Public consultation on an intra-EU investment protection and facilitation initiative

EFILA's Answers to the Public Consultation Document

The European Federation for Investment Law and Arbitration (EFILA) has been established in Brussels as an independent, non-profit, think-tank to promote the knowledge of all aspects of EU law and international investment law, including arbitration. EFILA endeavours to facilitate a meaningful debate and constructive exchange of views on relevant and timely issues regarding investment law and arbitration.

Since EFILA was established in June 2014, it has developed into a highly regarded think-tank that is specifically focusing on the EU's investment law and arbitration policy and its impact globally. EFILA is unique in that it brings together arbitration practitioners, academics and policy makers from many different states, who have extensive first-hand experience and deep understanding of the relevant investment law and arbitration issues.

This and all previous submissions and publications of EFILA are freely available at: https://efila.org/publications/

The opinions expressed in this paper are those of EFILA and no other organization, institution, or law firm. For more information or any questions and comments, please contact the Secretary General of EFILA, Prof. Dr. Nikos Lavranos, n.lavranos@efila.org

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I. General questions

The general questions set out in this section aim at gathering information on EU citizens and companies' approach to and experience with cross-border investments.

Question 1: Have you ever invested or been involved in an investment process in another EU Member State?

- Yes
- **No**
- Not applicable

Question 1.1 If not, could you explain why?

Please select as many answers as you like

- I am/the company is only interested in my/its national market and do/does not want to invest cross-border
- I/the company want/s to invest cross-border, but it is too complex
- I/the company want/s to invest cross-border, but it is too costly
- I do not/the company doesn't know the rules and feel/s uncertain about the protection of my/its investment in another EU Member State.
- I am/the company is familiar with the rules, but do/does not trust the protection of my/its investment in another Member State
- **Other**

Please specify for what reason you have never invested or been involved in an investment process in another EU Member State:
5000 character(s) maximum

Established in June 2014, the European Federation for Investment Law and Arbitration (EFILA) is a prominent non-profit, independent, think-tank focusing on the EU's investment law and arbitration policy.

Founded by leaders in European investment law, EFILA aims to promote the use of arbitration as a dispute resolution mechanism in investor-State disputes. It also serves as a platform for meaningful discussion on timely issues vital to the development of the European market. As such, its purpose is to contribute to a more favourable investment climate in Europe and beyond, through dialogue with European policy makers, stakeholders, and society at large.

EFILA's events—notably its flagship Annual Conference and Annual Lecture—connect arbitration practitioners, academics, and policy makers. This commitment enriched the investment arbitration

community and EFILA's publications are widely read and cited by policy makers and academics alike.[1] *EFILA has also been granted Observer status for the UNCITRAL WG III on ISDS reforms.*

The Executive Board and Advisory Board of EFILA are composed of leading investment law and arbitration specialists, representatives of investors, and academics from various European states. All EFILA Executive Board and Advisory Board members strictly serve in their personal capacity. They are completely independent from the organisations in which they are employed or hold mandates from.

As an independent, non-profit, think-tank, EFILA has not made any investments in another EU Member States and consequently has never been involved in an investment dispute with an EU Member State.

Question 2: 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?

- Please choose one of the following answers:
- Investment protection framework has no impact
- Investment protection framework has a small impact
- Investment protection framework has medium impact
- **Investment protection has a significant impact**
- Investment protection is a factor that can have a major impact on cross-border investments decisions and can result in cancellation of planned or withdrawal of existing investments

Question 2.1 (Follow-up) (if the respondent considers there is a negative impact): which of the following you consider an obstacle to your cross-border investments? (More than one reply possible)

- Costs and burden of finding information on the legal framework regulating investments
- Costs and burden of finding market opportunities or possible business partners
- Uncertainties regarding the setting-up or exercise of activities linked to my cross-border investment (e.g. due to delays in administrative procedures or withdrawal of licences, expropriation, uncertainties about the protection of legitimate expectations)
- Different treatment of investments coming from other Member States compared to domestic investments when disputes arise
- Other (please specify)

Please specify what else you consider an obstacle to your cross-border investments:
5000 character(s) maximum

The fact that most investor-State arbitration proceedings are brought by European investors (that is, investors established within the EU) against EU Member States lends credence to the allegation that EU Member States engage in discriminatory treatment of investments from other EU Member States compared to domestic ones.

[1] *See* https://efila.org/publications/

Indeed, in a significant number of cases, arbitral tribunals have found that EU Member States have breached their obligations under their intra-EU BITs or the ECT and have awarded significant amounts of compensation to European investors.

This discriminatory treatment is not restricted to certain sector or industries of certain EU Member States but occurs across the board and in virtually all EU Member States.

In addition to the abovementioned obstacles, throughout EFILA's publications, events, and research, the following investor concerns, which influence cross-border investments, have been identified:

(i) Tighter FDI screenings

In the context of the Covid 19 crisis many EU Member States have tightened their screening of Foreign Direct Investments (FDI) in an uncoordinated manner and applying different conditions and thresholds. This complex situation reduces regulatory stability and is leading to additional administrative burdens, increasing uncertainty as to the legal framework applicable, and thus unnecessary additional costs for cross-border investments.

(ii) Increasing insecurity regarding State aid

The approach of the EU Member States and the European Commission towards State aid in the context of investments, for example in renewable energy, is becoming increasingly unpredictable. An example of such unpredictability arises in the recognition and enforcement of intra-EU BIT/ECT awards, which are qualified as "illegal State aid" by the European Commission as the Micula case illustrates. This relates to the general point concerning the increasing insecurity regarding the recognition and enforcement of investment treaty arbitral awards within the EU generally (see also below).

(iii) State Liability

Due to the diversity of national procedural laws, the European Commission acknowledges that cross-border investors might face difficulties when claiming State liability, despite the fact that the CJEU recognises extra-contractual State liability for violations of EU law.

