Impact assessment study on investment protection and facilitation in the EU

Final Report

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1 INTRODUCTION

1.1 Objective and scope of the study

The objective of this study is to support the preparation of a proposal on a new initiative on investment protection and facilitation in the EU. It does so by providing input for the Impact Assessment (IA) for the relevant European Commission services – DG FISMA to accompany such proposal.

The main objective of this this study is to collect data and evidence on the problems related to cross-border investments in the EU and on the impacts of options that can be considered to tackle such problems.

The scope of this study covers investors of all sizes (large and SMEs) and sectors (e.g. financial institutions and real economy sectors), and all types of investment with specific emphasis on direct investment. The geographical scope covers the EU as a whole and a balanced representation of Member States exporting and receiving capital was ensured to the extent possible (see section 1.2). Data was collected for all Member States. One of the findings of this exercise is that while the problems related to cross-border investments in the EU can concern any MS, they do so to different degrees and frequencies.

1.2 Methodological considerations and limitations

The study is based on a comprehensive data collection methodology including: desk research, interviews, targeted survey, six case studies, and a focus group. The caveats to the collected data are as follows:

- Specific literature on investment protection is scarce. The general driving factors of cross border investment flows are well documented and the impact of foreign investments on host countries are also well researched. However, the subset of the literature (academic and policy reports) focusing specifically on the area of investment protection rights and their relationship with investment levels is not particularly well developed.
- Survey results are not statistically representative of all existing investors in the EU. Despite extensive outreach activities to mobilise participation (such as virtual session organised with business associations to promote the survey among their members, follow up calls with the business associations, circulation of survey link via DG FISMA newsletter with 10 000 subscribers and to Member States in the Expert Group on intra-EU investment environment), there were a total of 77 respondents. Almost all respondents (65) were actively investing in another EU Member State.

A major challenge in interpreting results is a bias towards companies that have experienced problems and therefore were more interested in responding to the survey. Discussions with several investment promotion agencies showed a lack of awareness of any investment protection related problems in their respective countries, particularly in Central and Eastern Europe, which could however also be due to limitations of competencies of such agencies which are not always dealing with dispute resolution and prevention. Therefore, a major challenge was either lack of interest and engagement, which could have been exacerbated by the challenging situation that the companies experience as a result of the Covid-19 pandemic, and lack of awareness or understanding of the issue given the relative specialisation and complexity of survey. It is also likely that compared to SMEs larger companies have more resources and means to engage in discussions related to investment protection and enforcement. While attempts have been made to engage SMEs and the impact on SMEs is analysed separately, the findings should not be treated as representative or a standalone conclusion.

Despite those limitations, the survey results provide an added value to the study, as they provide direct insights from the investors on the key barriers to investment and examples of specific challenges faced. In addition, the results were interpreted in conjunction with other data sources (e.g. OPC results as well as literature) to ensure the robustness of findings.

As a result of the above-described data limitations:

- Problem size estimation proved difficult. While the focus of the study is on investment protection and enforcement issues, these cannot be easily or fully separated from other factors such as taxation, costs of investment and business environment challenges which are all important divers of cross-border investment. Therefore, we carried out a qualitative assessment of the direct consequences of the problem along the investment process (micro) and we used results from peer reviewed publications and secondary data on property rights to quantify the economic impact at EU level (macro).
- Quantification of impacts proved difficult. As for the problem size estimation, we established the *indirect benefits* based on a set of assumptions regarding the potential economic activity that could stem from additional cross-border investments. We focused on these indirect benefits to value the scale of the policy options' impacts. Assumptions were required at different stages of the estimation process. While the assessment of the main changes that would directly affect stakeholders can be reasonably established, quantification of the resulting direct benefits would be speculative. This is because these *direct benefits* mainly come from a potential for cost reduction (cost of investment protection) and little data exists on the costs that can be unequivocally tied to investment protection. Therefore, we carried out a qualitative assessment for this aspect.

Scope of the analysis and investment characteristics

As per the ToR, this study comprises "Investors of all sizes (large and SMEs) and sectors (e.g. financial institutions and real economy sectors)". While all types of investment are relevant, as outlined in the ToR, specific "emphasis is placed on direct investment and establishment". This alone presents a broad spectrum of investors and type of investments. This is further complicated by the fact that the EU investment characteristics are multi-faceted and cannot be analysed in isolation. Therefore, the problem definitions and analysis should be read keeping in mind some of the following elements:

- As per available data and literature, portfolio investment in the EU remains dominant although there has been a growth in alternative forms of lending i.e. variety of financial sector related investments. In addition, the volume investment made by the financial industry is likely to be larger. The relevance of financial and insurance sector related cross-border investment is further validated by the study survey, where the majority of the companies and investors that responded to the survey are active in the financial and insurance sector, as well as business services. In addition, the majority of the respondents were engaged in direct and portfolio investment. Therefore, while we examine all types of investments, considering the profile of survey respondents it is probable that some issues are more pronounced and of relevance to specific sectors and types of investment.
- As illustrated by the level of diversity of investment in the EU, regional specificities in the financial sector remain strong. This diversity is significantly higher than, for example, in the U.S.—and there is substantial heterogeneity in European reliance on banking[1]. Therefore, even though the scope covers "all types" of investments, the diversity

[1] Adams-Kane, Jonathon & Lopez, Claude & Wilhelmus, Jakob. (2017). Cross-Border Investment in Europe: From Macro to Financial Data. SSRN Electronic Journal. 10.2139/ssrn.2911899.

of investments cannot be ignored when reading the analysis of the problems and assessing the consequences.

- When studying the investment trends and patterns in the EU, it is probable that the core euro-area countries, are the main actors in attracting investments and in making them. Meanwhile, literature also points to the stark external imbalances in investment trends which continue to persist for Southern Europe and are worsening in case of Central and Eastern Europe. However, it is also important to note that there are various internal and external factors behind these trends which need to be studied further and are outside the scope of this assignment.

The box below provides some definitions for the key types of investments.

Box 1 Types of investments

Foreign Direct investment: is the category of international investment that reflects the objective of obtaining a lasting interest by an investor in one economy in an enterprise resident in another economy. The lasting interest implies that a long-term relationship exists between the investor and the enterprise, and that the investor has a significant influence on the way the enterprise is managed. Such an interest is formally deemed to exist when a direct investor owns 10% or more of the voting power on the board of directors (for an incorporated enterprise) or the equivalent (for an unincorporated enterprise).[2]

Portfolio Investment: relates to cross border financial flows and positions between residents and non-residents involving debt or equity securities and affects their assets and liabilities vis-à-vis each other. As opposed to direct investment, portfolio investments do not involve active management and lasting interest of the firm receiving the investment but entails passive ownership of assets.[3]

Other investment: covers all investment flows not covered by direct investment or portfolio investment (such as financial derivatives, and reserve assets, etc).and mainly includes financial flows from cross border transactions between residents and non-residents stemming from loans and deposits, equity other than securities, as well as insurance, pension and standardized guarantees schemes.[4]

Additionally, investments can be distinguished into debt and equity instruments: *Equity investments* refer to the issuing of shares so that investors own a position in the company. They refer to securities linked to a 'claim' on the earnings and assets of the corporation. The most common equity instrument is common stock.[5]

Debt investments relate to the lending of money or corporate borrowing and specify fixed payments including interest to pay back to the investor. Debt instruments are for example bonds and mortgages.[6]

External shocks: Although this study specifically focuses on investment protection and related enforcement issues, it is difficult to isolate consequences of the problems from other factors. Empirical research on FDI highlights that different types of investments have different patterns of positive and negative spill-overs. These include issues related to business environment, political economy landscape, taxation, cost of doing business, and recently, impact of Brexit, amongst others. Therefore, while the analysis focuses solely on protection and enforcement issues, the drivers and consequences of the problems cannot be analysed in isolation.

Based on the above, the analysis of the identified problems is a complex exercise, particularly when specific drivers could be more relevant or pronounced for specific groups and investment protection and enforcement alone cannot address the overarching investment

2 https://ec.europa.eu/eurostat/web/structural-business-statistics/global-value-chains/fdi
3 http://datahelp.imf.org/knowledgebase/articles/505731-how-is-portfolio-investment-defined-in-the-coordin
4 https://www.imf.org/external/region/tlm/rr/pdf/Jan12.pdf
5 https://www.blackrock.com/us/individual/education/equities
6 What are the differences between debt and equity markets?

challenges. Therefore, our analysis draws on multiple literature sources, interviews, and a survey carried out for this study and attempts have been made to focus on each issue and validate findings through triangulation of the sources.

1.3 Outline of the report

The structure of the report is as follows: Chapter 2 provides context, problem definition including its drivers and consequences as well as estimates of the scale of the problem and it lays out the EU's need to act. Chapter 3 presents policy objectives and policy options. Chapter 4 provides an assessment of the impacts linked to policy options. Chapter 5 compares the options in terms of their effectiveness and efficiency. Finally, Chapter 6 presents the monitoring framework. The report also contains a number of Annexes: Annex I References; Annex II: Case studies; Annex III: Survey results analysis; Annex IV: Stakeholder consultations; Annex V: Main areas screened for impacts; Annex VI: Change projections in FDI and GDP impacts and Annex VII: Cost modelling for Option A1, B1, B2, B3 and B4.

2 CONTEXT, PROBLEM DEFINITION AND SUBSIDIARITY

2.1 Context

Cross-border investments within the EU play a key role in mobilising additional funding and making full use of the investment opportunities in the Single Market. The *Achmea* ruling of the Court of Justice of the European Union (CJEU, Court, or Court of Justice) that intra-EU investment arbitration is incompatible with EU law rendered clear that bilateral investment agreements (BITs) cannot be applied in an intra-EU context. This has created concerns that the level of protection is weakening at a time when intra-EU cross-border capital flows have not grown.[7] These concerns relate to two areas: first, the adequacy of EU law in protecting investments and, second, the adequacy of enforcement of the relevant EU rules. While there are many ultimate safeguards in EU law, there is still some room for interpretative divergence among national administrations, and enforcement can be difficult and time-consuming in certain EU Member States. Furthermore, investor-State dispute settlement (ISDS) through arbitration had the added value, for instance, of industry-specific expertise not always available to national courts of law throughout the EU.[8]

In July 2018, the Commission adopted a Communication on *Protection of intra-EU investment*[9], recalling the most relevant substantive and procedural EU rules with the aim of increasing investor confidence. Through the Communication the Commission wished to demonstrate that there are adequate safeguards in place and make it clear that EU law offers sufficient protection to all forms of EU cross-border investments throughout their life cycle. It recalled the EU rules protecting investment, including the obligation on Member States "to ensure that national measures they may take to protect legitimate public interests do not unduly restrict investments."

At the same time, the Communication emphasised that intra-EU BITs designed to provide investor protection and redress, are incompatible with EU law. This was the Commission's position already earlier, subsequently confirmed by the *Achmea* judgement, a preliminary ruling rendered by the Court of Justice in March 2018 in the context of an action brought before the German court for the annulment of an arbitral award relating to an investment made by a Dutch insurer, Achmea, in Slovakia.[10] The Court ruled that ISDS clauses in an international agreement applying between Member States are incompatible with EU law. Member States subsequently committed to terminate their intra-EU BITs either via a plurilateral agreement or bilaterally[11]. An Agreement for the Termination of Bilateral Investment Treaties between 23 Member States of the European Union[12] was signed in May 2020, while the remaining Member States embarked on bilateral terminations.

Nevertheless, the termination of these intra-EU BITs has highlighted a possible need for more effective cross-border investment protection and enforcement at EU level, particularly at a time of economic uncertainty which could undermine the Commission's and Member States' efforts to spur an economic recovery through investment.

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7 Analysis of developments in EU capital flows in the global context, Bruegel report, November 2019

8 Building an efficient EU wide mechanism for investor-state dispute settlement within the EU
Overcoming negative consequences of the "Achmea" judgment of the European Court of Justice and the joint declaration of Member States from 15 January 2019, March 2019, afep/Deutsches Aktieninstitut

9 https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52018DC0547, COM (2018) 547 final

10 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0284

11 Declarations of the Member States on the legal consequences of the Achmea judgment and on investment protection of 15 and 16 January 2019 https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en

12 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01)

In this context, based on the 2020 Commission Work Programme[13], the Capital Markets Union Action Plan[14] put forward in September 2020 Action 15 to improve, modernise and harmonise as much as possible the rules contributing to the protection of intra-EU cross-border investments, and at the same time, to strengthen the investment protection and facilitation framework.

Lack of adequate investor protection could possibly even divert investment to non-EU countries with which Member States might still have BITs in place to potentially benefit from the protection provided in the frame of these BITs.

The European Commission has taken into account the concerns expressed in the context of the termination of intra-EU BITs during the stakeholders' workshops and engaged in Open Public Consultation[15] on investment protection and facilitation in the EU. The nature of the concerns and the results of the consultation process led the Commission to start an impact assessment, which this study supports.

The remaining part of this chapter is structured in the following parts: Section 2.2 presents the problem tree, Section 2.3 includes the problem definition related to Specific Problem A – insufficient investment protection and lack of investor confidence in rules protecting investment, Section 2.4 includes the problem definition related to Specific Problem B – Difficulties in enforcing investment protection rules and obtaining effective remedies for cross-border investments, and Section 2.5 presents the overall consequences of these problems. Section 2.6 provides for baseline quantification, whereas Section 2.7 lays out the EU's need to act.

2.2 Problem tree

As per the Better Regulation Guidelines, "better regulation is about regulating only when necessary and in a proportionate manner", clearly defining the problem and its drivers is key. The problem definition lays the groundwork for development of a baseline scenario (Option 0 or status quo) in section 2.6 against which the policy options are compared in Chapter 4 and 5.

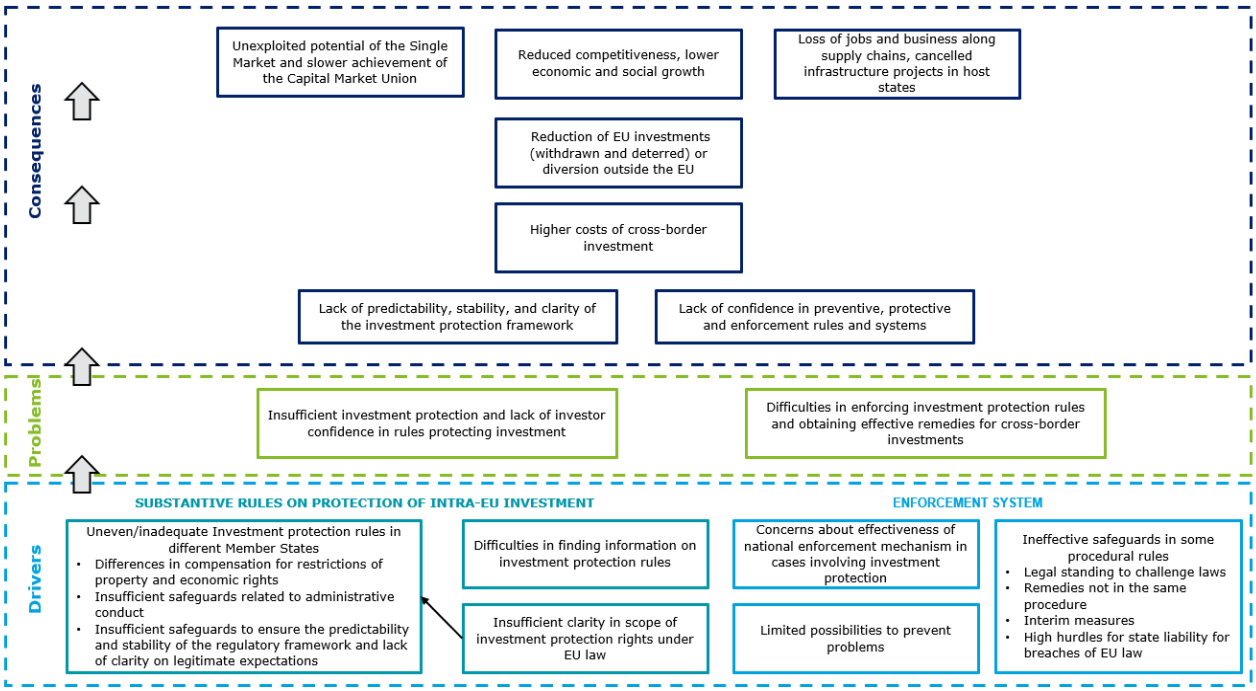
Figure 1 presents the problem tree, to illustrate causal relationships. The visual should be read from bottom to top, starting with the drivers, which lead to problems and have as their expected effects or consequences obstacles to the development of the EU Single Market and EU growth. The drivers fall into two categories: (i) the investment protection rules and (ii) enforcement of the rules.

13 Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions, A Capital Markets Union for people and businesses-new action plan

14 Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions, A Capital Markets Union for people and businesses-new action plan

15 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12403-Investment-protection-and-facilitation-framework/public-consultation

Figure 1 Problem tree



Source: Ecorys and Deloitte, based on information from the European Commission

A number of important remarks should be made:

- The *drivers are specifically focused on protection rules and their enforcement and therefore, not on the overall business environment issues such as taxation, business enabling environment, amongst others.* As illustrated in the diagram above, in each problem cluster, the drivers are interdependent;
- The drivers together lead to the *specific* 'Problems'. These constitute the challenges to be addressed by any policy initiative in order to alleviate the consequences;
- There are immediate *consequences* (on predictability and confidence).

