

# EU Commission launches public consultation on protection of intra-EU investment

Clémentine Baldon

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On 26 May, the European Commission launched a public consultation on the protection and facilitation of intra-EU investment.

## Background of the consultation

The consultation recalled that, on 6 Mars 2018, the Court of Justice of the European Union rendered its Achmea decision whereby it judged that **intra-EU bilateral investment treaties (“BITs”) are incompatible with EU law**. This implies that EU investors are no longer entitled to rely on the protections provided by intra-EU BITs or the Energy Charter Treaty [1] to seek remedies before arbitration tribunals against other EU Member States. Following this decision, in January 2019 Member States committed to terminate their intra-EU BIT's and, on 5 May 2020, signed an Agreement for the termination of intra-EU BITs.

In this context, the consultation indicates that “some EU investors have repeatedly raised concerns” over an alleged deterioration of the investment climate during the last years, which led the Commission to launch an initiative to improve the protection of intra-EU investment protection.

## Objectives and content of the consultation

According to the **Inception Impact Assessment** (also open to feedbacks), the Commission's initiative on the protection and facilitation of intra-UE investment aims at :

- « 1) Ensuring a **more consistent protection of investments** across the EU »
- « 2) providing **more effective remedies in case of investment protection problems** arising in any Member State, in order to increase investors' confidence that their investments are effectively protected in every EU Member State. »

On this basis, the consultation seeks comments mainly on the **need for** :

- **clarification and enhancement of investment protection rules** in the EU
- improved **enforcement of investment protection rules** including through the introduction of new dispute settlement mechanisms for EU investors

- measures to facilitate and promote cross-border investment in the EU.

### **Possible outcome of the consultation**

Following the consultation, the Commission will certainly pursue its initiative as it considers that action is needed to prevent cross-border investments from decreasing « especially following the economic impact of the COVID-19 outbreak » and that the impacts of the initiative should be positive for the economy, the employment, the environment and fundamental rights (see. Inception Impact Assessment).

According to the Inception Impact Assessment and in view of the questions asked in the consultation, the Commission seems to be contemplating the following measures :

1) **Adoption of common EU rules on investors' rights** in the following areas : compensation for direct or indirect expropriation, safeguards for legal certainty and legitimate expectations, rights stemming from the principle of good administration, remedies for wrongdoings by public authorities.

2) **Creation of new mechanisms for the enforcement of investors' rights within the EU** through :

- the imposition of specific procedural rules before national courts to improve the enforcement of investors' rights,
- the creation of an "ombudsman-like EU administrative body" where investors could file complaints against measures of the Member State where the investment is located, or
- the creation of a "specialised investment court" responsible for solving individual cross-border investment disputes.

According to the Inception Impact Assessment, such options could be addressed by a directive, regulation, recommendation and/or international treaty.

### **Target of the consultation and opportunity to submit comments**

Despite a statement that the consultation is addressed to companies, business associations, civil society representatives, private individuals and Member States authorities, in practice, virtually all the questions are intended to companies and business organisations.

However, as public consultations may play a significant role in EU policymaking, it is **important that other stakeholders, such as civil society, express their views** to allow for a more balanced assessment of the appropriateness and possible impacts of an increased protection of investors' rights against Member States and the creation of new EU dispute settlement mechanisms for investors. At this stage, the Commission seems to endorse the claims of business organisations [2] calling for more investors' protection.

[1] The relevance of the Achmea decision for the Energy Charter Treaty was confirmed by the Commission in its Communication on the Protection of intra-EU investment.

[2] The consultation echoes in particular the concerns and propositions expressed by BusinessEurope at a “stakeholder workshop” held on December 2019 (see <https://www.businesseurope.eu/publications/businesseurope-headlines-no-2019-38>).

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