II. Rules protecting investments within the European Union

This section contains questions regarding **specific rights granted to cross-border investors within the EU**. The aim is to understand the extent to which these rules are known and effectively enjoyed by investors. The reference to some specific rights is used as example but the section encourages respondents to provide additional information and/or refer to other rights in relation to which they have experienced or may want to report problematic issues.

According to prior information available to the Commission, some stakeholders consider that EU rules providing for investment protection rights are **scattered** in different legal instruments (sector-based legislation, case law etc.), are difficult to identify and therefore to enforce. As a result, in their view it

is possible that investors, legal practitioners and public authorities do not always have a full overview of rights available to investors and might have difficulties to correctly and consistently apply them. Furthermore, some stakeholders suggest that there would be **shortcomings** in the protection of investments and that relevant EU rules are too general, resulting in large differences in implementation and application at national level.

For example, specific protection is provided by EU law to the right to property from direct and indirect **expropriation**. Pursuant to the Charter of fundamental rights of the European Union, expropriating measures can be lawful but have to comply with certain conditions (being justified and proportionate). In case their investments are expropriated by the Member State, investors are entitled to compensation even if the expropriation is lawful. However expropriation may take different forms and when investing abroad it may be less clear which rights and safeguards a person can rely on.

Additional protection is provided by the principles of **legal certainty** and legitimate expectations. According to the principle of legal certainty every measure of the administration having legal effects must be sufficiently clear and precise and must be drawn to the attention of the person concerned. This implies inter alia that, unless duly justified and proportionate, a measure cannot produce effects with regard to situations occurred prior to the date on which it entered into force or, for individual measures, to the date of its notification or publication (**non-retroactivity**). Directly applicable EU rules apply from their entry into force, with the result that they apply to the future effects of situations arising prior to that date (Judgment of 1 February 2019 *Milivojević*, C- 630/17, EU:C:2019:123, paragraph 42).

Economic operators cannot, in general, claim a **legitimate expectation** that an existing situation, which may be altered by the national authorities in the exercise of their discretionary power, will be maintained. However, an economic operator on whose part national authorities have, through precise, unconditional and consistent acts, created reasonable expectations about the fact that the current situation will not change (for instance through a favourable decision, an individual representation or an assurance regarding the stability of a specific situation) may – under certain conditions - rely on the principle of the protection of legitimate expectations.

In general, investment protection rights granted to citizens and companies are not absolute and need to leave Member States sufficient policy space to protect public interests (**right to regulate**) (although under certain conditions), and to take the measures necessary and appropriate to achieve overarching policy goals, such as public security or public health.

Public policy may however try to minimise the risks that arise from regulatory uncertainty or regulatory changes, including by providing transparency and policy stability. This may be done by Member States by taking into account the situation of affected investments when taking measures that negatively affect a cross-border investment.

As a general principle of EU law (Judgment of 8 May 2019 PI, C-230/18, EU:C:2019:383) administrative actions should be carried out according to the principle of **good administration**. This means inter alia that competent national institutions should conduct a diligent and impartial examination of each situation and take into account all the relevant features of the case and interests involved. The principle plays an important role for ensuring a good investment environment, because national administrations are usually the first and most common interlocutor that investors face in a Member State when starting an investment or in the course of running their business. The right to good administration

includes inter alia that affairs are handled impartially and fairly; the right to be heard before any individual measure which would affect him or her directly is taken; the right to access to documents and the obligation of the administration to give reasons for decisions.

Question 3. When investing in another Member State, which of the following rights and principles were you aware an investor can rely on?
Please select as many answers as you like

Right to a compensation if the investment is expropriated
Principle of legal certainty and legitimate expectations
Right to good administration
Other

Please specify which rights you were aware to have beyond the ones listed when investing cross-border:

Non-discrimination within EU borders;
Free movement of goods and capital and freedom of establishment;
Right to access to an effective and efficient system of justice and a fair trial in any EU Member State;
The right to property;
Principle of non-retroactivity;
Recognition & enforcement of EU Member States' courts' judgements across the EU.

Question 3.1 For which of these rights and principles do you think their content is clear?
Please select as many answers as you like

Right to a compensation if the investment is expropriated
Principle of legal certainty and legitimate expectations
Right to good administration
The rights I listed under "other"

None of the above.

Question 4. Do you think it would be useful to further specify what Member State measure can constitute investment expropriation?

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

Question 4.1 Please explain the reasons for your answer to question 4:
5000 character(s) maximum

In our experience, investors are not always aware of relevant EU law when confronted with expropriation measures, let alone when it comes to indirect investment expropriation. Therefore, it would be good to provide more guidance to parties and courts confronted by the fact-specific situations of indirect expropriation that nowadays occur. Courts of the EU Member States have applied a variety of tests for assessing whether expropriation has taken place. This has resulted in considerable uncertainty regarding the standard of protection against expropriation.

In the context of investment law, it has become more common for States to define the expropriation standard in their more modern investment treaties with increasing precision so as to limit the scope of the State's liability. Increasing precision generally may be welcomed, as it creates legal certainty as to the applicable standards of protection against expropriation.

However, it must be noted that improving the precision and clarity of the expropriation standard should not be a disguised way of circumventing the existing investor protection under national law, European law or international law (for example, by incorporating unreasonably extensive carve-outs in the new generation investment treaties).

Question 5. Do you think it would be useful to further specify the rights investors enjoy in case of investment expropriation (e.g. compensation)?

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

Question 5.1 Please explain the reasons for your answer to question 5:
5000 character(s) maximum

(i) Standards of compensation/valuation

Also with respect to the investor's rights in case of expropriation, clear guidance and legal certainty is to be welcomed.

Although the investor's fundamental right to compensation for expropriation is well established, agreement on the applicable method of valuation (and thus the amount of compensation to be paid) is subject to debate.