The *drivers* fall into one of two clusters relating to:

- Substantive rules on protection of intra-EU investment;
- The enforcement system.

The *problems* that result from the drivers are:

- Insufficient investment protection and lack of investor confidence in rules protecting investment, and
- Difficulties in enforcing investment protection rules and obtaining effective remedies for cross-border investments.

While each problem has distinct drivers, they have common consequences, i.e. higher costs of cross-border investment (including risks that can be monetised), which have a multitude of knock-on effects on intra-EU foreign direct investment (FDI), jobs, growth and competitiveness and unexploited potential of the Single Market.

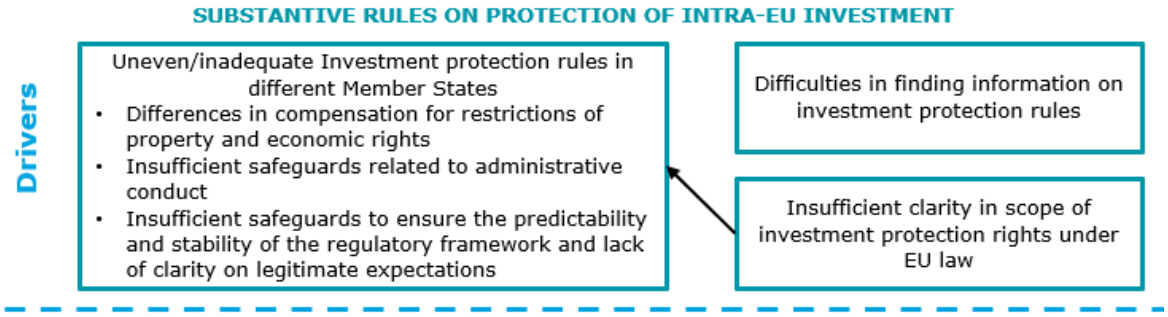
The sections below analyse the evidence base for the drivers, elaborate on the problem and discuss the consequences.

2.3 Problem definition - Specific Problem A – insufficient investment protection and lack of investor confidence in rules protecting investment

2.3.1 Drivers

This section addresses the drivers deriving from Specific Problem A - the insufficient investment protection and lack of investor confidence in rules protecting investment. Identifying the drivers that are obstacles to cross-border investments within the EU is necessary for defining the broader problem. The drivers are interdependent root issues that cause the specific problem.

Figure 2 Drivers of problem A - insufficient investment protection and lack of investor confidence in rules protecting investment



Source: Ecorys and Deloitte, based on information from the European Commission

As outlined in the figure above, extracted from the problem tree, the following drivers and sub-drivers have been identified as the root cause of insufficient investment protection and lack of investor confidence in rules protecting investment:

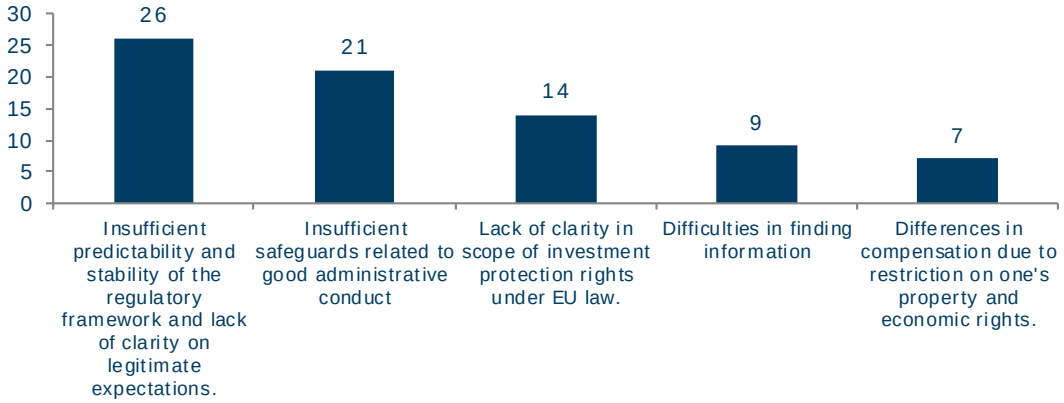
- Insufficient clarity in scope of investment protection rights under EU law.
- Uneven or inadequate investment protection rules in different Member States;
    - Differences in compensation for restrictions of property and economic rights;
    - Insufficient safeguards related to administrative conduct;
    - Insufficient safeguards to ensure the predictability and stability of the regulatory framework and lack of clarity on legitimate expectations;
- Difficulties in finding information on investment protection rules.

In particular, among the above-mentioned drivers, the predictability and stability of the regulatory framework stood out as the overriding concern in the area of investment protection in a survey for this study. When asked to choose between a range of potential obstacles to investment, 59% of the respondents identified a lack of stability and predictability of the regulatory framework and a lack of clarity about legitimate expectations as being most likely to have an adverse impact on investment decisions (

Figure 3).[16]

[16] The results of this survey should be regarded as indicative as only 77 companies from 16 Member States responded and more than half were from two sectors: finance and insurance (33 responses) and business services (12). 34 responses came from large companies, 37 from SMEs and 6 from individual investors. The results cover investments towards all EU Member States. Detailed results of the survey are presented in Annex III.

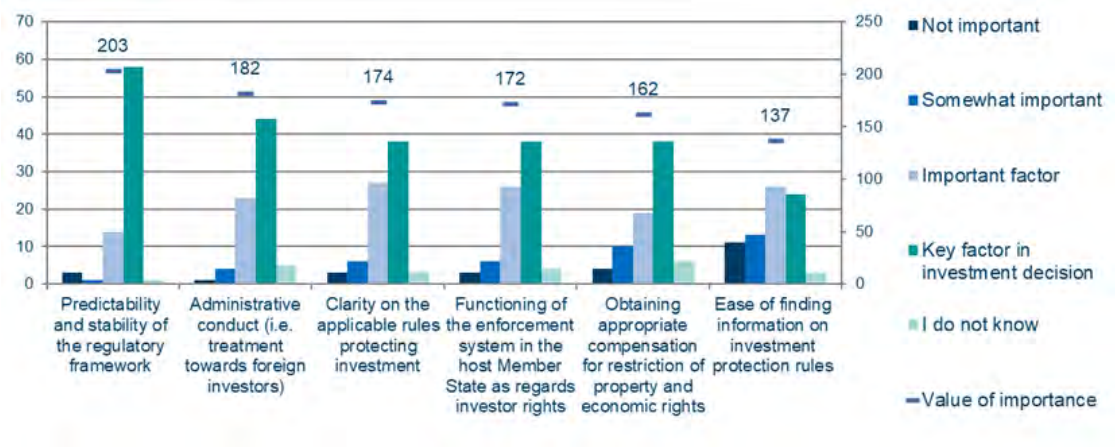
Figure 3 Main investment protection factors for adverse investment decisions



Source: Ecorys, EU Investor Survey Note: n=44; Selection of multiple factors possible.

When the answers in relation to six investment protection and enforcement factors are weighted (Figure 4), a similar picture emerges except that the issue of compensation increases in importance. Overall, respondents rated all factors as at least somewhat important with only on average 5% of respondents choosing the answer "not important".

Figure 4 Importance of investment protection and enforcement factors



Source: Ecorys, EU Investor Survey

Note: n=77; The value of importance was calculated by assigning values to response categories and multiplying it with the amount of responses, e.g. the response "Not important" has the value 0, while the response "Key factor in investment decision" has the value of 3.

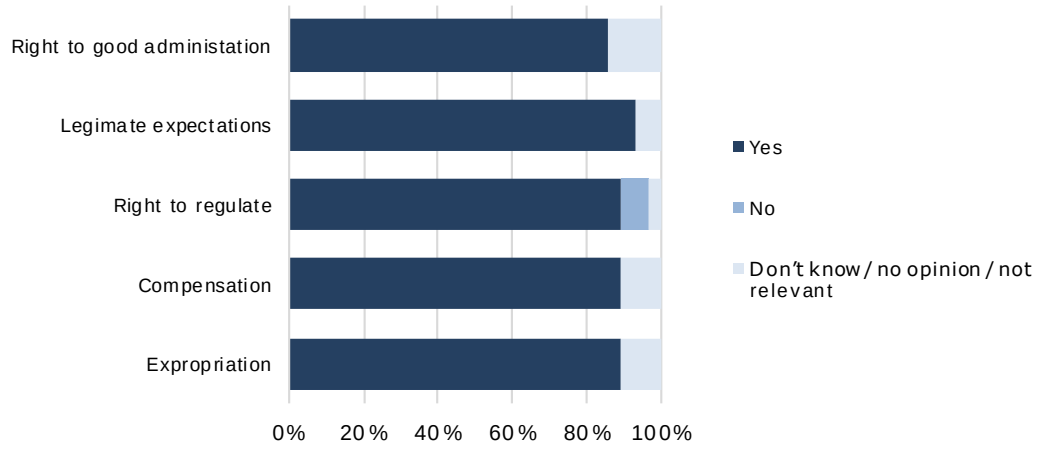
Below, we provide an analysis of each driver in further detail.

Insufficient clarity in scope of investment protection rights under EU law

The first driver is that there is insufficient clarity in EU law on the scope of investment protection rights. The limited literature sources on this driver show that there is lack of clarity in the scope of investment protection rights under the EU law. "No clear body of norms protecting cross-border investments" exists for intra EU investments and hence EU law does not provide for a clear scope of investment protection. In addition, the analysis highlights that investment protection rights granted under EU law are scattered and legal clarity needs to be improved to provide EU investors with substantive protection and to develop a level playing field between investors from different

Member States as well as between EU and foreign investors[17]. Moreover, the minimum levels of protection that individuals need to have to plan their investments in a stable and predictable regulatory framework, the circumstances under which legitimate expectations arise and qualify for protection, as well as the need to the right to good administration implies for an investor investing in another Member State. Of particular interest is the summary of the investors' responses (Figure 5), which shows that more than 80% of them agree with the need of further specifying these substantive rights.

Figure 5 **OPC Results, Summary of Investors' responses to the question on the need to specify** selected substantive rights



Source: OPC Results, DG FISMA

The study team's survey indicates that while insufficient clarity in scope of investment protection rights under EU law is a barrier, it was flagged more frequently by large companies compared to SMEs.

Uneven or inadequate investment protection rules in different Member States

The second driver is that the investment protection rules in different Member States can be uneven or inadequate. The following issues contribute to the uneven or inadequate investment protection rules:

(a) Differences in compensation for restrictions of property and economic rights;

(b) Insufficient safeguards related to administrative conduct;

(c) Insufficient safeguards to ensure the predictability and stability of the regulatory framework and lack of clarity on legitimate expectations.

(a) Differences in compensation for restrictions of property and economic rights

According to the European Commission, every investment protection regime should take into account the fundamental right to property, covering the right to own, use and dispose of possessions lawfully acquired. The right to property involves a right to compensation if the

[17] http://arbitrationblog.kluwerarbitration.com/2020/11/07/the-future-of-intra-eu-investment-protection-an-urgent-call-for-a-new-roof-and-a-level-playing-field/

property is expropriated by way of direct expropriation or measures having equivalent effects, even if the government pursues legitimate public interests.[18] [19]

When exercising their fundamental Single Market freedoms, investors benefit from the protection granted by:[20]

i. Rules in the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU; collectively EU Treaties, or just Treaties), such as free movement of capital or the freedom of establishment;

ii. The Charter of Fundamental Rights of the European Union ("Charter"), which includes the right to property;

iii. General principles of Union law (such as proportionality and legal certainty);

iv. Extensive EU legislation, which may be sector-specific, covering areas such as financial services, transport, energy, telecommunications, public procurement, professional qualifications, or horizontal, e.g. (company law, services).

The importance of adequate protection of cross-border investments has been highlighted by the authors of a legal working paper of the European Central Bank.[21] In fact, claims seeking to remedy an unlawful expropriation are the second most frequent set of claims in arbitrations relating to the banking and financial sector, after claims that the investor has not received fair and equitable treatment. "Banks or other financial institutions invoking such grounds would typically allege that the state deprived them, directly or indirectly, of their investment, involving the total or near-total deprivation of an investment without a formal transfer of title or outright seizure by the State."[22]

The scope of damages eligible for compensation can also lack clarity and may diverge across Member States. In one Member State, the scope of the compensation seems, for example, unclear in case of governmental interference with mining activities (see Box 2 below). Landowners are required to hold a licence if they want to perform certain business activities, like mining, on their land. If the land is seized by the government for public purpose, such as road construction, compensation is generally provided for the land itself, but the situation of the licence and profits foregone can be unclear. A lack of usability of the licence – although not formally expropriated – must be compensated, as it generally results in substantial deprivation of the company's property, preventing its peaceful enjoyment[23]. Also, in the case of usufruct – a right to use a certain property, like land, and to collect revenue from it – uncertainties existed with regard to its protection. When the right is cancelled by Member State authorities, they deprive the usufructuary of use of its property. This is a loss which one can expect to be compensated.[24]

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[18] The European Court of Human Rights has on several occasions ruled that rights similar to property are covered by Article 1 Protocol 1 of the European Convention of Human Rights, on the ground that the notion of "possession" has an autonomous meaning which is not limited to ownership of physical goods; hence, certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions", for the purposes of this provision (see for example judgments Handyside v UK, judgment of 7 December 1976; James v. UK of 21 February 1986 regarding a leasehold; Wittek v. Germany of 12 December 2002 regarding a transferable usufruct over a piece of land; Bruncrona v. Finland of 16 February 2005 regarding a lease).

[19] Joined Cases C-78/16 and C-79/16 Pesce a.O., ECLI:EU:C:2016:428, para. 86.

[20] Protection of intra-EU investment. European Commission. 2018.

[21] The new challenges raised by investment arbitration for the EU legal order, European Central Bank, 2019. https://www.ecb.europa.eu/pub/pdf/scplps/ecb.lwp19~e4d0a59cea.en.pdf

[22] Ibid

[23] European Court of Human Rights ("ECtHR"), *Werra Naturstein GmbH & Co KG v Germany*, No. 32377/12 ("*Werra Naturstein*"). or see Annex II – case studies (case study I).

[24] CJEU, Case C-235/17, ECLI:EU:C:2019:432 – *Commission v. Hungary* or see Annex II – case studies (case study VI).

Box 2 Case study illustrating uneven/inadequate investment protection rules in different Member States

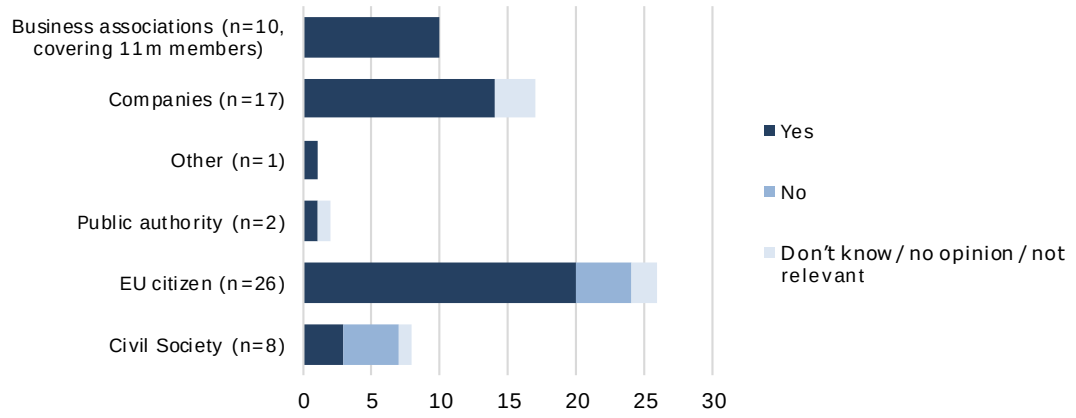
Werra Naturstein concerned the utilisation of private land for public road construction purposes. The case may serve as an illustration of latent insufficient clarity in scope of investment protection rights under EU law, more specifically in the misperceived protection of mining rights by an EU Member State which failed to compensate for interfering with it: A landowner used its property for limestone mining and landfill activities. This activity required a mining licence. The license was granted despite ongoing public road planning for a potentially interfering motorway ("Autobahn"). While the company's land was seized by the government as soon as the final location of the Autobahn was fixed, the company remained in formal possession of the mining license. Due to the routing of the new Autobahn, the license could, however, not be used anymore. The company was compensated for the expropriation of the land. According to the EU Member State's national law, no compensation was due for the futile mining license, and forgone profits from landfill. After the landowner was involved in over a decade of litigation, in 2017, the European Court of Human Rights ruled that not compensating for the unusable mining license amounted to breach of the European Convention of Human Rights' Protocol No. 1. Article 1 of the Protocol entitles everyone to a peaceful enjoyment of its property. Deprivation of someone's property by government must be compensated.[25]

Replying to the Commission's open public consultation (OPC) on a Prospective Framework on Intra-EU Investment Protection, a business representative organisation wrote: "*Even though the principle of what constitutes a measure of investment expropriation has already been stated by the CJEU or by the legislation of numerous Member States, there are still significant discrepancies between Member States".* Moreover, business representatives feel that EU rules are sometimes less specific than BITs, including those concluded with third countries, allegedly giving investors from these countries an unfair advantage over intra-EU investors investing in the Single Market (since BITs remain in force for relations with third countries). According to the OPC results, most respondents are in favour of further defining what constitutes expropriation. Investors note the lack of uniform interpretation across Member States and ask for directly applicable EU rules. In particular, more than 80% of business associations and companies believe that it would be useful to further specify which Member State measures can constitute expropriation of an investment as well as the rights investors enjoy in this case, while this is not necessarily seen as a problem by civil society respondents[26], with less than 40% of them agreeing with these statements. The results for the questions that relate to these substantive rights are presented in detail in the following figures.

