submits that there is no legal conflict between investment law and EU Law, but rather a lack understanding of intra-EU investments, this lack of understanding arises from the policy expansion of the EU.

EFILA considers that in terms of dispute resolution mechanisms, all modern intra-EU investment arbitration agreements already provide for cooling off periods, either in the form of mediation or conciliation. If the disputing parties could not reach an agreement within this cooling off period, the investor is able to start arbitration in accordance to the dispute resolution provision in the investment agreement. In this respect, EFILA submits that there is nothing under EU Law which explicitly prohibits an investor from a MS to sue another MS, yet this has been a major jurisdictional hurdle and an obstacle for most of the intra-EU disputes, as different arguments have been put forward. This is an important problem of intra-EU investments that should be addressed not only by the EU but in conjunction with the knowledge and experience from public international law and international investment experts.

Question. Which rules and principles protecting intra-EU investors create the highest degree of complexity and therefore require clarification as a priority? Does the complexity concern rules on free movement of capital and freedom of establishment, fundamental rights of investors (the right to property and the freedom to conduct business), or the general principles of Union law (the principle of non-discrimination, the principle of legal certainty, the protection of legitimate expectations)?

As mentioned above, EFILA submits that there are rules and principles currently protecting intra-EU investors which are fully understood at EU level. Therefore, fundamental rights of investors are not clarified in EU law, neither the proper protection of legitimate expectations, legal certainty and predictability. Similarly, minimum requirements for the effective functioning of administration and courts should be explicitly spelled out.