International investment treaties contain fairly similar provisions on the standard of compensation for expropriation. However, this does not make the task of determining the amount of compensation any easier. When detailing the standard of compensation, treaties often refer to "prompt, adequate and effective", compensation, to be assessed on the basis of "fair market value" or "genuine value" of the relevant assets. This broad and quite subjective wording inevitably results in a certain degree of

uncertainty as to the amount of compensation to be paid by the host State. It may thus be useful to further specify the rights investors enjoy in case of expropriation, in particular regarding the specific valuation method to be used by courts or tribunals (such as liquidation value, replacement value, book value, discounted cashflow value, etc.).
This will increase legal certainty, which is in the interest of all parties.

It may thus be useful to further specify the rights investors enjoy in case of expropriation, in particular regarding the specific valuation method to be used by courts or tribunals (such as liquidation value, replacement value, book value, discounted cashflow value, etc.) within the EU. This will increase legal certainty and uniformity, which is in the interest of all parties.

(ii) Principle of legal certainty and legitimate expectations

In addition to the above, the principle of legal certainty and legitimate expectations of foreign investors are key concepts in practically every dispute. Nonetheless, there is no uniform application of these concepts. Therefore, additional guidance that would further clarify these concepts in particular in the context of disputes between European investors and EU Member States would certainly be useful, insofar as doing so would not curb the broad protections ordinarily afforded under those principles.

(iii) Principle of non-retroactivity

The principle of non-retroactivity is becoming increasingly important because both the European Commission and EU Member States previously have violated the principle of non-retroactivity. Indeed, the recently signed Termination Agreement in which the applicable sunset clauses are retroactively qualified as inapplicable is a stark example of how vested rights of investors are taken away in a manner that is incompatible with the Rule of Law.

Question 6. When investing cross-border, have you ever experienced problems with the adoption of a State measure which violates the principle of non-retroactivity (as defined above) or do you know about investors having experienced such problems?

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

Question 6.1 Please explain the reasons for your answer to question 6:
5000 character(s) maximum

While EFILA itself does not engage in cross-border investments, its members, however, are indeed aware of situations in which investors have been confronted with the effects of (partially) retroactive measures –including with respect to legislative acts of parliament and other administrative acts by Member States.

Indeed, there are plenty of cases in the public domain, which prove the existence of the violation by Member States of the principle of non-retroactivity, such as for example the renewable energy cases against Spain, Italy and other EU Member States and which have resulted in significant awards against these EU Member States.

Question 7. Do you think it would be useful to further specify how to strike the right balance between the policy space that Member States need to have to protect public interests ("right to regulate") and the minimum levels of protection that individuals need to have to plan their investments in a stable and predictable regulatory framework?

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

Question 7.1 Please explain the reasons for your answer to question 7:
5000 character(s) maximum

Of course, a balance has to be struck between the investor's interest in the stability of the EU Member State's regulatory regime and the Member State's need for flexibility in order to reflect changed political or economic circumstances. Various investment tribunals have concluded that it is each State's fundamental right and privilege to exercise its sovereign legislative power to enact, modify or cancel a law at its own discretion (see, for example, Parkerings v Lithuania, ICSID Case ARB/05/08, par. 332).

In principle, the express acknowledgement of the EU Member State's regulatory powers is to be welcomed (as is the further clarification of the scope of such legislative powers). This will increase legal certainty, which is in the interest of all players. The Member State's regulatory powers should, however, always be balanced against the legitimate expectation of any investor to benefit from stability and predictability in the Member State's regulatory regime. For example, if the Member State has made a specific assurance or promise upon which the investor reasonably relied when deciding to invest in the Member State, and the Member State would reconsider that assurance or promise without important grounds to do so, the investor can hold the State accountable.

Of course, as is well-established, a host State may not abuse its regulatory powers with the intent to circumvent its responsibilities under domestic, European or international law.

Question 8. Do you think it would be useful to further specify under which circumstances legitimate expectations arise and qualify for protection?

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

Question 8.1 Please explain the reasons for your answer to question 8:
5000 character(s) maximum

The doctrine of legitimate expectations ensures the consistent application of the EU Member State's law and protects the investor against representations made by the host State. The protection of legitimate expectations is based on the general principle of law, included in the world's major jurisdictions and linked to the general principle of good faith in international law.

That being said, EU law and the national law of the EU Member States provide insufficient protection against a Member State's breach of legitimate expectations. Therefore, it would be useful to further clarify under which circumstances legitimate expectations arise and qualify for protection. This will increase legal certainty, which is in the interest of all parties involved.

However, it must be noted that the legal doctrine of legitimate expectations is very fact-specific. Therefore, it is difficult (if not impossible) to draft an all-encompassing definition of this standard covering all possible situations encountered in day-to-day practice. It is a matter of fact that in order to decide whether a legitimate expectation has been made (and, subsequently, has been breached), courts would need to look at all relevant circumstances of the case, including the specific actions of both the host State and investor.

Although legal certainty is, of course, to be welcomed, one should bear in mind that situations will inevitably arise in which courts or tribunals would need a certain extent of freedom to decide whether legitimate expectations have arisen in a particular case and whether the investor's expectations in the given circumstances qualify for protection under the relevant instrument. Distinct situations warrant distinct approaches, and courts or tribunals should be given enough freedom to apply the principles of good faith in their assessment of each particular case.

Question 9. Which measures could enhance transparency and mitigate the potentially negative impact of Member States' policy changes on investments?
Please select as many answers as you like

Information to investors on the projected policy measures a reasonable time in advance
Involvement of investors during the preparatory phase of the policy measures to discuss the impact on investment
Measures enabling investors to adapt to new policies while avoiding substantial harm to investments (e.g. transitional measures)
Other

Please specify what other measures could enhance transparency and mitigate the potentially negative impact of Member States' policy changes on investments

One measure, which should be considered is to ensure that any new EU or Member States' investment policy is made subject to public consultation and public comment, allowing the investment community but also other interested parties to have a say. This is also consistent with established procedures in some EU Member States' jurisdictions.