[25] European Convention of Human Rights' Protocol No. 1. Article 1

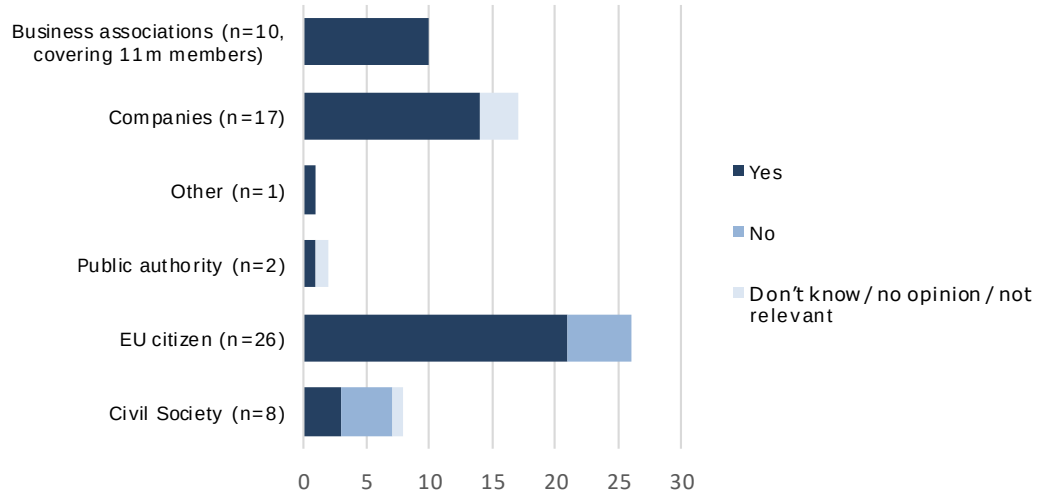
[26] Civil society refers to all forms of social action carried out by individuals or groups who are neither connected to, nor managed by, the State. A civil society organisation is an organisational structure whose members serve the general interest through a democratic process, and which plays the role of mediator between public authorities and citizens. Examples of such organisations include: a) social partners (trades unions & employers' groups); b) non-governmental organisations (e.g. for environmental & consumer protection); c) grassroots organisations (e.g. youth & family groupings). More info available at: https://eur-lex.europa.eu/summary/glossary/civil_society_organisation.html

Figure 6 **OPC Results on the question "Do you think it would be useful to further specify what Member State measure can constitute investment expropriation?"**



Source: OPC Results, DG FISMA

Figure 7 OPC Results on the question "Do you think it would be useful to further specify the rights investors enjoy in case of investment expropriation (e.g. compensation)?"



Source: OPC Results, DG FISMA

While the interviews highlighted that the Charter provides protection in case of all forms of expropriation of property by the State, establishing the extent to which indirect forms of expropriation are covered, is burdened with uncertainties, e.g. situations where the investor retains title to an investment, but restrictions are placed on its ability to enjoy the economic benefits. Given the uncertainties around indirect forms of expropriation at EU level, the protection rules at national level may diverge and lead to inequitable treatment. This could be a barrier to ensuring that the investor has a right to compensation.

In addition, the interviews revealed that it is not always clear when an investment implies the right to property under the Charter. There are indeed differences on how the property titles are granted and the interpretation with regards to the rights varies depending on who is in power. More specifically, there are significant differences in the interpretations from one Member State to the other with regards to what is covered by the protection of property and in particular of the word "possessions" within the meaning of Article 17 of the Charter of Fundamental Rights. Moreover, the rules determining the amount of compensation, the methodologies for calculating it and the related procedures vary from on Member State to another. In addition, there are

differences with regard to the definition of eligible damages for compensation. The same circumstances and consequent losses can lead to a right to compensation in one Member State but not in another.

Furthermore, it was the perception of some interviewees that compensation decisions are increasingly politically driven rather than based on the facts of the case.

(b) Insufficient safeguards related to administrative conduct

Uneven or inadequate investment protection rules are also reflected in the fact that safeguards related to administrative conduct are insufficient. The European Commissions' Single Market Scoreboard has identified unnecessary administrative burdens as one of the obstacles to be tackled in order to improve investment performance in the EU.[27] Additionally, the EU is seeking to reduce delays in obtaining government permits and approvals in order to facilitate investment and encourage the setting up of a more transparent, efficient and predictable business climate for investors.[28]

According to a European Central Bank legal working paper, almost all investment protection treaties guarantee full protection and security for cross-border investments as well as Fair and Equitable Treatment (FET). The FET commonly ensures protection for foreign investors against arbitrary and discriminatory treatment as well as transparency of state conduct while enacting measures affecting protected investments. At the same time, failure to afford FET is the most frequently invoked claim in investment arbitrations relating to the banking and financial sector, whereby the authors of the ECB working paper were predominantly looking at cases involving third countries, not at intra-EU cases. Nonetheless, when arbitration claims relating to financial investment arise, the lack of FET seems to be the biggest challenge for investors, including unreasonable treatment, denial of justice, coercion, or even harassment. [29]

Furthermore, administrative authorities sometimes have competences as well as obligations vis-a-vis the investor from one Member State, naturally varying from Member State to Member State, which may conflict with the investor's rights under EU law. For example, in some Member States authorities may have no obligation under national law to justify their decisions in writing (such as closing a business on the ground that illegal activities are suspicious), which falls short of a Member State's obligations under the Charter, violating the fundamental right of the concerned person to ascertain the reasons of the decision taken and to defend their rights in the best conditions.[30]

Looking in general at the obstacles to cross-border activity in the EU, a national association of chambers of industry and commerce has highlighted the excessive bureaucracy, the inefficiency of procedures and the lack of digitalisation of procedures as main challenges. [31]

Similarly, according to a survey conducted by the special task force (of Member States, Commission and the EIB) on investment in the EU[32], administrative capacity was pointed out by Member States as a specific issue when talking about the main cross-cutting barriers to increased

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27 https://ec.europa.eu/internal_market/scoreboard/integration_market_openness/fdi/index_en.htm#priorities

28 EC. Investment Facilitation. https://ec.europa.eu/trade/policy/accessing-markets/investment/

29 The new challenges raised by investment arbitration for the EU legal order, European Central Bank, 2019, https://www.ecb.europa.eu/pub/pdf/scplps/ecb.lwp19~e4d0a59cea.en.pdf.

30 CJEU. Case C-230/18, ECLI:EU:C:2019:383 – PI v. Landespolizeidirektion Tirol ("PI") or see Annex II – case studies (case study IV)..

31 Survey on Single Market Obstacles, DIHK 2019.

32 This taskforce was created upon request of the ECOFIN Council to the European Commission and the EIB, in coordination with Member States. Its overall objectives were to: a) provide an overview of the main investment trends and needs; b) analyse the main barriers and bottlenecks to investment; c) propose practical solutions to overcome those barriers and bottlenecks; d) identify strategic investments with EU added value that could be undertaken in the short run; and e) make recommendations for developing a credible and transparent pipeline for the medium to long term.

investments within the EU. In particular, the administrative burden related to investments is identified as a major bottleneck during the investment process and has been defined as the main barrier to investment implementation in a couple of cases by the special task force. Furthermore, according to the same study, unnecessary administrative burdens can be a significant cost for potential investors, especially for SMEs, and can lead to reduced investments and substitution towards the informal sector where rules can be more easily circumvented. [33]

UNCTAD in one of its factsheets identified administrative procedures and difficulties relating to these as the main measures challenged in intra-EU investor-state arbitration cases, as well.[34]

According to the respondents to the study's survey, administrative conduct and the treatment of foreign investors is the second most important factor that affects investment decisions. This was perceived by 57% of the respondents as a key factor (Figure 4). Furthermore, the study survey reiterates that there is a lack of confidence in relation to the conduct of public administrations being transparent, predictable and duly motivated (i.e. a proper motivation of administrative decisions was provided), with 43 respondents (55%) of the respondents disagreeing with this statement and only 20 respondents (26%) agreeing with it.

Interviewees perceived that some administrations are politically biased and also highlighted the time needed to approve investments, that sometimes those working in administrations do not have the knowledge they need for the position, or are not client-oriented, resulting in delays in the procedures. Therefore, as presented in this section, there are several indications that indeed the safeguards related to administrative conduct are ineffective or insufficient.

(c) Ineffective safeguards to ensure the predictability and stability of the regulatory framework and lack of clarity on legitimate expectations

Finally, uneven or inadequate investment protection rules are also reflected in the fact that safeguards ensuring the predictability and stability of the regulatory framework are ineffective and the protection of legitimate expectations is unclear. In its response to the Open Public Consultation on this issue organised by the Commission, a national Association of Insurers in a Western European Member State highlighted this: "A stable and favourable investment environment and adequate protection of investments are crucial for more cross-border investments." Indeed, legal certainty and legitimate expectations are basic principles of EU law.[35] "However, it is only in certain circumstances that EU investors can, on the basis of the protection of their legitimate expectations, challenge the amendment of existing rules or the adoption of new rules falling within the scope of EU law." [36].

When identifying the obstacles to cross-border activity in several EU Member States, the Association of German Chambers of Industry and Commerce (DIHK) highlighted the inconsistent implementation of EU laws, leading to legal uncertainty and distortions of competition as being a challenge. Indeed, the transposition of EU laws into national laws seems to be an issue, emphasised by the inconsistent interpretation and lack of knowledge of EU laws in national jurisdictions.[37] An EIB study on Investment Barriers cites that regulatory uncertainty causes project revenue risk, which reduces project viability, investment, private sector interest and innovation.[38]

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[33] https://www.eib.org/attachments/efsi_special_task_force_report_on_investment_in_the_eu_en.pdf
[34] https://unctad.org/system/files/official-document/diaepcb2018d7_en.pdf
[35] https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52018DC0547
[36] Protection of intra-EU investment, European Commission, 2018 at III.3
[37] Survey on Single Market Obstacles, DIHK 2019.
[38] EIB Study "Breaking Down Investment Barriers at Ground level https://www.eib.org/attachments/thematic/breaking_down_investment_barriers_en.pdf

Lack of stability and a well-designed regulatory framework are also identified as major barriers to investments by the special task force on investment in the EU. The survey of the task force highlights the regulatory constraints, such as the non-transposition of EU directives into national law and unnecessary regulatory burdens, hamper investments in the EU.[39] Similarly, UNCTAD identified regulatory instability as well as regulatory decisions as major issues challenged in intra-EU investor-state arbitration cases.[40]

Most interviewees stressed that the predictability of regulatory frameworks can be considered as one of the main drivers for cross-border investment. According to some[41], the predictability and the stability of the regulatory framework are particularly important for long-term investments as these are usually capital intensive and need to be planned, financed and operated over long periods. One area creating uncertainty according to some interviewees is the absence of a codified legal framework for investment protection is an issue as it causes uncertainty among investors.

An interviewee for whom the predictability is by far the biggest problem also believes that decisions are currently too often politically driven and biased against large companies, especially in Eastern European countries, with a lack of consultation or time for enough consultation or time to adapt, and that the European Commission is too slow in calling Member States to account.

Difficulties in finding information on investment protection rules

The third driver is that finding information on investment protection rules can be challenging. Further to that, according to the European Commission, businesses express difficulties about obtaining information on market opportunities, potential business partners as well as regulatory requirements.[42] This assessment is also proved by the fact that the EU is seeking to make information on investment rules public and easily accessible in order to facilitate investment and encourage the setting up of a more transparent, efficient and predictable business climate for investors in its external trade policy, vis a vis third countries.[43] Additional literature in this area is limited. From the available literature, the inaccessibility of information on rules and requirements has been put forward by the European Chambers of Commerce as one of the main barriers to the single market (69% of their members consider it is an obstacle). [44]

In addition, according to the analysis of Business Europe, "Only one in four smaller businesses (SMEs) currently trades within the EU; many more would be inclined to if there were fewer administrative and legal barriers." Business Europe, the European Banking Federation and Eurocommerce report the same issues.[45]

The study interviews highlighted that transparency and finding information are a clear issue; some markets are very difficult to assess from another country, as there is not enough information on the legal frameworks to be found. The lack of clarity when it comes to exit strategies seems to be a main challenge for example.

Moreover, the interviewees stressed that there should be more transparency and that awareness should be built around existing investor initiatives. The study survey also examined the "ease of finding information on EU investment protection rules" as a factor affecting investment decisions, where only 14% of the respondents see it as not important compared to 82% who see it as "somewhat important", "important", or a "key factor" in the investment decision.

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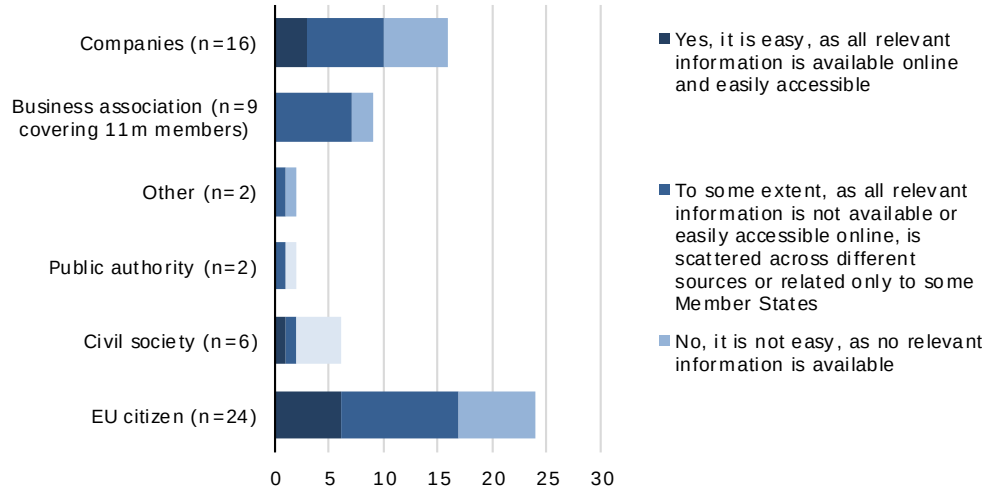
[39] https://www.eib.org/attachments/efsi_special_task_force_report_on_investment_in_the_eu_en.pdf
[40] https://unctad.org/system/files/official-document/diaepcb2018d7_en.pdf
[41] This is also substantiated in the literature quoted in this report.
[42] Identifying and addressing barriers to the Single Market, European Commission, 2020.
[43] EC, Investment Facilitation, https://ec.europa.eu/trade/policy/accessing-markets/investment/
[44] Eurochambres, 'Business survey – EU Internal Market: Barriers and Solutions', 2019
[45] Eurochambers position on Investment protection in the Single Market after the termination of Intra-EU Bilateral Investment treaties, Eurochambers 2020.

Furthermore, this is confirmed by the results of the Open Public Consultation conducted by the European Commission on "Cross-border investment within the EU – clarifying and supplementing EU rules". The responses to the relevant questions, show that less than 20% of companies and none of business associations find it easy to obtain information on the rules, procedures and data relevant for cross-border investment in the EU, (more details in the following figure) or to identify potential projects, partners and financing sources once they are interested in cross-border investment in the EU. The majority of stakeholders replied that it is easy to some extent to obtain information on the rules, procedures, as they are not available or easily accessible online but scattered across different sources. Furthermore, the majority of stakeholders believe that investment promotion measures could help identify potential projects, partners and financing sources.

Figure 8 OPC Results on the question **"Do you think it is easy to obtain information on the rules, procedures and data relevant for cross-border investment in the EU?"**



Source: OPC Results, DG FISMA

This assessment of the study was also confirmed by a survey to chambers of industry and commerce and chambers of foreign trade in one of the Member States, which has highlighted the lack of information about the rules and requirements as a major challenge to intra-EU investment.[46]

Key conclusions

Uneven or inadequate investment protection rules in different Member States:

- A body of literature and sources validate that there are differences in compensation for restrictions of property and economic rights in the EU. The problem is likely to be pronounced and more in relation to banking and financial sector, primarily due to the volume of investment.
- A number of sources, studies and study team's analysis indicate that the safeguards related to administrative conduct are ineffective. Particularly insufficient safeguards for application of good governance on the ground impact investment in the EU – this specifically relates to implementation of good administration and governance.

[46] Survey on Single Market Obstacles, DIHK 2019.

- Multiple sources of research highlight safeguards to ensure the predictability and stability of the regulatory framework and lack of clarity on legitimate expectations as a significant issue.

Difficulties in finding information on investment protection rules. While evidence points towards the difficulties in relation to finding information based on literature review, the scale of the problem is not conclusive. However, the study survey, interviews and the results of the OPC show that difficulties in finding information is a clear issue at the moment and a factor affecting investment decisions.

2.3.2 The problem

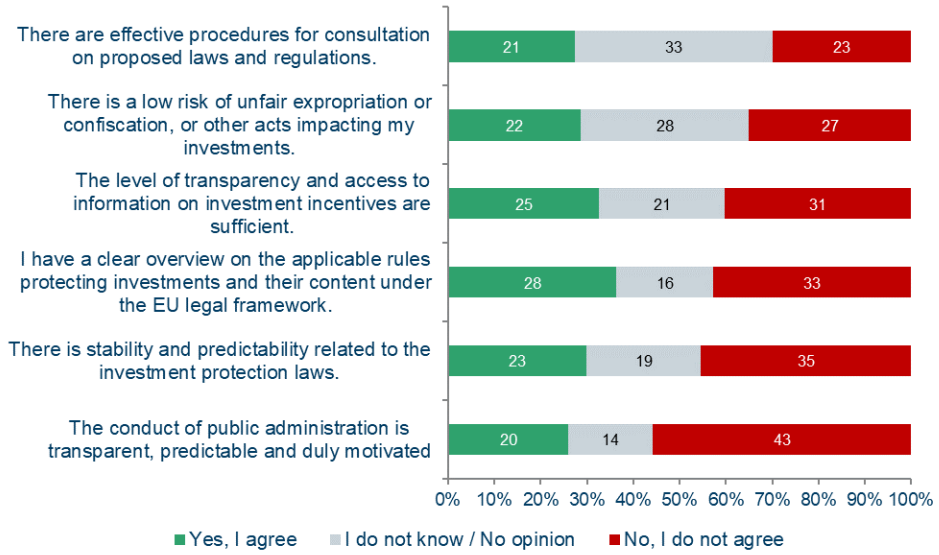
As set out above, the listed drivers contribute to the specific problem: insufficient investment protection and lack of investor confidence in rules protecting investment. There is a growing body of academic literature on the topic (e.g. Bloom, 2017 and Amore and Minichilli, 2018), several institutions including the World Bank, IMF and European Commission, have recently made explicit reference to "uncertainty" and "lack of confidence" as a driver for investments.

Despite this development, the empirical evidence regarding the effect of uncertainty on firms' investment activities remains limited, specifically in relation to investment protection and enforcement. To overcome these shortcomings, the EIB in 2019 carried out a survey and multi-faceted analysis which suggests that an increase in uncertainty has a major negative effect on firm investment decisions. The study carried out across EU suggests that, "This effect tends to be stronger when the shock is negative than when it is positive. The results also tend to be stronger the more dispersed are the assessments of the other firms[47]." In addition, weaker firms respond more strongly to negative shocks.

Focusing on specific target groups, several contributing factors are at play. For example, the results of the survey for this study demonstrate a lack of confidence in the rules. The number disagreeing with the hypothesis about the sufficiency of the current situation outnumbers those agreeing in each case.

[47] https://www.eib.org/attachments/efs/economic_investment_report_2019_en.pdf

Figure 9 Confidence in investment protection factors



Source: Ecorys, EU Investor Survey Note: n=77; Respondents were asked to either agree or disagree with each of these statements. [48]

However, based on the results of the survey for this study, there is a difference between the opinion of large companies and SMEs regarding confidence in some investment protection factors[49]:

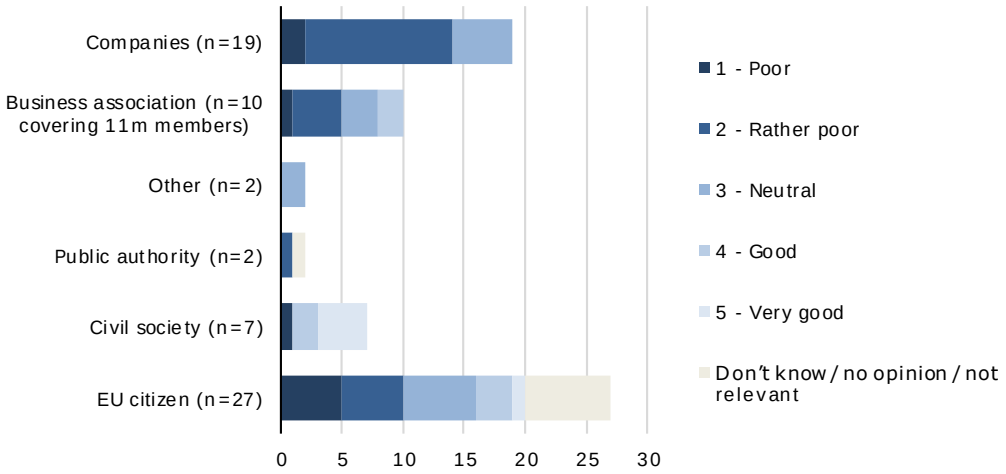
- Large companies are far more likely than SMEs to feel they have a clear overview of the applicable rules protecting their investments under the EU legal framework.
- A majority of the large companies surveyed stated that they do not trust the stability and predictability in investment laws, while for SMEs the result is less clear because almost one third does not have a view.
- Large companies are slightly more likely to have faith in the conduct of public administrations;
- Large companies disagree more than the SMEs about the sufficiency of transparency and access to information on investment incentives (e.g. clear laws and regulations, information on funding opportunities);
- The majority of large companies disagree that there is a low risk of unfair expropriation or confiscation or other acts impacting their investments, while the majority of SMEs do not have an opinion on this.

Moreover, the results of the Open Public Consultation highlight the insufficient investment protection. In particular, only civil society and a small percentage of EU citizens find the investment protection framework very good, while companies and business associations find it poor, rather poor, are neutral or have no opinion. Similarly, more than 80% of the last three stakeholder categories find useful the regulation by EU legislation of more aspects of investment protection for all Member States.

[48] In total 77 EU companies and investors provided responses to the survey (comprising of 45% of large companies, 46% SMEs and 9% individual investors)

[49] It should be noted that many of the differences are small and the results of the survey are indicative as the overall numbers are small, and half the respondents come from three countries: Austria, Germany and the Netherlands.

Figure 10 **OPC Results on the question "What is your overall assessment of the investment protection framework provided by EU law when investing in another Member State?"**



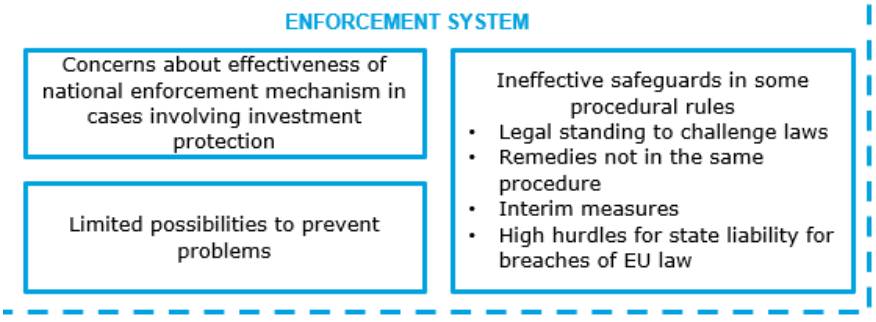
Source: OPC Results, DG FISMA

2.4 Problem definition - Specific Problem B – Difficulties in enforcing investment protection rules and obtaining effective remedies for cross-border investments

2.4.1 Drivers

This section addresses the drivers deriving from the Specific Problem B - the difficulties in enforcing investment protection rules and obtaining effective remedies for cross-border investments. Identifying the drivers that are obstacles to cross-border investments within the EU is necessary for defining the broader problem. The drivers are all to be seen as interdependent issues, but all need to be considered individually.

Figure 11 Drivers of problem B – Difficulties in enforcing investment protection rules and obtaining effective remedies for cross-border investments



Source: Ecorys and Deloitte

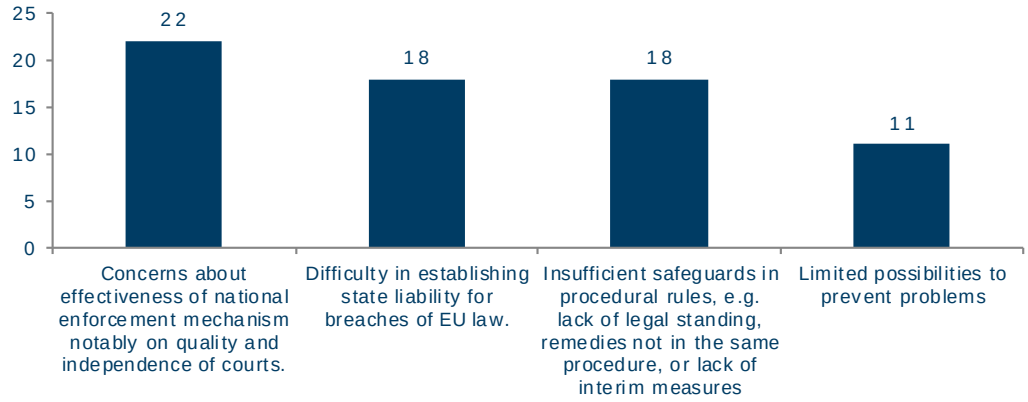
As outlined in the figure above, the following drivers are identified:

- Limited possibilities to prevent problems;
- Concerns about effectiveness of national enforcement mechanisms in cases involving investment protection;
- Ineffective safeguards in some procedural rules:
    - Legal standing to challenge laws
    - Remedies not in the same procedure

- Interim measures
- High hurdles for state liability for breaches of EU law

The figure below presents the study survey responses on the hierarchy of enforcement issues, as factors for adverse investment decisions. Among these, the concerns about effectiveness of national enforcement mechanisms stood out in the study survey as the overriding factor, followed by the difficulty in establishing state liability for breaches of EU law as well as insufficient safeguards in procedural rules.

Figure 12 Main investment enforcement factors for adverse investment decisions



Source: Ecorys, EU Investor Survey Note: n=44; Selection of multiple factors possible

The sections below provide an analysis of each of the above identified drivers.

Limited possibilities to prevent problems

The first driver is the limited possibilities to prevent problems. As per interviews and background papers, there are limited possibilities to prevent or resolve problems at an early stage and amicably; as a result, in some cases investors have no other option than to bring the matter before a court, which in turn may lead to dispute escalation. Judicial disputes generate costs, can damage the relationship with public authorities and can lead to the eventual withdrawal of investments[50].

Possibilities to prevent or resolve problems at an early stage refer to "Alternative Dispute Resolution (ADR) Methods" and comprise three different of instruments: 1) tools to avoid conflict through preventive policies and early resolution, e.g. an Ombudsman; 2) traditional ADR mechanisms, such as mediation to solve the conflict and 3) tools based on cooperation, including advisory centres to provide expertise about investment strategies and methods to host states. [51]

Although particularly provisions on mediation mechanisms are contained and elaborated in recent EU international agreements with third countries[52], both investor and government are in practice very reluctant to use mediation mechanisms to settle disputes.[53] Often the bureaucratic burden can lead to a complicated and lengthy mediation procedure. For investors, the choice of mediation is often overshadowed by the financial motivation of legal councils and their preference for ISDS.

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[50] Request for Services FISMA/2020/021B4/ST/SC for impact assessment study.

[51] Levashova, Y. (2020), Prevention on ISDS Disputes: From Early Resolution to Limited Access, *Handbook of International Investment Law and Policy*

[52] Hindelang, S. and Sassenrath, C-P. (2015), The investment chapters of the EU's international trade and investment agreements in a comparative perspective, European Parliament, 26-31; Hindelang, S. and Hagemeyer, T. M. (2017), In pursuit of an international investment court. Recently negotiated investment chapters in EU comprehensive free trade agreements in comparative perspective, 11-12, 32-47.

[53] Levashova, Y. (2020), Prevention on ISDS Disputes: From Early Resolution to Limited Access, *Handbook of International Investment Law and Policy*

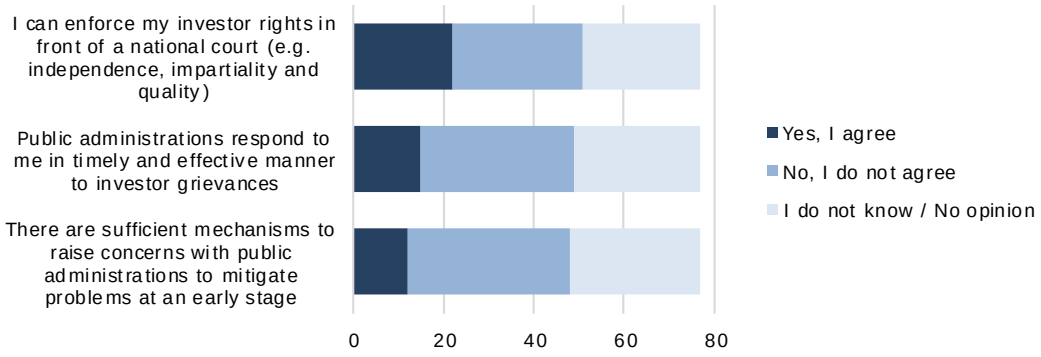
Furthermore, the unwillingness of investors to recourse to mediation can be explained by their fear of being perceived incompetent because of their inability to assess the strength of the case.[54]

While some initiatives to create advisory centres already exist, they are still in the inception stage, and are tailored to smaller regions, as is the case in the South Eastern European economies.[55] Additionally, Systemic Investment Response Mechanism (SIRM) have been designed from practices around the world to "to enable governments to identify, track, and resolve, in a timely manner, investor-state grievances" before they escalate to disputes.[56]

As far as international law and BITs alone are concerned, it is important to note that ISDS by the way of arbitration is very infrequent with only a few cases each year in certain countries and sectors. According to the UNCTAD, which has recorded the global cases of ISDS worldwide since 1987, intra-EU cases accounted for 20% of ISDS cases in 2017. The cumulative cases of intra-EU ISDS cases initiated amounted to 146 between 2008 and 2018. About half of all intra-EU disputes were directed against Spain, the Czech Republic and Poland, while most intra-EU cases were brought by investors from Germany, Luxembourg, the Netherlands, and the United Kingdom.

The survey conducted as part of this study indicates that 46% of respondents (35) do not think that there are sufficient mechanisms for raising concerns with public administrations, while only 16% think there are. Moreover, 45% do not believe that public administrations respond in a timely and effective manner to investor grievances.

Figure 13 Confidence in enforcement factors



Source: Ecorys, EU Investor Survey Note: n=77; Respondents were asked to either agree or disagree with each of these statements. [57]

Finally, it is worth mentioning that, even though the interviewees recognise the limited possibilities to prevent problems as a driver, less weight was given to this compared to other drivers. On this issue, a national chamber of commerce mentioned that a predictable framework is certainly desirable. However, at the same time, it should be recognised that not all problems can always be predicted or prevented. The chamber's network usually identifies and shares the problems in order to keep the members informed.

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[54] Levashova, Y. (2020), Prevention on ISDS Disputes: From Early Resolution to Limited Access, *Handbook of International Investment Law and Policy*, p.9; Hindelang, S. (2014), Study on Investor-State Dispute Settlement ('ISDS') and Alternatives of Dispute Resolution in International Investment Law, in: European Parliament (ed.), Investor-State Dispute Settlement ('ISDS') Provisions in the EU's International Investment Agreements, 81-82 et seqq.; Hindelang, S. and Hagemeyer, T. M. (2017), In pursuit of an international investment court. Recently negotiated investment chapters in EU comprehensive free trade agreements in comparative perspective, 11-12, 32-47.

[55] Levashova, Y. (2020), Prevention on ISDS Disputes: From Early Resolution to Limited Access, *Handbook of International Investment Law and Policy*

[56] http://documents1.worldbank.org/curated/en/528401576141837231/pdf/Political-Risk-and-Policy-Responses-Summary-of-Research-Findings-and-Policy-Implications.pdf

[57] In total 77 EU companies and investors provided responses to the survey (comprising of 45% of large companies, 46% SMEs and 9% individual investors).

Concerns about effectiveness of national enforcement mechanism in cases involving investment protection

Another driver behind the problem of investors having difficulties in enforcing investment protection rules is linked to concerns regarding the effectiveness of national enforcement mechanisms. Indeed, investors have low confidence in the rules protecting cross-border investments, but also a lack of trust in their effective enforcement. According to the authors of the EIB study on Investment Barriers, the properties of the legal system, (i.e. the protection of property rights in legislation and in its enforcement, the prevalence of crime, and the efficiency of the judicial system) are identified as a category of barriers to investment.[58] Furthermore, according to AFEP, several factors, such as the lack of expertise in investment protection cases in the national courts of many EU Member States, judges' lack of sufficient knowledge on EU and investment law as well as capacity to work on such cases reduce the confidence in effective enforcement of investor rights.[59]

Interviewees also indicated that investors lack opportunities to invoke their rights effectively before national courts due to the way national courts apply certain laws. This mostly refers to the varying interpretations of substantive rules by the courts, once access is established. Among Member States, the effectiveness of enforcement and the quality of interpretation of EU laws vary highly according to interviewees, who cite problems of political interference with the judiciary and not being prepared to engage in corruption.