Question 9.1 Please explain the reasons for your answer to question 9:
5000 character(s) maximum

It is of paramount importance that foreign investors are adequately informed about any relevant change in the EU Member States' investment policy. In addition, each EU Member State should ensure that if regulatory changes are introduced, foreign investors will be given the opportunity to adapt and take the necessary measures to mitigate the harm to their investments. In order to attract foreign investors and ensuring that foreign investors will continue with their activities in the EU Member States, the Member States may enter into a dialogue with the potentially impacted investors before any policy change is introduced.

The required transparency may be ensured in a number of ways, including:

- *(i) providing information to the investor on the projected policy measures a reasonable time in advance,*
- *(ii) involving the investor in the preparatory phase of the policy measure,*
- *(iii) introducing measures that enable the investor to adapt to the anticipated policy (such as transitional agreements), and*
- *(iv) proactively approach the foreign investors which may be impacted by the anticipated policy change and seek their input on the new policy.*

It is important to note that in the context of regulatory changes, EU Member States are well-advised to inform and involve investors in every step of the process. This must be a continuing process, not ceasing to apply after the State has approached the investor for the first time.

In this context, it would also be useful if the knowledge and expertise in the administrations of the EU Member States regarding the rights of investors is increased, for example regarding the principle of non-discrimination, the principle of non-retroactivity, legal certainty and legitimate expectations.

Question 10. Do you think it would be useful to further specify what the right to good administration implies for an investor investing in another Member State?

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

Question 10.1 Please explain the reasons for your answer to question 10:
5000 character(s) maximum

Because of the generality of the doctrine of good administration and the lack of clear definitions of the treatment to be accorded to investors under this standard, it would be helpful to further specify what the right to good administration implies for a foreign investor, what requirements would need to be met in order to invoke protection under this standard, and what possible exceptions and/or carve-outs exist with respect to the standard of good administration. This will increase legal certainty, which is in the interest of all parties involved.

Moreover, in addition to the lack of knowledge and expertise regarding the rights of investors in many administrations of the EU Member States, the right to good administration is a concept that seems to be insufficiently understood and embedded in most EU Member States. This is also illustrated by the annual EU Justice Scoreboard, which consistently illustrates that many EU Member States are in breach of Rule of law principles, such as the one on good administration, which has effectively leading to a denial of justice and thus long litigation procedures.

Consequently, improving the level of understanding and further specifying the concept of good administration would be particularly helpful for all parties involved, insofar as such further specificity would not be leveraged to introduce an overly narrow concept of "good administration", thus allowing States to skirt responsibility in a wider range of scenarios.

Question 11. When investing cross-border, have you ever experienced any issue with national administration in relation to the right to good administration? Do you know about investors having experienced such issues?

No
Don't know / no opinion / not relevant
Yes, I was not involved in an administrative procedure that affected my investment
Yes, I was not granted access to information on procedures affecting my investments
Yes, the public authority adopted a measure negatively affecting my investment without explaining the reasons for such
measure
Yes, for other reasons. See previous answers.

III. Improving enforcement of investment rules within the EU

This section seeks views on the enforcement of EU rules on investment protection when disputes arise between an EU foreign investor and the Member State where the investment is located, including dispute resolution mechanisms and remedies when issues related to cross-border investments arise.

Given the incompatibility of intra-EU BITs (including investor-to-state arbitration) from the date of entry into force of EU law, where necessary all investors within the EU need to seek legal remedies for disputes related to their investments in national courts. Pursuant to Article 19 (1) TEU Member States are obliged to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. Under Article 47 of the Charter, which is directly applicable, everyone has the right to an effective remedy and to a fair trial. National justice systems in the Union are subject to standards of independence, quality and efficiency, spelled out in case-law of the Court of Justice and of the European Court of Human Rights (ECHR). Some stakeholders have, however, raised concerns as to the enforcement of their rights based on the EU investment protection rules and some of these concerns merit to be further analysed by the Commission. They claim that the levels of effectiveness of the national enforcement systems very much differ between Member States. They question the impartiality of national courts that may be influenced by national interests and suggest that there would be an added

value in additional Europeans solution to settle disputes between Member States and investors coming from other Member States. The options they put forward include out of court dispute resolution mechanisms and possible forms of binding investment dispute resolution mechanisms at EU level in relation to intra-EU investments. Some stakeholders have also pointed out that particular attention should be given to SMEs as they may have more difficulties in asserting their rights before national administrations or courts since they have less economic resources and less leverage than bigger companies.

Under EU law, individuals once harmed by State measures breaching EU law have a right to reparation by the State. For instance, under certain conditions, damages caused by State measures breaching EU law may give right to claim damages. The effective enforcement of this right may, however, be difficult when investing cross-border.

Q12: Do you think the current system of enforcement of EU investment rules in Member States works adequately?

No.