Additional analysis of the problem suggests that not every Member State has adequate judicial review processes. In some cases, there is insufficient judicial reviewability of administrative decisions from another Member State. In some instances, qualifications obtained in other Member States, such as professional attributes, were not enough considered and taken into account (see Box 3 below). Cases indicate that there is a need for national authorities to properly carry out these considerations to ensure an effective protection of the fundamental rights of the Charter.[60]

Box 3 Case study illustrating concerns about effectiveness of national enforcement mechanisms in cases involving investment protection

The Josep Peñarroja Fa case may serve as an illustration of the concerns about effectiveness of national enforcement mechanisms also relevant in cases involving investment protection, more specifically the insufficient judicial reviewability of non-reasoned administrative decisions in an EU Member State. Mr. Peñarroja Fa is a publicly accredited expert translator in Spain. He translates French into Spanish and Spanish into French. He applied for enrolment in the register of court expert translators in France and was rejected. No reason was given, as there was no such requirement in national law. The competent national court, when reviewing the rejection, did not address its substance, such as Mr. Peñarroja Fa's professional qualifications as a translator. The CJEU found such review ineffective and thus incompatible with EU law, more specifically with the freedom to provide services and the right to an effective remedy and to a fair trial. All administrative decisions must be open to judicial scrutiny under EU law. In order to ensure that such court review is effective, Mr. Peñarroja Fa should have obtained the reasons for the decision taken to defend himself under the best possible conditions. While this case at hand relates to the provision of cross-border services, for the purposes of illustrating the driver at hand, it does not make a difference as to whether the Spanish entrepreneur is established in France, or whether provides its services cross-border from Spain, as the decision of the domestic authority and the response of the CJEU would arguably be the same.[61]

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[58] EIB Study "Breaking Down Investment Barriers at Ground level https://www.eib.org/attachments/thematic/breaking_down_investment_barriers_en.pdf

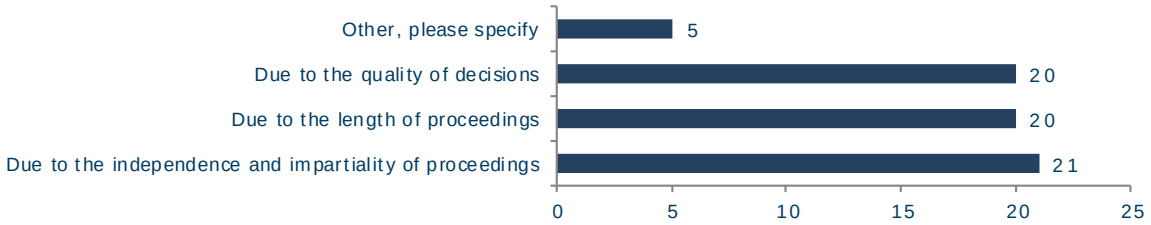
[59] https://afep.com/en/publications-en/pour-une-meilleure-protection-des-investissements-directs-en-europe/

[60] CJEU, Joined Cases C-372/09 and C-373/09, ECLI:EU:C:2011:156 – Josep Peñarroja Fa or see Annex II – case studies (case study V).

[61] CJEU. Joined Cases C-372/09 and C-373/09, ECLI:EU:C:2011:156 – *Josep Peñarroja Fa*. or see Annex II – case studies (case study V).

According to the study survey, most large companies surveyed believe that they cannot enforce their rights properly in Member States in which they invest. At the same time, most large companies also believe that there are insufficient mechanisms for raising concerns with public administration to mitigate problems at an early stage. Respondents of the study survey indicated a lack of confidence in general about being able to enforce their investor rights before a national court, with 38% (29) lacking this confidence and only 29% (22) feeling confident that they can obtain redress from the courts. The following figure shows that perceived lack of independence and impartiality, length of proceeding as well as low quality of decisions are factors behind this lack of confidence. Companies and investors attribute this lack of confidence to all three reasons with many selecting all three of them.

Figure 14 Reasons for lack of confidence in national courts



Source: Ecorys, EU Investor Survey, Note: n=30; multiple selection possible

The interviews indicate that the willingness to invest in other Member States is hindered by a lack of effectiveness in enforcement. Interviews further highlight that in some Member States national courts lack capacity and expertise on EU investment law, there is a lack of guarantee on the quality of judgments, especially with regard to independence and length of the procedure. In addition, the rights of the investor technically exist, but these are not efficiently enforced within the Member States. This leads to long procedures and losses on their investment for the businesses. Furthermore, it was pointed out during the interviews that preliminary rulings before the CJEU take too long while access to annulment procedures before the CJEU is difficult.

The concerns about effectiveness of national enforcement mechanism in cases involving investment protection are also highlighted in the Open Public Consultation. In particular, most stakeholders (more than 90% of companies and more than 80% of business associations) think that better enforcement by the authorities and courts of the Member State where the investment is located would not help or would only partially address enforcement concerns. At the same time, more than 90% of companies, and 100% of business associations believe that improving enforcement mechanisms at EU level would be needed. It is particularly interesting to note that around 60% of the civil society respondents[62] seem to have a completely different view and disagree with the last statement.

Ineffective safeguards in some procedural rules

The last driver of this specific problem is the ineffective safeguards in some procedural rules. These ineffective safeguards include, among others:

(a) Legal standing to challenge laws;

(b) Remedies not in the same procedure;

[62] Civil society refers to all forms of social action carried out by individuals or groups who are neither connected to, nor managed by, the State. A civil society organisation is an organisational structure whose members serve the general interest through a democratic process, and which plays the role of mediator between public authorities and citizens. Examples of such organisations include: a) social partners (trades unions & employers' groups); b) non-governmental organisations (e.g. for environmental & consumer protection); c) grassroots organisations (e.g. youth & family groupings). More info available at: https://eur-lex.europa.eu/summary/glossary/civil_society_organisation.html

(c) Interim measures;

(d) High hurdles for state liability for breaches of EU law.

The first ineffective safeguard is the lack of legal standing to challenge laws directly in certain situations. This absence of legal standing to bring investment protection claims and court action directly against certain types of national measures creates concerns for cross-border investors about the practical effectiveness of some procedural rules. This may also complicate or impede access to remedies, as described in the following sub-section.

The second ineffective safeguard is the fact that remedies need to be invoked in a different procedure. Based on the feedback received in the Open Public Consultation, the remedies for breach of EU investment law by the State include, among others, annulment of national measures, provisional measures (interim relief), 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, and restitution (e.g. of the claimed good).

Sometimes, under the law in some Member States, a claim for compensation of expropriation has to be decided in proceedings concerning the legality of the measure first, and the amount of compensation is set in subsequent proceedings. If the investor wishes to challenge such decisions, he may have to bring separate claims in different courts. Such a two-step approach may lead to uncertainty and inefficiency in the course of judicial proceedings, for example with regard to securing sufficient compensation for expropriation of a licence.[63] See a case study in the box below.

Box 4 Case study illustrating ineffective safeguards in some procedural rules

United Video may serve as an illustration of the driver of ineffective safeguards in some procedural rules. The case relates to a patent dispute. The business defending itself against an unsuccessful claim could, according to national legislation, reclaim only 6 percent of the costs for its lawyers. However, the fair allocation of legal costs potentially occurring when investors seek to defend their investment-related rights and interests will also be determinative for their effective safeguarding and enforcement. The CJEU stated that EU law requires that the unsuccessful party infringing rights of the other party must bear 'reasonable' legal costs. This is motivated by the fact that otherwise a party could be inclined to actually infringe rights of other parties, if the infringing party had only to reimburse a small part of the reasonable lawyer's fees incurred by the injured right holder, defending its interest in court. A Member State's legislation which allows for reimbursement of merely a fraction of the real costs relating to lawyers' fees undermines a high level of protection of such rights in the internal market.[64]

Procedures to obtain remedies for undue action by public authorities do exist. These procedures clarify, for example, under what conditions remedies can be claimed for breaches of investment protection rules by public authorities and which type of remedies can be claimed (e.g. restitution, compensation). However, access to these remedies might sometimes be complicated or impeded (for example due to lack of legal standing to bring court action against certain types of national measures, as mentioned in the previous sub-section). Therefore, the issue of the practical effectiveness of some procedural rules arises.

The results of the OPC confirm this assessment on the effectiveness of remedy procedures[65]. These results, which are presented in detail in the following figures, show that among the

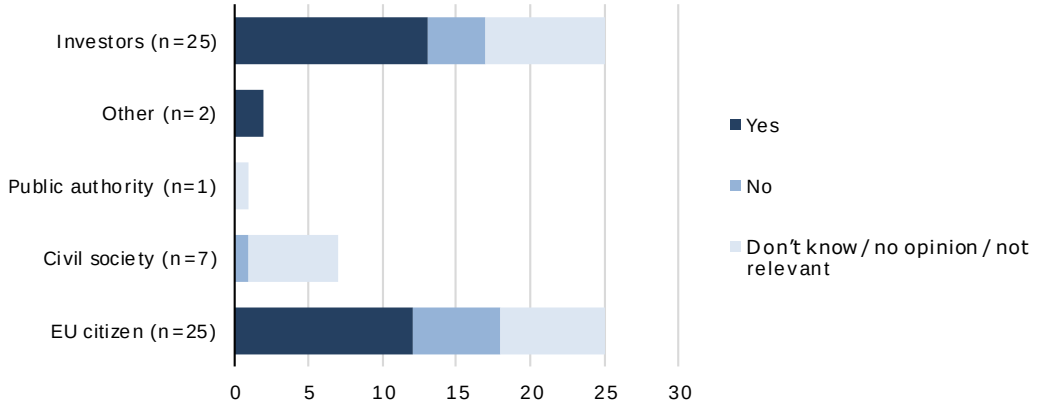
[63] European Court of Human Rights ("ECtHR"), *Werra Naturstein GmbH & Co KG v Germany*, No. 32377/12 ("*Werra Naturstein*"). or see Annex II – case studies (case study I).

[64] CJEU, C-57/15, ECLI:EU:C:2016:611 – *United Video Properties Inc. v. Telenet NV* ("*United Video*").

[65] This question refers to the remedies previously mentioned, i.e. annulment of national measures, provisional measures (interim relief), 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, and restitution.

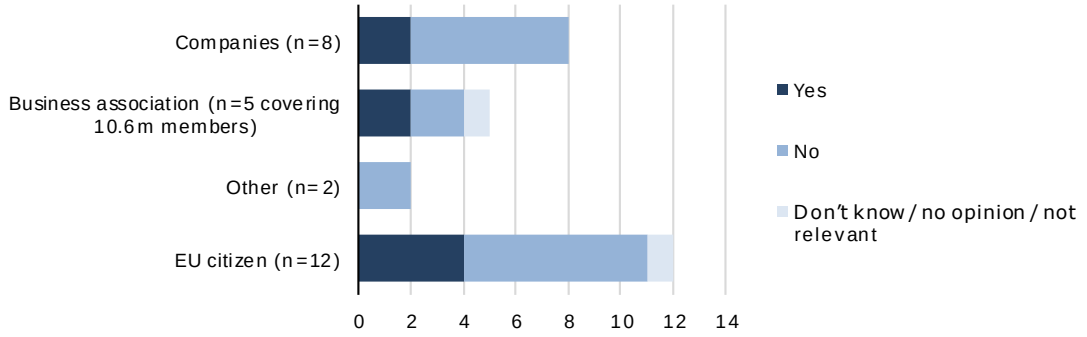
respondents only around 25% of companies, 40% of business associations and around 35% of citizens believe that the available remedies are appropriate, while the rest disagree with the statement or have no opinion.

Figure 15 **OPC Results on the question "Have you ever experienced/Do you know about a situation where you/the investor claimed one of those remedies?"**



Source: OPC Results, DG FISMA

Figure 16 **OPC Results on the question "If you ever experienced/ know about a situation where** you/the investor claimed one of those remedies, do you consider that the remedies available were **appropriate?"**



Source: OPC Results, DG FISMA

The third ineffective safeguard is linked to effectiveness of interim measures. Interim measures would allow preventing irreparable damage to investments before a final judicial decision. However, limited literature in this arena makes it complicated to fully assess the issue and its scale.

The fourth ineffective safeguard relates to high hurdles for state liability for breaches of EU laws. The Member States have to provide an effective procedure enabling investors to seek damages in the event of a breach of their rights under the EU law. However, due to the diversity of national procedural laws, it can be challenging for cross-border investors to make a claim on the state liability for breaches of EU law. Nevertheless, requirements for extra-contractual state

liability in the event of violation of EU law is provided by the Court of Justice[66]; the standard to succeed with the claim is however rather high.

Specific actions, as in the case of patents, can also have dissuasive effects: the legal costs for a business can be unreasonably high, but not reimbursed per domestic legislation.[67]

The interviewees emphasised the desirability that a solution be found for the investing business without the need to pay high legal costs. Indeed, only large companies are well equipped for this and have the appropriate resources.

Key conclusions

Some possibilities to prevent problems do exist. However, sources show that, despite particular provisions on mediation mechanisms in international agreements being elaborated in recent EU agreements (with third countries), both parties are in practice very reluctant to use mediation mechanisms to settle disputes due to the bureaucratic burden.

Several sources, including literature, interviews and surveys show that national enforcement mechanisms in cases involving investment protection are seen as ineffective in some cases, or difficult and long in other cases. This is particularly pronounced in specific Member States.

2.4.2 The problem

The drivers presented in the previous section cause the following specific problem: "Difficulties in enforcing investment protection rules and obtaining effective remedies for cross-border investments".

The authors of the EIB study on investment barriers, have identified the enforcement of legislation aiming at the protection of property rights, the prevalence of crime, and the efficiency of the judicial system as a barrier to investment.[68] Moreover, the AFEP states that in many EU Member States the national courts lack expertise in investment protection cases, the judges lack sufficient knowledge on EU and international investment law as well as capacity to work on such cases. This reduces the confidence in effective enforcement of investor rights.[69]

The study survey showed that 42% of the respondents expressed a lack of confidence in the enforcement of investor rights across the EU. This is further confirmed by the results of the Open Public Consultation. It is overwhelmingly the view of companies (more than 80%) and business associations (100%) that the current system is not working well.

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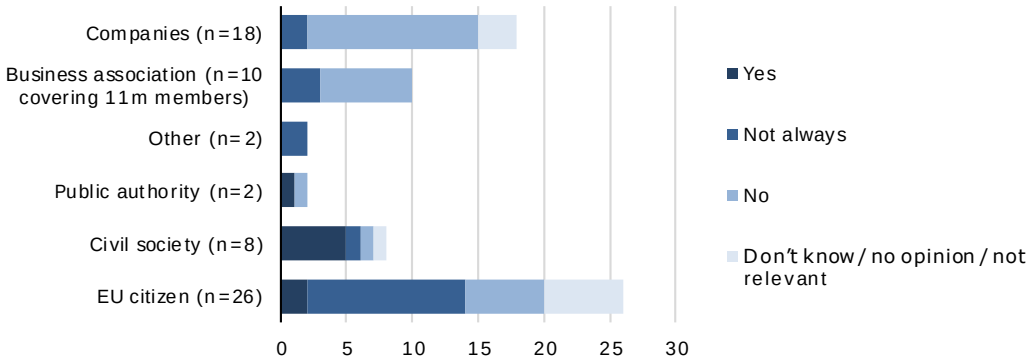
66 Protection of intra-EU investment, European Commission, 2018

67 CJEU, C-57/15, ECLI:EU:C:2016:611 – *United Video Properties Inc. v. Telenet NV* ("*United Video*") or see Annex II – case studies (case study III).

68 EIB Study "Breaking Down Investment Barriers at Ground level https://www.eib.org/attachments/thematic/breaking_down_investment_barriers_en.pdf

69 https://afep.com/en/publications-en/pour-une-meilleure-protection-des-investissements-directs-en-europe/

Figure 17 **OPC Results on the question "Do you think the current system of enforcement of EU investment rules in Member States works adequately?"**



Source: OPC Results, DG FISMA

However, as outlined in earlier sections, the analysis of the drivers indicates that the scale of the problem is possibly concentrated in specific Member States.

2.5 Consequences

The two broader problems outlined in earlier sections contribute to a number of effects or consequences. As presented in the problem tree (Figure 1), the following consequences have been identified:

- Lack of predictability, stability, and clarity of the investment protection framework;
- Lack of confidence in preventive, protective and enforcement rules and systems;
- Higher costs of cross-border investment;
- Reduction in intra-EU investments (withdrawn or deterred) or diversion outside the EU;
- Reduced competitiveness, lower economic and social growth;
- Unexploited potential of the Single Market and slower achievement of the Capital Markets Union;
- Loss of jobs and business along supply chains, cancelled infrastructure projects in host States.

2.5.1 Lack of predictability, stability, and clarity of the investment protection framework

The first consequence in this problem tree is the lack of predictability, stability, and clarity of the investment protection framework. The regulatory environment has a direct impact on investment, as in order to trigger investment, the regulatory framework at the European as well as national level needs to be clear, predictable and stable. This is particularly true for long-term investment and projects that can span several years or even decades: for example – an investor eyeing a major renewable energy project would need certainty about the policy approach and relevant legislation regarding emission levels and energy-targets.[70] The European Commissions' Single Market Scoreboard has pointed out the need for regulatory stability to be strengthened as one of the obstacles to be tackled in order to improve investment performance in the EU.[71] The European

[70] EC – EIB Factsheet on Improving the Investment Environment, https://ec.europa.eu/commission/sites/beta-political/files/factsheet4-environment_en.pdf

[71] https://ec.europa.eu/internal_market/scoreboard/integration_market_openness/fdi/index_en.htm#priorities

Investment Bank's 2019 Investment Survey also shows business regulations as an important long term barrier to investment, with a percentage of around 60% of share of firms.[72]

2.5.2 Lack of confidence in preventive, protective and enforcement rules and systems

The second consequence in the problem tree is the lack of confidence in preventive, protective and enforcement rules and systems. Enforcement of and compliance with EU law, and in particular in the single market, are not only legally necessary but also of economic importance for business, consumers and the European economy at large. Only with reliable, permanent and effective enforcement will all the potential gains from the single market be fully reaped.[73]

Proper enforcement of EU law in the single market is as crucial as enacting the EU laws in the first place. In business circles there are lingering doubts about the effectiveness of enforcement of single market laws, including case law of the Court of Justice of the European Union (CJEU). These doubts cause frustration, higher costs (than necessary under EU law) and missed opportunities for European business. Such frustrations or anxieties may also play a role in the temporary provision of cross-border services (by 'posted workers') or with specific forms of establishment in some services sectors.[74] The lack of confidence in the enforcement of investor rights across the EU was also expressed by 42% of the respondents of the study survey.