Q 12.1 Please explain the reasons for your answer to question 12 and possibly indicate which MS you are referring to:

(5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

*There are fundamental problems with the **Rule of Law** and **integrity of judicial institutions** in several Member States. The EC cannot deny this, having itself taken action against Poland, due to a "clear risk of a serious breach of the rule of law in Poland." (https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367). Similar concerns have been voiced by the EP in relation to Hungary (https://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act), which also ranks poorly on both corruption and civil justice in the WJP Rule of Law Index 2020. Bulgaria, Romania and Hungary indicated high levels of corruption in Transparency International's Corruption Perceptions Index 2019, with the Report noting that these states "have taken steps to undermine judicial independence, which weakens their ability to prosecute cases of high-level corruption." (p. 22)*

*There is also the problem of (or at least the perception) of **bias by domestic courts** against foreign individuals or legal entities – see eg https://www.dihk.de/resource/blob/4108/8861d0aa21c613f6d8a2ec46aaffe2dd/dihk-survey-on-the-need-of-intra-eu-investment-protection-in-central-and-eastern-europe-data.pdf, p. 2 for Bulgaria. Generally, Hungary ranks 103th, Poland 114th, Slovakia 116th and Croatia 120th (among 140) on "judicial independence" in the World Economic Forum's The Global Competitiveness Report 2018.*

*Courts in Member Stats can be **inefficient** and **underfunded** and judges **insufficiently trained** – see eg https://www.dihk.de/resource/blob/4108/8861d0aa21c613f6d8a2ec46aaffe2dd/dihk-survey-on-the-need-of-intra-eu-investment-protection-in-central-and-eastern-europe-data.pdf, pp. 6-7 for Greece, p. 8 for Latvia, p. 10 for Poland.*

*There are problems of **serious delay** in judicial proceedings in many Member States – see eg the EU Justice Scoreboard 2019, Figures 7 and 9; and the numerous ECHR decisions condemning states for a*

pattern of excessive delay as violations of Article 6 (Bottazzi v. Italy, Sitarski v. Poland, Tsiotras v. Greece, SARL du Parc d'Activités de Blotzheim v. France).

Q13: Or do you think that improving enforcement mechanisms at EU level would also be needed?

Yes

Please explain the reasons for your answer to question 13 and possibly indicate which aspects could be improved:

(5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

The current enforcement mechanisms rely on two levels, (i) at the European level, the European Commission may initiate infringement procedures against a Member State, and (ii) at the domestic level, administrative and judicial bodies of the Member States.

Regarding the European level, the enforcement mechanism of the European Commission is highly political, non-transparent and will – even if successful – not lead to any award of compensation to the complainant. Indeed, in a scheme reminiscent of diplomatic protection in international law, the complainant is completely at the mercy of the European Commission whether, and if so, in what manner the European Commission will take action against a Member State. In addition, the complainant plays no role in this procedure and thus has no formal rights to participate in the procedure and thereby is unable to bring forward any factual or legal points.

Regarding the domestic level, as has already been pointed out in this document, the domestic administrative and judicial bodies in certain Member States do not function independently from the political and governmental forces, are often contaminated by corruption, and operate slowly and inefficiently. The annual EU Justice Scoreboard, the World Rule of Law Justice Index, the Transparency International and the Worldbank Doing Business reports illustrate the deficiencies of many EU Member States.

Thus, under both levels, the investor whose rights have been breached cannot effectively enforce them. This is why improving the Rule of Law level in the Member States should be of utmost priority for the European Commission. In addition, new enforcement mechanisms need to be created, now that the Termination Agreement will largely eliminate the possibility for investors to use international arbitration within the EU in order to enforce his rights effectively.

Q14: Would you have any other suggestion(s) to improve cross-border investment dispute resolution? Please explain your suggestion(s)

(5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

The option of an EU-wide investment treaty or EU Investment Protection Regulation providing standards of protection akin to those in existing bilateral investment treaties and an enforcement mechanism with the possibility of referral to the CJEU, either by way of a ***new standing court modelled on the Unified Patents Court or an arbitral mechanism*** *(with legal aid available for individuals and SMEs), should be considered if the EU is serious about wishing to facilitate and encourage intra-EU*

cross-border investments, given the serious problems in enforcement in (some) Member States. As the EC itself has stated:

"A recent study has found that reducing the length of court proceedings by 1% (measured in disposition time) may increase growth of firms and that a higher percentage of companies perceiving the justice system as independent by 1% tends to be associated with higher turnover and productivity growth. Another study has indicated a positive correlation between perceived judicial independence and Foreign Direct Investment flows in Central and Eastern Europe." (The EU Justice Scoreboard 2019, p. 4).

The question is not one of giving preferential treatment to foreign investors. They already suffer from a multitude of disadvantages by being foreign. As the CJEU has stated in Opinion 1/17, giving foreign investors access to arbitration ensures that "that they will be treated, with respect to their investments in the territory of the other Party, on an equal footing with the enterprises and natural persons of that other Party, and that their investments in the territory of that other Party will be secure"."

Q15: Would you have suggestion(s) on ways to ensure that legitimate interests of third parties (e.g. public interest considerations on climate change, environmental or consumers' protection) are better taken into account in cross-border investment disputes? Please explain your suggestion(s)

(5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

Amicus participation *and* ***transparency*** *including posting decisions and orders online has worked well in the investment arbitration context. There is no reason why lessons from the applicable rules (such as ICSID Rule 37(2)) could not be learnt in the EU context.*

Q16. When investing in another Member State, which of the following remedies for breach of EU investment law by the State were you aware that an investor has? Please select as many answers as you like

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)

Other

Please explain the reasons for your answer to question 16:

(5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

It is not clear what is meant by "EU investment law" in this context. While the substantive law emanating from the EU is applicable in domestic courts, ***those courts apply procedures and remedies that form part of their own systems****. Accordingly, e.g., interim relief or restitution may be available in some circumstances in some Member States, but not in others. Even the primacy of EU law cannot be guaranteed in all instances before all Member State courts as the recent Judgement of the German Bundesverfassungsgericht in case 2 BvR 859/15 and others illustrates.*

As far as the awarding of ***damages*** *is concerned, these are often too limited and* ***do not correspond to the true losses*** *suffered by the investor. E.g., they may cover the repayment of unduly levied charges, but not take into account the business lost due to cashflow difficulties that arise as a result.*

In addition, the knowledge and expertise of "EU investment law" as well as relevant concepts and principles varies from virtually non-existent to well established within the courts of the various EU Member States. For these reasons, the availability of remedies varies, which results in inequalities among European investors.

Q16.1: Have you ever experienced/Do you know about a situation where you/the investor claimed one of those remedies?

NA

Please explain the reasons for your answer to question 16.1:

(5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

NA

IV. General questions on the overall EU investment protection system

This section seeks views on the overall EU investment protection system provided both by specific rights (section 2) and their implementation when disputes arise (section 3).

Question 17. 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

Question 17.1 Please explain the reasons for your answer to question 17:
5000 character(s) maximum

In its Achmea-ruling the CJEU appears to have put an end to time-tested, proven, effective and viable investor-state dispute settlement (ISDS) methods within the EU. Moreover, it did so ex-tunc, retroactively, thus violating an important principle of law, of good governance and of good administration (section 2 of this survey). On top of that, the Termination Agreement, signed by the majority of Member States, intends to abolish the 'sunset clauses' in the BITs that are to be terminated. This is a major violation of international law, particularly as it was the intention at the time of the contracting parties to activate these clauses when their treaty was to be terminated. These clauses were meant to provide additional guarantees - over a period of up to 15 years - to investors who had invested prior to the termination of the treaty. This timespan was generally deemed sufficient to recoup the original investment of bona fide investors.

The advantage of the heretofore existing ISDS-methods in the EU was that arbitration tribunals 'in one go' could deal with the issues of liability and remedies. Not only direct expropriation, but also other types of encroachment upon investors property rights could be dealt with in an effective manner. Damages and compensation could be elements of arbitral awards.

As indicated above, it is doubtful whether domestic courts of the Member States could operate as efficiently as international arbitral tribunals. It would seem more likely that domestic courts would first rule on liability and that, if the investor were to win, he would have to initiate a second (lengthy) court procedure in order to obtain an award for damages and compensation. And then again, one has to be realistic. What state or government appointed judge would dare to rule against his country's national financial interests?

Investors who - for whatever reason - nowadays find themselves in conflict with the host state, have to turn to the courts in that host state. In an ideal world, that should cause no problem. However, the reality is different. Annually the European Commission (EC) presents its Justice Scoreboard. Some Member States over the years built up an abysmal track record, without any consequences whatsoever for that Member State. There may be a single European market, but there definitely does not exist a single and uniform judicial space. Among the shortcomings highlighted annually by the EC, one may find corruption, nepotism and political influence peddling. To put it bluntly: in an arbitral tribunal only one arbitrator may be appointed by the host state, in a state court all of the judges are state appointed.

When preparing the response to this survey, EFILA came across some pretty harrowing stories. In one case an investor filed a claim against a host state and noted that the court took more than half a year to open a file and to inform the host state. The host state then applied for an extension and took the maximum time allowed for its reply. The investor filed its reply promptly, but the case dragged on. After a change in government the presiding judge was suspended, allegedly for corruption or other improprieties and the case now awaits the appointment of a new judge. Meanwhile - as the court records show - the investor's brief has not yet been forwarded to the host state, at least not via the appropriate channels, thus incurring further, unnecessary delays in the initial, mainly administrative stages. It is unlikely that a hearing will called within the first two years of the procedure. Meanwhile, important actors or witnesses are pensioned off or pass away and the danger is that documentation and records get thrown out with the garbage.

EU law continues to be based on a number of principles, including those of the assumed uniform application of the law and mutual trust. These principles are eroding more and more. Strangely enough, neither the EC, nor the combined law makers of Council and Parliament saw any need for effective action. It is the judiciary itself that had to sound the alarm bell. Initially, when dealing with the issue of handing over suspects to Poland, now also when dealing with the overall quality and independence of the Polish judicial system on which the CJEU will rule shortly.

One other issue should be mentioned in this context.. One may wonder why the EC and the Member States that rushed to agree on a Termination Treaty did not or not sufficiently explore alternative options. This is the more striking, as the essence of the Achmea-ruling of the CJEU was the alleged invalidity of arbitration clauses, not of investment treaties as a whole. In addition to depriving investors of a procedural form of legal protection (arbitration), the planned termination of the investment treaties also deprives investors of a substantive form of legal protection in addition to national and EU law.

The latter is entirely unrelated to the CJEU's concern that EU law would be misinterpreted. One alternative would have been to allow for arbitration on the basis of the BITs provided that European law would not be applied or challenged (e.g., the proposed investment court under CETA, which received the CJEU's stamp of approval). Another alternative would be for a Member State or Member States to institute a dedicated chamber dealing with intra-EU investment disputes, domiciled in an existing court of law (for example the Netherlands Commercial Court in Amsterdam, firmly embedded in the European legal structures and which allows for proceedings to be conducted in English). What happens now, however, is that well-functioning ISDS methods are cast overboard before a new, robust system is put in place. Even if the EC were to present a proposal early 2021, it would take years before a new system could be operational, even if there would be no national legal obstacles.

While preparing this response, EFILA established that many internationally active companies might consider to restructure or re-route their investments in other European countries. Other companies spoke of investing overseas, in relatively high-income countries where the Rule of Law is firmly established (including the UK). To underpin their case, they pointed at the EU's annual Justice Scoreboard. Although current monetary policies might easily create a different impression, investment capital remains a scarce, much sought after commodity (see also the EC's introduction to the survey).

Question 18. Is there any specific aspect related to investments made or received by Small and Medium-sized enterprises (SMEs) that investment protection rules and mechanisms should take into account?

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

See also the answer to Question 17.1. Important aspects to be taken into account are the safeguarding and protection of investor's interests and legitimate expectations as well as maintaining an effective, efficient, viable, independent and reliable dispute settlement mechanism that offers both formal and substantive protection to investors.

As far as SMEs are concerned, the costs and length of any proceeding is of particular importance. Therefore, any dispute settlement system that the EC might envisage should ensure that there is a fast-track procedure, which enables SMEs to resolve their dispute fast and cheap but in fair and effective manner.