2.5.3 Higher costs of cross-border investment

The "lack of predictability, stability, and clarity of the investment protection framework" and the "lack of confidence in preventive, protective and enforcement rules and systems" in turn generally lead to higher costs of cross-border investment. Indeed, in addition to the inherent costs of investing in another country (mainly due to market research and complying with national administrative requirements), cross-border investors risk incurring additional legal costs. These can be linked to getting advice to provide clarity on the investor protection framework, support for navigating the national administrative landscape or to understand the impact of a sudden change in legislation on their ongoing investment. Otherwise, in case a problem arises where legal counsel is required to in case of litigation or the investor is expropriated and not appropriately compensated for their initial investment. Such legal costs, including the need to revert to experts in the area of the investment (who can estimate the damages for example), can amount to important costs for investors. The European Court of Human Rights case *Werra Naturstein GmbH & Co KG v Germany,* for instance, led to EUR 470,000 in legal costs and an estimated loss and additional costs amounting to more than EUR 3 589 000, and was ultimately only partly compensated. The ECtHR closed the case by accepting a unilateral offer by the government for compensation in the amount of 1,000,000.

Although the amount of the costs varies depending on the type of investment carried out (larger investors will make higher investments so the size of the loss will also be proportionally larger), all investors are subject to these potential costs linked to the problems at hand, which can, in turn, impact their investments.

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[72] EIBIS 2019, https://www.eib.org/attachments/efs/eibis_2019_european_union_en.pdf

[73] Quoting : Pelkmans J, Correia de Brito A., Enforcement in the EU Single Market http://aei.pitt.edu/47686/1/Enforcement_in_the_EU_Single_Market.pdf

[74] Quoting : Pelkmans J, Correia de Brito A., Enforcement in the EU Single Market http://aei.pitt.edu/47686/1/Enforcement_in_the_EU_Single_Market.pdf

2.5.4 Reduction in intra-EU investments (withdrawn and deterred) or diversion outside the EU

Another consequence resulting from the drivers, problems and first order consequences described above is the reduction in EU investment (withdrawn and deterred) or diversion outside the EU. While reduction in intra-EU investments is induced by a multitude of business environment and regulatory factors, some studies indicate causal linkages with several of the protection and enforcement drivers. For example, a paper developed by the World Bank Group and the European Commission, based on investor survey data and investor-state dispute settlement (ISDS) information, also showed that there is a link between the lack of transparency and predictability of government agencies as well as adverse regulatory changes, and the withdrawal and cancellations of FDI.[75]

The interviews of the study further indicate that, due to the lack of protection and confidence in the existing rules, investors are withdrawing investments and reducing the scale of their investments within the EU, namely, to mitigate risks. Statistically, the Bruegel Analysis of developments in EU capital flows in the global context[76] in late 2019 demonstrated that there has been a decline in intra-EU gross flows and that this is more marked in the case of FDI than portfolio investment. It cited a number of factors, some relating to the international context. Moreover, the data covered the EU-28 and a period of Brexit-related uncertainty which has affected investment into the UK. Therefore, it cannot be fully concluded that the consequence is directly linked to specific drivers in this case.

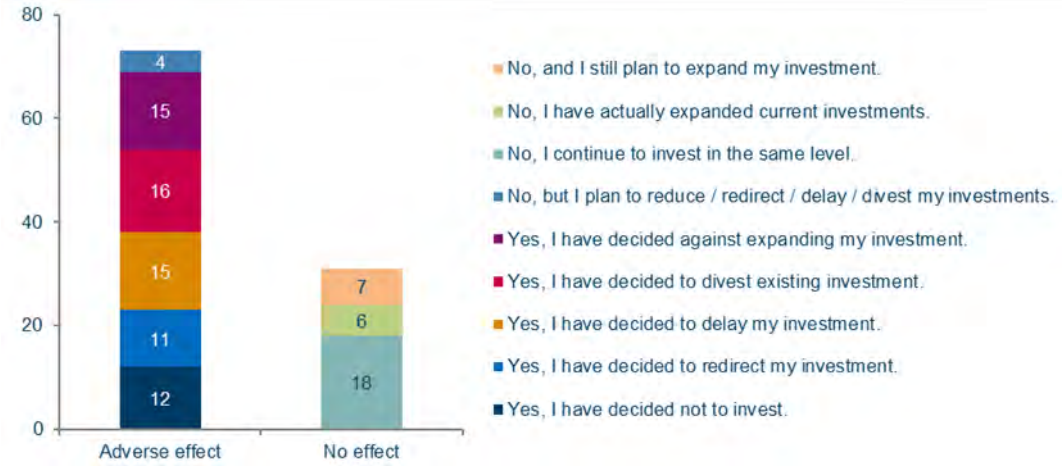
However, the assessment of stagnation or decline is confirmed by the study survey, which showed that only 9% of the companies had expanded investments (Germany 7 respondents, France 4, and 3 for Belgium, Luxembourg, Netherlands and Romania). At the same time, another negative impact in the investment behaviour that was revealed from the survey result is the fact that divestment, delay or redirection of investment was reported 69 times (including 15 times in Romania, 14 in Poland, 13 in Hungary, 11 in France and Latvia and 10 times for both Germany and Italy).

The figure below presents all the responses provided by companies, to the study survey question on how concerns about investment protection and enforcement factors have influenced their investment behaviour. Forty-one of the respondents indicated that their investments were adversely affected, as they either reduced, redirected, delayed, or divested their investments. Two further respondents said they plan to do so. Meanwhile, 26 respondents did not report any adverse effects as they are either continuing to invest at the same level, expanded or plan to expand investments. In some cases, a combination of answers was received, for example, some companies both divested and delayed their investments.

[75] World Bank Group and European Commission, "Retention and Expansion of Foreign Direct Investment", http://documents1.worldbank.org/curated/en/528401576141837231/pdf/Political-Risk-and-Policy-Responses-Summary-of-Research-Findings-and-Policy-Implications.pdf

[76] Analysis of developments in EU capital flows in the global context p. 70 https://www.bruegel.org/wp-content/uploads/2019/01/181101-study-capital-flows_en.pdf

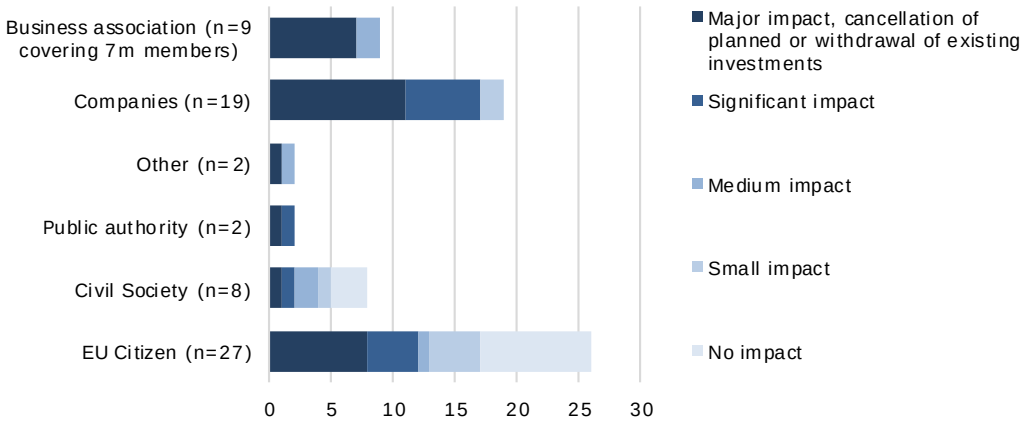
Figure 18 Effect on the investment behaviour



Source: Ecorys, EU Investor Survey, Note: n=70; multiple selection possible.

This assessment is confirmed by the results of the Open Public Consultation conducted by the European Commission on "Cross-border investment within the EU – clarifying and supplementing EU rules", as presented in the following figures. In particular, the majority of business associations, (more than 70%) companies (more than 50%) and public authorities (100%) consider that the protection offered by the investment regulatory framework within the EU has a major or significant negative impact on the decision to make a cross-border investment.

Figure 19 **OPC Results on the question "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?"**



Source: OPC Results, DG FISMA

2.5.5 Reduced competitiveness, lower economic and social growth

Fewer investments lead to reduced competitiveness of European companies, while reduced competitiveness in turn further leads to lower economic and social growth in EU Member States.

Through FDI and investment in general, business and individuals contribute to the economic[77] and social growth of host countries[78]. By introducing (or failing to tackle) barriers to investment, problems (and their drivers) such as the ones described in this report diminish an economy's potential for productivity (as there is a reduced transfer of technology and management know-how that would come from business investors[79]) and long-term economic growth. It also does not allow to grow the physical capital available in the host country and diminishes the potential for the improvement of future productivity, growth and employment, which impacts opportunities for local businesses to scale up. [80] In fact, interviewees highlighted that EU investors are choosing to divert their investments into third countries because, as mentioned further above in the drivers of problem A, BITs concluded with third countries remain and they feel their rights are better guaranteed outside of the EU.

Moreover, due to this divergence of investments to third countries, it is not only the competitiveness of local business that is hampered, but the potential of other EU firms to grow and create EU wide champions who can compete in the global sphere. Undermining the ability of European firms to compete in the global economy, also limits the possibility to provide rewarding jobs and a high standard of living to EU citizens.[81]

Although there is currently no direct evidence that links directly the problems to the consequences described in this sub-section, the links between the problems and the different consequences described above, would support the assumption that the EU might not be achieving its full potential in terms of competitiveness, and economic and social growth and this could be due to, amongst other reasons, the problems developed in this study. It should also be noted that there are other factors impacting competitiveness, and economic and social growth, so it is not always possible to provide evidence of the direct link between the two problems and this consequence in a specific context.

2.5.6 Loss of jobs and business along supply chains, cancelled infrastructure projects in host states

The sixth consequence is the loss of jobs or jobs foregone along supply chains and the cancellation of infrastructure projects in host states. Indeed, due to positive spill-over effects brought about by investments such as FDI, new investments bring employment, but also horizontal investments linked to value chains[82]. With new investments, local people can be employed by the investor or can benefit from the rental or sale of their land to cross-border investors. This opportunity for employment and revenues diminishes when investors do not feel confident about investing. If an investor comes to another Member State, employs people, but then leaves because of the complexities or uncertainties, these people will lose their jobs. The authors of the EIB study on investment barriers also recognise that investment barriers and subdued investment activity diminish employment and limit the creation of new jobs.[83]

This assessment is supported again by the study survey, which showed that 71% (55) of the 77 respondents had experienced an impact in loss of revenue to at least some extent as well as over

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77 https://ec.europa.eu/trade/policy/accessing-markets/investment/

78 World Bank Group and European Commission, "Retention and Expansion of Foreign Direct Investment", http://documents1.worldbank.org/curated/en/528401576141837231/pdf/Political-Risk-and-Policy-Responses-Summary-of-Research-Findings-and-Policy-Implications.pdf

79 https://wps-feb.ugent.be/Papers/wp_12_822.pdf

80 EIB Study "Breaking Down Investment Barriers at Ground level https://www.eib.org/attachments/thematic/breaking_down_investment_barriers_en.pdf

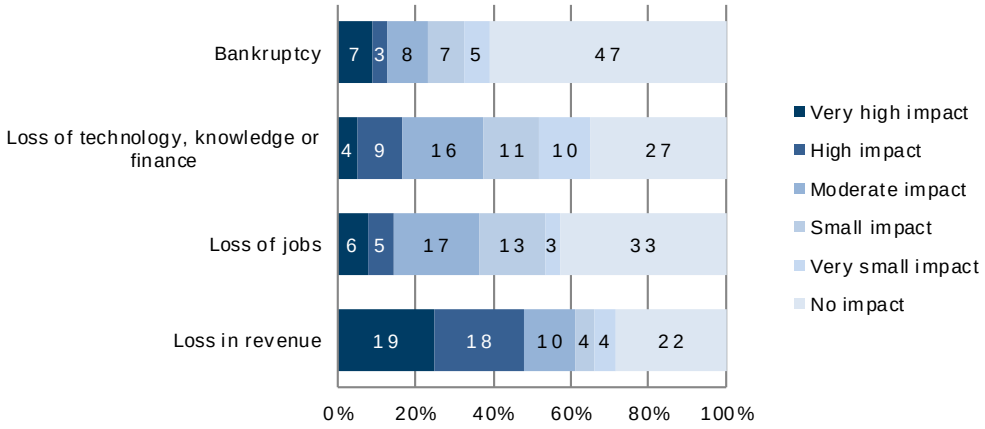
81 EIB Study "Breaking Down Investment Barriers at Ground level https://www.eib.org/attachments/thematic/breaking_down_investment_barriers_en.pdf

82 Supply Chain Fragmentation and Spillovers from Foreign Direct Investment, https://wps-feb.ugent.be/Papers/wp_12_822.pdf

83 EIB Study "Breaking Down Investment Barriers at Ground level https://www.eib.org/attachments/thematic/breaking_down_investment_barriers_en.pdf

half of the respondents with 64% (50 respondents) and 57% (44 respondents) respectively had been impacted in terms of a loss of technology knowledge or finance and loss of jobs. Bankruptcy had hit 39% of respondents.

Figure 20 Impacts on businesses already caused by investment protection challenges



Source: Ecorys, EU Investor Survey. Note: n=77. [84]

With regards to the loss of jobs, around 36% of respondents answered having been impacted either moderately, highly or very highly due to investment protection challenges. The extent of this impact varied by size of company, with large companies reporting a stronger impact compared to that for SMEs. This is possibly due to the fact that SMEs' investments are smaller and thus entail a smaller creation of jobs than large companies. Therefore, even though the impact in comparison to larger companies is lesser, it is relative - any small impact on revenue or loss of jobs can potentially impact SMEs investment behaviour.

Moreover, it should be noted that, on top of the potential impact on loss of jobs, a reduction in investment also entails a reduction in the potential for creation of jobs. Although this aspect was not tackled through the survey, as mentioned in the previous sub-section, literature shows that an increase in investment leads to economic growth and job creation[85].

In sum, although there is no conclusive empirical evidence that links the problems to the consequences described in this sub-section, the study survey, OPC results (with due respect to the data limitations) and limited literature sources establish direct conceptual links between the identified problems and the different consequences, such as loss of jobs or revenues. This could however be further examined and clarified by the means of a future study dedicated to this topic.

2.5.7 Unexploited potential of the Single Market and slower achievement of the Capital Markets Union

The final consequence is the unexploited potential of the Single Market and slower achievement of the Capital Markets Union. As described above, investments can play a role in spurring economic growth and the creation of jobs in the receiving economy. Moreover, the level of FDI may indicate – among many other factors – a particular attractiveness or competitiveness of an

[85] EIB Study "Breaking Down Investment Barriers at Ground level https://www.eib.org/attachments/thematic/breaking_down_investment_barriers_en.pdf

economy. Measuring the levels and trends of FDIs in the EU's Single Market is thus a relevant exercise in order to assess the latter's performance and attractiveness.[86]

A prerequisite for a proper functioning system and particularly capital markets is appropriate Investor protection and enforcement. According to studies, the recent agreement on the European Supervisory Authorities (ESAs) review has "provided the European Securities and Markets Authority (ESMA) more competencies and staff, however, more supervisory convergence will be key to create the impression of a truly single market. The European Commission and the European Court of Justice (ECJ) will need to be vigilant that rules are respected, and prevent regulatory arbitrage, which undermines the attractiveness of the European capital markets"[87], not just in relation to cross-border investments but also from third countries.

The final report of the High-Level Forum on the Capital Markets Union (CMU) reports on the obstacles to an EU CMU. Among the issues stressed are the difference in the allocation of ownership rights and execution of entitlements for shareholders across Member States as well as the difference and inefficiency of insolvency and refund procedures in the event of debtor default in some Member States.

Markets for Europe stresses that, in order to facilitate the creation of the CMU, cross-border investments need to be made as easy and reliable as domestic investments.[88] Similarly, according to a special report of the European Court of Auditors barriers to intra-EU cross-border investments need to be reduced in order to facilitate the implementation of the CMU [89] and the authors of the EIB study on investment barriers conclude that if structural barriers to intra-EU investments are resolved and these investments through higher protection facilitated, the potential of the Single Market will unleash.[90]

Therefore, it cannot be concluded that the resolution of the two problems will fully solve this issue however it will add towards the building blocks for a holistic framework.