SMEs in particular may have difficulties funding a dispute against a Member State. See also the CJEU's holding in Opinion 1/17, with respect to CETA's investment tribunal: "in the absence of rules designed to ensure that the CETA Tribunal and Appellate Tribunal are financially accessible to natural persons and small and medium-sized enterprises, the ISDS mechanism may, in practice, be accessible only to investors who have available to them significant financial resources" (para. 213).

Question 18.1 If there is/are such specific aspect(s) that investment protection rules and mechanisms should take into account, please specify and/or explain which ones:
5000 character(s) maximum

In addition to the cost and length efficiency aspect mentioned in answer to Q18, SMEs also would need the possibility of obtaining legal advice on the basis of low fees and be able to turn to other independent bodies such as an Ombudsman who would be able to resolve disputes at an early stage. This however would require an obligation on the part of the responsible bodies in the EU Member States to participate in good faith in such an Ombudsman procedure.

Question 19. Is there any aspect related to cross-border investments, not covered by the questions in sections two and three, that you think should be better protected by EU law?

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

Question 19.1 Please explain the reasons for your answer to question 19:
5000 character(s) maximum

Three further issues are at stake here.
Firstly, it remains an open question how the EC considers awards, handed down by arbitral tribunals or (investment) courts. There have been cases where the EC considered financial compensation to be paid by a Member State by virtue of an award - in whatever form - as unlawful State aid (eg Micula case). How could financial compensation, awarded to 'make whole' what had been damaged, ever be considered as unlawful? Investors perceive the EC's stance as politically motivated and nothing but an attempt to prop up the wrongdoings of individual Member States, regardless of their ranking on the Justice Scoreboard. This uncertainty unfortunately negatively impacts the investment climate in Europe.

Secondly, it has become increasingly difficult to enforce claims (based on awards by tribunals or courts) against Member States. It is not only a matter of diplomatic immunity, or the fact that the property of state-owned companies may generally not be impounded to 'settle the score' with the owner. What is more, the billions of Euros the European institutions annually transfer to Member States also remain

out of reach for legitimate claim holders. It would greatly enhance the reputation of the European institutions if legitimate claimholders could turn to the European institutions to enforce their legitimate claims. That certainly should be the case within the European investment dispute settlement system envisioned by the EC.

Thirdly, as a result of the Termination Agreement, a proven form of dispute resolution is going to be eliminated without any valid alternative being established as adequate substitute. As the EC points out in the introduction to this consultation, the - justified - objection of EU investors is that, as a result, third country investors will fully retain the protection agreed in the investment treaties relevant to them. This puts investors from EU Member States at a disadvantage compared to, for example, investors from Asia, the Middle East, the US, Canada or the UK. This would imply a significant distortion of 'the international playing field', which in turn will be detrimental to European investors.

Therefore, the EU should create a fair, independent, cost efficient dispute settlement and enforcement mechanism, which is as good as the one offered to third state investors. There is simply no reason why the EU should treat its own investors less favourably than third state investors.

Question 20. Do you think aspects of the current EU investment protection framework may need to be adapted to evolutions brought by digitalisation and new technologies (e.g. new ways of buying and selling assets, assets offered in a new form or new types of assets to be invested in, etc.)?

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

Question 21. Do you think it would make it easier for investors to exercise their rights when they invest cross-border within the EU if more aspects of investment protection would be regulated for all Member States by EU legislation?

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

Question 21.1 Please explain the reasons for your answer to question 21:
5000 character(s) maximum

Given the mess intra-EU investors are in after the Achmea judgment, a uniform approach would indeed help investors exercise their rights easier and thus would be most welcome. However, the opposite is the reality. Legislation (including treaties) dealing with the protection of foreign (intra-EU) investments has become highly fragmented. Twenty-three Member States are keen on getting rid of the intra-EU BITs and the sunset clauses, four apparently are not. What does that mean for investors from these countries and investors in these countries? Some Member States ended their BITs earlier, at the time

when they came up for renewal, and now should honour the sunset clauses. Or will they - retro-actively - not comply with their international obligations? And how should individual investors deal with this loss of rights in countries where the Rule of Law is not firmly entrenched, not even in the view of the European Commission?

Thus, while uniform rules regarding the rights and obligations of EU Member States vis-à-vis European investors would be needed not only in order to create a level playing field within the EU but also in order to improve the general Rule of Law level within the EU, the failure of the EU to address this issue so far begs the question whether (more) EU legislation is the answer to this.

V. Facilitating and promoting cross-border investments

This section is looking at the investment environment more generally and at measures that could facilitate investors' activities when they decide to invest in another Member State.

To attract and encourage cross-border investment, a range of promotion and facilitation measures can be envisaged. Investment promotion services make it easier to identify cross-border opportunities, while investment facilitation measures help implement planned investments and operate them smoothly. They include information on the business environment and legal framework, possible partners and location for investments in Member States, advice on the project (legal and financial), identification of relevant competent authorities and support in completing authorisation processes. In some cases, specific support is provided for strategic projects or priority sectors. Some problem prevention and solving mechanisms relating to individual problems and issues of general relevance may also be granted.

Investment promotion and facilitation measures and services have been developed both at national and EU level (besides the EU being strongly committed to promoting investment facilitation at the international level). Investment promotion agencies are set up in many Member States and provide a range of services to cross-border investors. The EU has also put in place a number of initiatives to facilitate investment in the Single Market such as the Your Europe portal, the Single Digital Gateway, SOLVIT and InvestEU. These tools provide information on EU law, facilitate the completion of key administrative procedures online, help resolve problems relating to the application of EU law and support investments in different policy areas, including R&D and innovation, SMEs financing, infrastructure, cultural sectors, social investment and skills, as well as promoting environmental, climate and social sustainability.

Feedback from stakeholders suggests that there may be a need to build further on these initiatives with a specific focus on cross-border investments in the EU.

Question 22. Do you think it is easy to obtain information on the rules, procedures and data relevant for cross-border investment in the EU (e.g. rights before public administration when applying for an authorisation to start an investment or if actions of public authorities negatively affect an existing investment, economic data)?

Yes, it is easy, as all relevant information is available online and easily accessible

Only to some extent, since all relevant information is often not available or easily accessible online as they are scattered across different sources or related only to some Member States.

No, it is not easy, as no relevant information is available

Other

Question 23. How easy is it to identify potential projects, partners and financing sources once you are interested in cross-border investment in the EU and what measures could help?

Yes, it is easy anywhere in the EU, based on the available information and tools

To some extent, only for some EU countries (where we have business activities and our own business network)

It is not easy, but investment promotion measures could help.

No, it is not easy, and investment promotion measures cannot help

Question 24. Do you think it would be useful to have specific measures focusing on cross-border investment facilitation?

No. All necessary measures and standards are in place or will soon be implemented (e.g. the Single Digital Gateway, which covers information and procedures on starting, running and closing a business)

To some extent. Whilst all necessary measures and standards are in place (or will soon be implemented, e.g. the Single Digital Gateway), their effective application in practice differs per Member State

Yes. Even though many measures are already in place or will soon be implemented, there is need for additional facilitation measures for cross-border investments.

Other

Question 25. 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 there are follow-up possibilities, accessible to all stakeholders

To some extent: There is no established mechanism for dialogue, feedback and follow-up by the government, but it is possible to provide feedback on an informal basis

Partially: There is a mechanism for dialogue and to provide structured feedback to authorities and there are follow-up possibilities, but they are not accessible to all stakeholders (depending on size of investment, sector, etc.).

No, generally, no such mechanisms exist to provide structured feedback in formal and effective manner for investors. Consequently, there is a real need for such mechanisms, which would not only be in the interest of investors but also in the interest of the EU Member States as such mechanisms could be a tool for preventing the escalation of problems into full blown disputes. Such mechanisms, if set-up in proper manner and sufficiently staffed, could be a particularly useful tool for SMEs.

Other

Question 26. Have you used SOLVIT or other mechanisms which help prevent or resolve individual problems with cross-border investments in an amicable way with public authorities?

Yes, I have used SOLVIT and it helped solve my problem

Yes, I used another mechanism and it helped solve my problem

Yes, I tried, but SOLVIT or other existing problem solving mechanisms did not solve my problem

No, because I was not aware of SOLVIT or other relevant problem-solving mechanisms

No, I did not even try, because I think that SOLVIT and other problem solving mechanisms are not suitable to solve my problem

Other

As EFILA is not an investor, it has never used SOLVIT itself.

Additional information

Are there any other relevant issues related to investment protection and facilitation that you would like to bring to the attention of the European Commission?

Please comment as appropriate:
2000 character(s) maximum

(i) Reduced Rule of Law level within the EU

As the (CJEU) recently confirmed with regard to Poland[2], the Rule of Law and the judicial independence is below the minimum standards required by EU law. Similar trends are – unfortunately – clearly visible in other EU Member States.

Despite their significant efforts and financial support in the past decade, the EU institutions have failed to improve the Rule of Law standards in those Member States. Consequently, investors cannot rely on domestic courts in order to resolve their disputes with EU Member States in a fair and efficient manner.

Many studies[3] show that a high level of investment protection guaranteed by independent, international courts or tribunals is essential for attracting investments. Thus, the envisaged termination of most intra-EU BITs without providing a comparable alternative is misguided.

In light of the fact that EU law as it stands now does not provide a sufficient and effective level of investment protection and Rule of Law, a European Investment Court and a EU Investment Protection Regulation are needed. The EU Investment Protection Regulation[4] ought to contain comparable protection standards as those contained in the intra-EU BITs (in particular, FET, MFN, NT, umbrella, full compensation in case of (in)direct expropriation), while the European Investment Court[5] would provide for an independent and effective forum for solving investment related disputes.

The current EU's SOLVIT system is insufficient to provide the necessary means for resolving serious and high stake investment related disputes.

[2] See, Case C-192/18 and Joined Cases C-585/18, C-624/18, and C-625/18.
[3] See, *2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS* (Queen Mary University of London, 2020); Follesdal, A. (2020), "Survey Article: The Legitimacy of International Courts", Journal of Political Philosophy, accessible at doi:10.1111/jopp.12213; and Gaukrodger, D. and K. Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, OECD Publishing, accessible at http://dx.doi.org/10.1787/5k46b1r85j6f-en.
[4] See, N. Lavranos, After Achmea: The Need for an EU Investment Protection Regulation, Kluwer Arbitration blog, March 17, 2018, http://arbitrationblog.kluwerarbitration.com/2018/03/17/achmea-need-eu-investment-protection-regulation/?doing_wp_cron=1597733139.1300818920135498046875
[5] See, P. Paschalidis, The pressing need for a European investment court, Global Arbitration Review, 10 February 2020, https://globalarbitrationreview.com/article/1214259/the-pressing-need-for-a-european-investment-court

(ii) Increased insecurity regarding recognition and enforcement of awards within the EU

The EC's efforts to prevent the recognition and enforcement of arbitral awards – whether intra-EU BITs or intra-EU ECT awards – has resulted in an increased insecurity as to the actual ability to get an award recognized and enforced within the EU. This is further amplified by the Termination Agreement, which explicitly aims at preventing the recognition and enforcement of arbitral awards.

This legal insecurity undermines the Rule of Law within the EU and negatively impacts the trust of investors in the judicial systems within the EU Member States, which in turn reduces the appetite of investors for making cross-border investments.

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