Conclusions

The consequences presented in this section are interrelated, creating a domino effect from the less to the most important one. The "lack of predictability, stability, and clarity of the investment protection framework" and the "lack of confidence in preventive, protective and enforcement rules and systems" are leading to higher costs of cross-border investment. Although the amount of the costs varies depending on the type of investment carried out, all investors are subject to these potential costs linked to the problems at hand, which can, in turn, affect their investments. Furthermore, there is currently no conclusive evidence, except investor surveys that links the investment protection and facilitation framework in the EU to the consequences described in this sub-section. Literature sources, study survey and OPC results (with due respect to data limitations) nonetheless show that there is a link between the different problems and consequences, supporting the assumption that the EU might not be achieving its full potential in terms of competitiveness, and economic and social growth. As a final and most important consequence, EU's Single Market does not reach its full potential and slows down the achievement of the Capital Markets Union.

2.6 Baseline quantification

[86] https://ec.europa.eu/internal_market/scoreboard/integration_market_openness/fdi/index_en.htm

[87] https://www.ceps.eu/wp-content/uploads/2019/07/Rebranding-Capital-Markets-Union.pdf

[88] Markets4Europe: Transforming Europe's capital markets

[89] https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=57011

[90] https://www.eib.org/attachments/thematic/breaking_down_investment_barriers_en.pdf

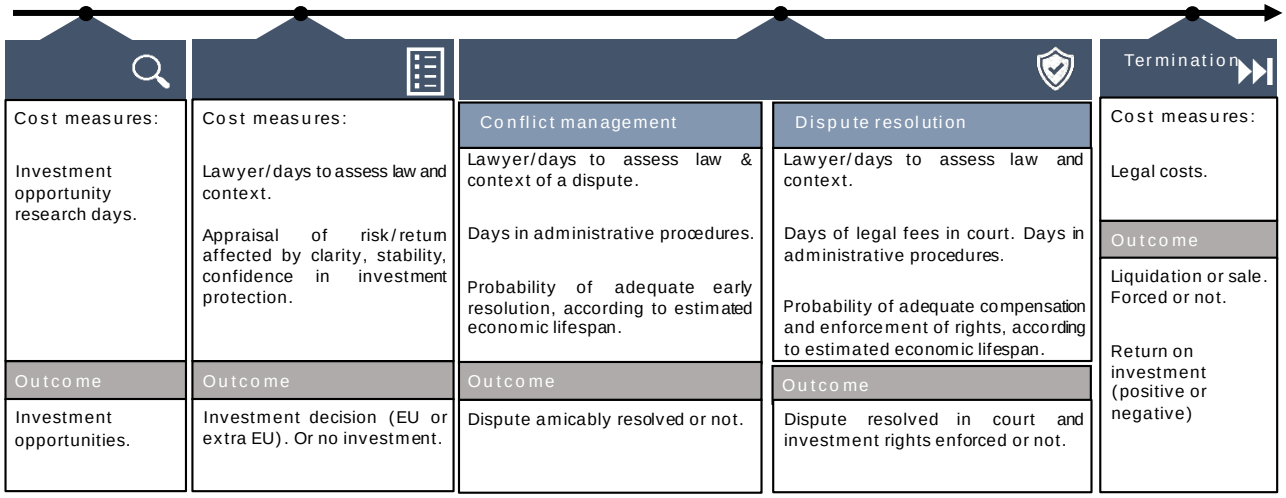
If no action were taken at EU level, the two problems identified in this study would remain unresolved, namely a) the insufficient investment protection and lack of investor confidence in rules protecting investment and b) difficulties in enforcing investment protection rules and obtaining effective remedies for cross-border investments. Unresolved problems would lead to concomitant negative impacts on competitiveness, and the economy and society of the EU as laid out in section 2.5. Thus, ultimately, the European Single Market would not reach its full potential and achievement of the Capital Markets Union could be slowed down or be at risk.

2.6.1 Stylised investment process

We rely on a stylised investment process to structure the establishment of a baseline scenario and the assessment of impacts. We retain four major phases of the investment process that are affected by the policy options under consideration:

- The search phase: the search for investment opportunities is affected by the accessibility of information, the language, and the type of publicity channels.
- The investment decision phase: the screening of opportunities is affected by the expected returns on investment which stem among other factors from the level of perceived risk and the investment costs (direct or indirect, set-up, legal protection, recovering…). Perceived risk is driven by the level of trust in the financials of the investment project, but also the level of trust in the investment environment, including the legal protection and the enforcement of fundamental rights.
- The operation phase: if a problem arises, the operation phase includes the assessment of the legal situation, the search for early solutions, the administrative procedures, and the court process.
- The termination phase: either at the end of the planned operation period or at an earlier date, the investment is liquidated and the return on investment is realised.

Figure 21 Stylised investment process / life cycle



Source: Ecorys elaboration

2.6.2 Baseline estimate and scale of the problem

Direct impacts baseline

This part of the baseline chapter describes the domains which might be directly impacted by the problem. These domains are structured according to the investment process.

With regard to finding investment opportunities, according to a survey by the European Investment Fund among angel investors, identifying good investment opportunities is shown as the third biggest challenges.[91] The EIF survey results indicate that macro-level challenges – which affect a business angel's activities only indirectly (e.g. regulation, market volatility or political uncertainty) – do play a role, even though micro-level challenges that are directly related to a business angel's activity (e.g. valuations or investment opportunities) are mentioned more prominently. This finding is broadly in line with our own survey results, which point to 20% of respondents stating they divested, redirected or delayed investments due to the ease of finding information (market opportunities, business partners, investment protection rules). Although most respondents saw other factors related to investment protection and enforcement as more important for their investment decision, 40% of all respondents do not think that the level of transparency on investment incentives is sufficient[92].

The investment decision phase is relatively short, as an appraisal can be performed in a few weeks to a few months. But the length of the appraisal might be increased by the lack of clarity of the legal context, with direct cost implications. Almost half (43%) of our survey respondents do not think they have clear overview on the applicable rules protecting investments[93]. Looking at SMEs and large companies separately, the majority of large companies says that they have a clear overview on investment rules, while 48% of SME respondents said they do not have a clear overview, and costs related to the legal aspects of the appraisal can be relatively higher for SMEs. However, clarity of investment protection rights seems to be less decisive factor influencing investment decision with only 32% of companies citing these factors as a reason to divest, redirect or delay investment.

The dispute resolution phase is highly heterogeneous across MS and topics. For example, the average estimated time needed to resolve administrative cases in first instance ranged in 2018 from 109 days in Hungary to 1057 days in Malta.[94] However this statistic covers all topics, not only investment protection issues. With regard to investment protection, in our survey 11 respondents reported to have faced litigation in front of national courts. Five of them reported to have encountered a litigation that lasted 1-2 years, two that lasted 2-3 years, and for four it lasted over 3 years. Among the companies and investors responding to our survey, many also indicated various enforcement factors for the reason to redirect, divest or delay investments. 29% of respondents had concerns about the effectiveness of national enforcement mechanisms. Irrespective of the results of the procedure, litigation might represent significant costs for investors. The major element of litigation costs is lawyers' fees and the usual factor in such costs is the time spent on a case[95].

According to our survey, Problem A and problem B have a stronger impact on SMEs when it comes to bankruptcy. The survey reported 45% of SMEs having been impacted by bankruptcy compared to 37% of large companies, which is due to the fact that SMEs are less able to compensate losses.

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91 EIB (2019) European Investment Bank Investment Report. Accelerating Europe's Transformation.
92 32% of respondents said they have a clear overview, while 27% did not know or had no opinion
93 36% of respondents said they have a clear overview, while 21% did not know or had no opinion.
94 European Commission (2020) The 2020 EU Justice Scoreboard, quantitative factsheet, figure 9.
95 Hodges, C., Vogenauer, S. and Tulibacka, M. eds., 2010. The costs and funding of civil litigation: a comparative perspective. Bloomsbury Publishing. https://ssrn.com/abstract=1511714

Meanwhile, about 50% of the large companies surveyed estimated a high to very high negative impact on their revenue, while 40% reported revenue loses among surveyed SMEs.

Indirect impacts baseline

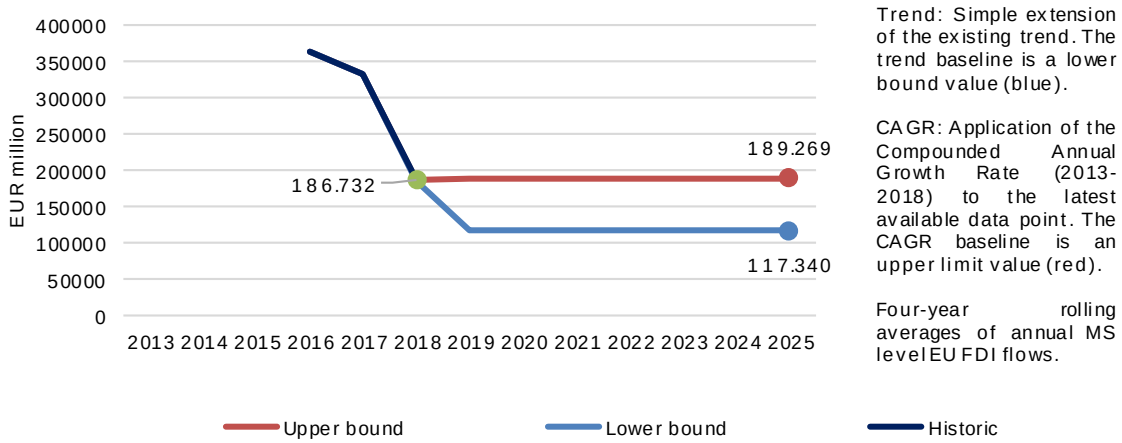
This part of the baseline chapter describes the domains which might be indirectly impacted by the policy options. These are mainly the domains affected by the results of a change in the investment process and the level of investment protection. The most important of these domains are the level of cross-border investments and the degree of economic activity.

The relevant type of cross-border investment data for this study are direct investments and portfolio investments (equity or debt). In the next few paragraphs, we discuss the direct investments made across borders in the EU (i.e. EU FDIs in EU).

FDI Stocks. The overall stock of EU 27 FDI originating from other EU 27 MS stood at about EUR 7.5 trillion in 2018. A large share of this stock was allocated to Luxembourg and the Netherlands and it contracted significantly in 2018. The group of host countries with the smaller volume of FDI has also been the group which showed the strongest growth in recent years (Slovenia, Latvia, Estonia, Lithuania, Bulgaria, Croatia, Greece). The FDI stock in group is expected to continue growing along this upward trend in the next 5 to 10 years. The rest of the EU has stagnant or slightly upward FDI stock trends, except France which saw its EU FDI stock rapidly grow between 2013 and 2018 (from EUR 0.4 to 1 trillion).

FDI Flows. The overall flow of EU 27 FDI originating from other EU 27 MS stood at about EUR -328.5 million in 2018 (a negative net flow). The negative net flows in Ireland and Luxembourg (EUR -170.5 million each) significantly contributed to the overall figure of 2018. The MS level flows are highly volatile across years. To establish the baseline, we rely on a four-year rolling average of MS level flows to smooth some of the year-on-year variations. The EU 27 sum of the four-year MS averages was 186.7 million in 2018, and the median MS level average was 1.6 million.

Figure 22 EU 27 FDI flows – 2 possible baselines – EUR Million



Trend: Simple extension of the existing trend. The trend baseline is a lower bound value (blue).

CAGR: Application of the Compounded Annual Growth Rate (2013-2018) to the latest available data point. The CAGR baseline is an upper limit value (red).

Four-year rolling averages of annual MS level EU FDI flows.

Source: Ecorys based on Eurostat bop_fdi6

Economou (2019)[96] investigated the role a set of rule of law and regulatory efficiency measures such as government integrity, property rights, and business freedom, in driving the level of FDIs. The issue of property right is a close proxy of the problem described in the earlier sections of this

[96] Economou, F., 2019. Economic freedom and asymmetric crisis effects on FDI inflows: The case of four South European economies. Research in International Business and Finance, 49, pp.114-126.

report. Economou (2019) relied on a set of quality of property rights indicators translated on a 0 to 100 index, also used by Júlio et al (2013)[97]. According to the methodology of the Heritage Foundation[98], this index assesses the extent to which a country's legal framework allows individuals to acquire, hold, and utilize private property, secured by clear laws that the government enforces effectively. Relying on a mix of survey data and independent assessments, it provides a quantifiable measure of the degree to which a country's laws protect private property rights and the extent to which those laws are respected. It also assesses the likelihood of state expropriation of private property. The more effective the legal protection of property is, the higher a country's score will be. Similarly, the greater the chances of government expropriation of property are, the lower a country's score will be. The score for this component is derived by averaging scores for the following five sub-factors, all of which are weighted equally:

- Physical property rights,
- Intellectual property rights,
- Strength of investor protection,
- Risk of expropriation, and
- Quality of land administration

The scale of the investment protection problem studied in this chapter is then measured for each MS by taking the different between the property right index score and the theoretical ideal situation proxied by the highest index level in the 2020 sample (i.e., 92.3). We will use this order of magnitude to anchor the assumptions regarding quantification of the baseline for indirect impacts (cross-border investments flows and economic growth), in this section, and the potential indirect impact of the policy options in the next sections.

According to the econometric analysis of Economou (2019)[99], on the drivers of FDI, each property rights index point might lead a 1.6% FDI variation, on average. We will use this 1.6% initial variation to scale the changes in EU FDI flow levels (four-year rolling averages) that might be considered lost due to investment protection rights problems. The baseline estimate is obtained by extending the latest available year of EU FDI flows (four-year rolling averages) with either a simple extension of the existing trend, or the application of the Compounded Annual Growth Rate (last 3 data points of the rolling averages) to the latest available data point. From this baseline, a share of unachieved potential FDI flows is obtained. The resulting share of lost FDI potential is then summed to obtain an EU wide projection. See Annex VI for more details on calculations for the baseline and the indirect impacts and benefits of solving problem A and B.

The results of this process suggest that the scale of the problem could stand in the range of EUR 20.5 to 32.8 billion of unachieved FDI flows, which represents about 17.5% of the projected baseline EU FDI flows. Note that in this simple multiplicative model, a significant share of these flows would come from MS with the largest flows of FDI such as France, Luxembourg and the Netherlands, even though the problem was not identified as strong in these MS.

To assess the economic impact, we rely on the results of Baiashvili and Gattini (2020)[100]. The authors found that "*on average, the impact on growth of a 1 percentage point increase of FDI to GDP ratio ranges between 20 percent (or 0.2 percentage points of real GDP growth per capita) and 1 percent (or 0.01 percentage points of real GDP growth per capita) depending on the method*

[97] Júlio, P., Pinheiro–Alves, R. and Tavares, J., 2013. Foreign direct investment and institutional reform: evidence and an application to Portugal. Portuguese Economic Journal, 12(3), pp.215-250.
[98] https://www.heritage.org/index/download
[99] Júlio et al (2013) also found an impact of property rights but on the FDI stock level.
[100] Baiashvili, T. and Gattini, L., 2020. Impact of FDI on economic growth: The role of country income levels and institutional strength (No. 2020/02). EIB Working Papers. https://www.eib.org/attachments/efs/economics_working_paper_2020_02_en.pdf

and income group." Within that 1 to 20% range, we pick the 10% point. The range is mostly driven by the income level of host countries. As a result, the forgone cross-border investment flows identified above could lead to an unachieved potential GDP amount of EUR 2.1 billion to 3.3 billion across Europe.

The upper and lower bounds of the FDI and GDP estimates come are driven by the upper and lower bounds of the FDI flow baseline projections. Caveats to these estimated impact on the GDP include the heterogeneous impacts of FDIs in different industries (some industries might lead to more growth when receiving more capital), and the types of FDIs (duration of the investment, its objectives, etc). Finally, this exercise is a multiplicative approach that does not account for the dynamic equilibrium adjustments that could arise from increased capital flows and increased growth.

2.7 The EU's need to act and justification

2.7.1 Legal basis – insufficient investment protection

The appropriate legal basis for EU action is grounded in the nature of the main or predominant objective and content pursued with an EU measure.

An envisaged EU measure would aim at providing investors with protection when they invest cross-border, making them feel confident about the rules protecting them. This would translate into the following operational objectives: improving access to information on investment protection rules (at EU and national level) and investment opportunities, clarifying the scope of investment protection under EU law, and improving consistency of investment protection rules across Member States.

Measures improving access to information on investment protection rules can be based on Article 114(1) TFEU, which confers to the EU competence to lay down appropriate provisions for the approximation of laws of the Member States that have as their objective the establishment and functioning of the internal market.[101] Also, dissemination of information on investment opportunities could be based on Article 114(1) TFEU.

EU measures having the objective of clarifying the scope of investment protection under EU law, and improving consistency of investment protection rules across Member States by, *inter alia*, specifying rules on compensation awarded for expropriation, including the definition of what constitutes expropriation for this purpose, the assessment of the amount of compensation and elements to be taken into account, and the procedures to obtain compensation may be based, depending on the precise content of the legislative measure, on Article 114 and/or Article 352 TFEU. The scope of Article 114 TFEU was just explained. Article 352(1) TFEU allows the EU, if action should prove necessary, within the framework of the policies defined in the EU Treaties, to attain one of the objectives set out in the EU Treaties where the Treaties have not provided the necessary powers, to adopt the appropriate measures. Enacting a code which would include a wide-ranging set of rules on free movement of capital and intra-EU investment protection in a single comprehensive legislative package can essentially be based on the same legal bases.

[101] See also Single European Gateway, REGULATION (EU) 2018/1724 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCILREGULATION (EU) 2018/1724 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL REGULATION (EU) 2018/1724 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012

2.7.2 Subsidiarity – insufficient investment protection

The identified objectives have not and cannot be achieved sufficiently by Member States acting alone. The Single Market is not an area with fully harmonised rules. Beyond the basic principles and the areas in which fully harmonised rules were agreed, investors will still need partly to rely on national rules protecting their investments against illicit government interference whenever they invest cross-border, exercising their Single Market rights.

Individual actions by Member States have led to considerable differences in approach in terms of access to information on investment protection rules in EU and domestic law, and investment opportunities. This leads to considerable uncertainty as regards to the applicable rules and available opportunities. Such differences impose additional costs on firms, in particular SMEs, when investing cross-border and discourage many from doing so. Coordination at EU level, an agreed set of common quality criteria and a requirement to ensure full accessibility for cross-border investors would make sure that information is of comparable quality and that it is fully accessible for cross-border investors, leading to better enforcement of Single Market rights – including such flowing form free movement of capital and the freedom of establishment – for foreign investors.

The same discouraging effects flow from uncertainty as to the precise content and scope of EU rules protecting cross-border investments. Naturally, further clarifying these rules cannot be sufficiently achieved by the EU Member States alone but falls on the EU. Also, more clarification, specification, and improvement at EU level would lead to better enforcement of Single Market rights for foreign investors.

More consistent investment protection rules across Member States, again, cannot be achieved by the EU Member States alone, as considerable differences in approach with regard to investment protection rules exist, which are coupled with uncertainty relating to their scope and application. An EU approach would ensure a certain quality standard across the EU Member States, reduce costs on firms – in particular SMEs – when operating in cross-border situations which are challenged to establish the relevant investment protection rules applicable in each individual Member State and to receive sufficient protection of their cross-border investments. Ultimately, more consistent rules will lead to a better enforcement of Single Market rights for cross-border investors as they are more easily ascertained, both, by the cross-border investor, as well as by the EU Member State, and conform to a certain minimum standard.

2.7.3 Legal basis – enforcement mechanism

The envisaged EU measures would aim at ensuring that investors can obtain effective remedies for cross-border investment and that investment protection rules are enforced across Member States. This would translate into the following operational objectives: improving effectiveness of enforcement mechanisms for investment protection cases, improving possibilities to prevent problems and resolve disputes amicably, and strengthening of safeguards in procedural rules to improve enforcement in national courts.

Improving enforcement before national courts, for example, achieved by streamlining selected procedural rules in relation to specific matters for which an internal market issue has been detected, can essentially be based on Article 114 TFEU. For instance, it could streamline procedures to obtain remedies, improve rules on legal standing to bring investment protection claims, and rules ensuring (more effective) interim measures. Improving possibilities to prevent problems and to resolve disputes amicably, for example, by establishing a specialised mechanism in investment protection, operating at EU level, with competence to examine individual cases in the field of investment protection, complementing national enforcement systems could, depending on its precise scope, be based on Article 114 TFEU. Improving effectiveness of enforcement

mechanisms for investment protection cases can potentially be grounded on Article 114 TFEU and/or Article 352 TFEU as long as any EU measure respects the division of competences between the EU and the Member States in the area of the judiciary.

2.7.4 Subsidiarity – enforcement mechanism

"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.[102] Under Article 47 of the Charter, which is directly applicable, everyone has the right to an effective remedy and to a fair trial.[103] National justice systems in the Union are subject to standards of independence, quality and efficiency, spelled out in extensive case law of the Court of Justice and of the European Court of Human Rights (ECtHR).[104] [105]

However, disparities in awareness, coverage, quality, and effectiveness of remedies to enforce investment protection rules in cross-border situations in the EU Member States exist, which cannot be addressed by the EU Member States alone with the aim to ensure that investors can obtain effective remedies for cross-border investment and that investment protection rules are effectively enforced across Member States. This is due to the fact that the mentioned disparities constitute barriers to the Single Market and are among the reasons why investors, in particular SMEs, many abstain from investing cross border and why they lack confidence that potential disputes with Member State authorities can be resolved in an easy, fast and possibly inexpensive way. For the same reasons, investors might abstain from investing in other Member States where there is no sufficient access to effective enforcement mechanisms. Furthermore, investors established in a Member State where effective enforcement mechanisms are not sufficiently available are put at a competitive disadvantage with regard to investors that have access to such mechanisms and can thus resolve investment disputes faster and more cheaply, which endangers the Single Market level-playing field.

An EU approach would ensure that enforcement of investment protection rights is effective and sufficiently and consistently developed across the EU, complying with certain quality requirements. Investors being aware of the existence of effective enforcement of their investment protection rights will allow to exploit fully the potential of the internal market.

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[102] C-64/16 Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2018:117, para. 29.
[103] C-414/16 Vera Egenberger, ECLI:EU:C:2018:257, para. 78.
[104] See Articles 6 and 13 of the European Convention on for the Protection of Human Rights and Fundamental Freedoms. The case-law of the European Court of Human Rights is relevant in the interpretation of fundamental rights, as Article 52 (3) of the Charter states that, when rights under the Charter correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and scope shall be the same, unless the EU right grants a higher protection.
[105] COM(2018) 547 final.

3 POLICY OBJECTIVES AND OPTIONS

3.1 Objective tree

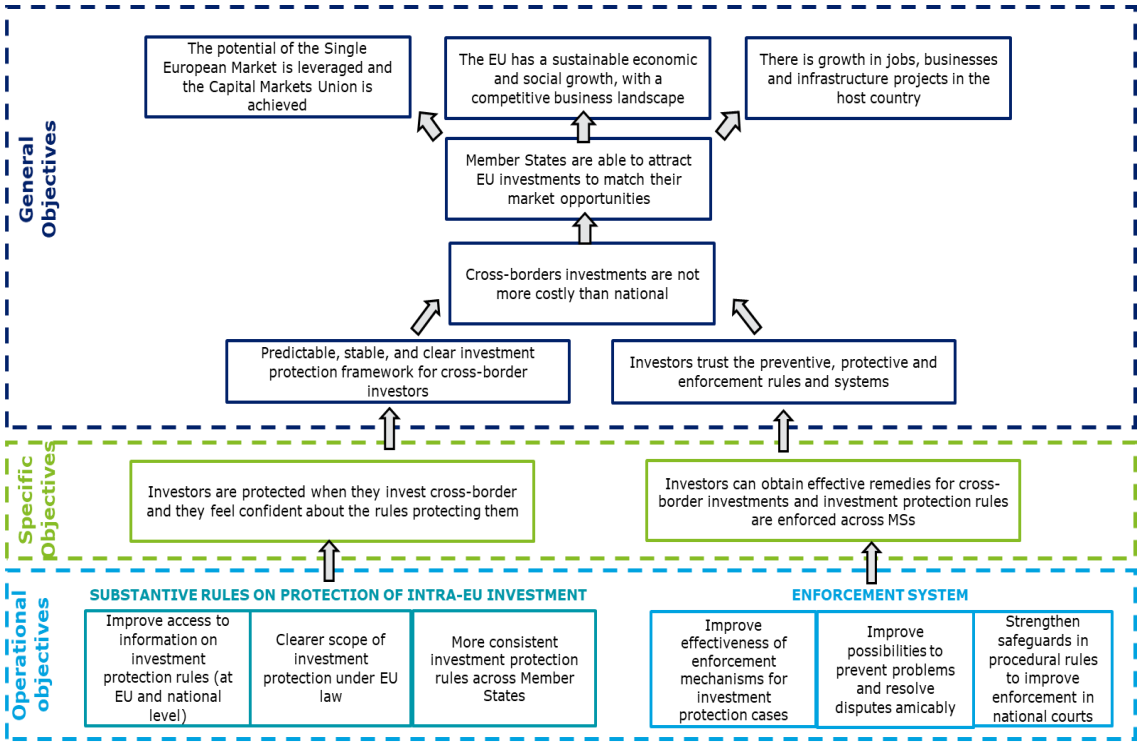
The problem tree presented in the previous chapter provides the basis to define the objectives of the initiative at hand. In fact, the drivers, problems and consequences can be transposed to operational, specific and general objectives. This exercise also allows for the assessment of different options' effectiveness - i.e. the extent to which they would achieve the operational objectives (Chapter 4). The assessment of effectiveness, together with the assessment of efficiency, will allow us to identify the preferred option in Chapter 5.

As specified in the Better Regulation Toolbox, the objective tree mirrors the problem tree defining three levels of objectives[106]:

- General objectives refer to Treaty-based goals that the policy aims to contribute to and constitute a link with the existing policy setting;
- Specific objectives relate to the specific domain and set out what the Commission wants to achieve with the intervention in detail; and
- Operational objectives concern deliverables or objectives of actions.

The operational, specific and general objectives of the initiative are summarised in the objective tree presented below:

Figure 23 Objective tree



General objectives

In light of the problems outlined in the previous chapter, the general objectives of the initiative are presented in the Figure 23 and outlined below. If investors trust the preventive, protective and enforcement rules and systems, and predictable, stable, and clear investment protection

[106] Better Regulation Toolbox TOOL #16, p.100 https://ec.europa.eu/info/sites/info/files/better-regulation-toolbox_2.pdf

framework for cross-border investors exists, cross-border investments become less costly and Member States are able to attract EU investments to match their market opportunities. As a result, the initiative can contribute to the following higher-level general objectives:

- There is growth in jobs, businesses, and infrastructure projects in the host countries;
- The EU has sustainable economic and social growth, with a competitive business landscape;
- The potential of the Single European Market is leveraged and the Capital Markets Union is achieved.

Specific and operational objectives

The specific objective of the initiative is to ensure a more consistent protection of investments across the EU and enhance means to prevent issues and provide more effective remedies in case of investment protection problems arising in any Member State. This translates into the following two specific objectives:

Specific Objective A. Investors are protected when they invest cross-border, and they feel confident about the rules protecting them. This translates into the following operational objectives:

- Objective 1: Improve access to information on investment protection rules (at EU and national level) and investment opportunities;
- Objective 2: Clearer scope of investment protection under EU law;
- Objective 3: More consistent investment protection rules across Member States:
    - Rules governing compensation for restrictions of property and other economic rights are transparent and clear across MS;
    - Administrative conduct safeguards are better set and implemented;
    - The regulatory framework is predictable and stable and the scope of protection of legitimate expectations is clear.

Specific Objective B. Investors can obtain effective remedies for cross-border investment and investment protection rules are enforced across Member States. This translates into the following operational objectives:

- Objective 4: Improve effectiveness of enforcement mechanisms for investment protection cases;
- Objective 5: Improve possibilities to prevent problems and resolve disputes amicably;
- Objective 6: Strengthen safeguards in procedural rules to improve enforcement in national courts in cases involving investment protection.

The following sub-section presents the policy options available to achieve operational objectives presented in the objective tree. The subsequent chapter (Chapter 4) examines the policy options' estimated impacts in achieving the objectives.

3.2 Options in response to specific objective A: Investors are protected when they invest cross-border, and they feel confident about the rules protecting them

Option A1 is complementary to option A2 and A3 and can be combined with either A2 or A3, while option A2 and A3 are mutually exclusive and cannot be combined.

A.1 - Increase visibility of existing EU and national rules

Beyond what the Single Digital Gateway already covers, all EU and national rules relating to investment protection would be made accessible in one single access point managed by the Commission with MS input (e.g. via the Single Digital Gateway), thus providing easy and user-friendly online access. It would ensure that the information on the rules is up-to date, accurate and reliable and presented in an understandable manner. In addition, the access point could facilitate identifying investment opportunities at EU level and national level (e.g. through enhanced EU match-making tools).

A.2 - Specify and improve rules -Targeted approach

This option would result in a new EU legal instrument (directive or regulation depending also on the outcome of the ongoing impact assessment), focusing on key aspects of investment protection of importance for investors. It would introduce more specific rules on key aspects impacting cross-border investments (e.g. on compensation for expropriation, on protection of legitimate expectations, on rights stemming from the principle of good administration).. Moreover, the new EU legal instrument would be consistent and coordinated with already existing EU legal instruments of horizontal nature (e.g. Services Directive) and of sectorial nature (e.g. Directives in the field of financial services).

A.3 - Specify and improve rules - Comprehensive approach

This option envisages a more comprehensive EU regulatory framework on investment protection, which, in addition to the rules envisaged under option 2, would include rules further specifying the EU Treaties' rules on free movement of capital and other fundamental freedoms and EU principles relevant for intra-EU investment protection in a legislative package. In addition to the rules on key aspects impacting cross-border investment in the above option, it could for instance consolidate relevant CJEU case-law on free movement of capital (e.g. clarifying types of justified and unjustified restrictions).

3.3 Options in response to specific objective B: Investors can obtain effective remedies for cross-border investment and investment protection rules are enforced across Member States

Options in response to specific objective B are largely complementary and can be combined to mutually reinforce each other with the exception of option B3 and B4 which from a practical perspective would not be combined with each other but can be combined with other options (B1 or B2).

B.1 - Enhance mechanisms to prevent problems or resolve amicably investor-to-state disputes

This option would seek to help avoid issues or resolve them at an early stage. It could include specialised SOLVIT centres for investors to resolve individual investment protection cases It could also include investment contact points to enable dialogue between investment stakeholders and public authorities on structural issues, which affect the investment environment in general, as well as mechanisms for follow-up.

B.2 - Improve enforcement before national courts by streamlining selected procedural rules in relation to specific matters for which an internal market issue has been detected

This option would harmonise selected procedural rules relevant for access to remedies for investors before national courts. For instance, it could streamline procedures to obtain remedies; improve rules on legal standing to bring investment protection claims, rules ensuring (more effective) interim measures.

B.3 - Create a European investment board where investors could bring cross-border investor-to-State complaints

This option would establish a specialised mechanism in investment protection, operating at EU level, and competent to examine individual cases in the field of investment protection, complementing national enforcement systems. It could include a mediation role and would have the competence to suggest how the alleged violation of EU law could be remedied. The mediators would be ad hoc experts and a permanent secretariat would maintain the lists and provide support (e.g. filtering cases). A fee structure could be envisaged. The body would have two functions: (1) facilitation of resolution before bringing a case to court, and (2) issuance of opinions (dispute assessments, guidance to investors, suggestion of possible settlements) upon investors' requests.

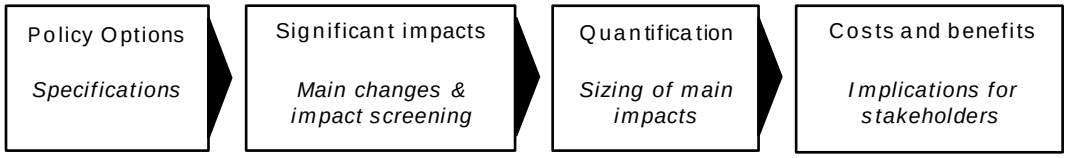
B.4 - Create a specialised investment court at EU level

This option would establish an investment court (which could be modelled on the Unified Patent Court - with a central division at 'EU-level' and local divisions, if needed, in Member States) that would deal with individual cases. Investors can bring claims directly and obtain compensation through a binding decision. The competence of the new investment court(s) would need to be designed taking duly into account the interplay with the competence of ordinary courts.

4 ASSESSMENT OF IMPACTS

This section assesses the impact of the policy options based on the main changes introduced by each option. For each policy option, significant impacts are sized and quantified whenever possible. Finally, costs and benefits are assessed for each stakeholder group, based on the option specification and its significant impacts.

Figure 24 Steps in the assessment of impacts



Source: own elaboration based on BRT guidelines

The policy options are outlined and specified in the previous section. The significant impacts are screened in the next section (Section 4.1). A discussion on the quantification of impacts and their costs and benefits is presented in Section 4.2.

4.1 Screening of impacts

This section identifies which of the impacts are expected to be significant, and should be subject to a detailed assessment, accompanied by a list of affected stakeholders. The impacts are selected on the basis of the following factors:

- The relevance of the impact within the intervention logic (all parameters relevant to the achievement of the policy objectives should be retained for further analysis);
- The absolute magnitude of the expected impacts;
- The relative size of expected impacts for specific stakeholders (including impacts which may be small in absolute terms but may be particularly significant to specific types of companies, regions, sectors, etc.); and
- The importance of impacts for Commission horizontal objectives and policies.

This subsections screens and describes the potential impacts that could arise from the set of policy options. Potential impacts are screened across the economic, social, environmental, and fundamental rights dimensions (see Annex V for the full list of dimensions screened).

Economic impacts

If implemented, policy options should lead to higher cross-border investment flows because they would lower the risks linked to investment protection and thus also costs of cross-border investment as compared to the baseline scenario. These costs are found across different phases of the cross-border investment process, and they include screening of investment opportunities, assessing the legal situation, engaging in administrative procedures, engaging in judicial procedures, and facing inadequate remedies, notably compensation.

The potential for increased cross-border flows is driven by expected returns on investment which stem among other factors from the level of perceived risk and the investment costs (direct or indirect, set-up, legal protection, recovering). Perceived risk is driven by the level of trust in the financials of the investment project, but also the level of trust in the investment environment,

including the legal protection and the enforcement of fundamental rights. There is evidence that improved institutional settings drive up the volumes of cross border investment flows in Europe[107] and elsewhere. Among the broader set of institutional factors, some in particular such as property rights, government integrity, investment freedom, were found to have a direct impact on foreign investments[108]. From an investor's perspective, the rationale for the increased investment effect of improved implementation of investment protection can be established by treating the investment risks generated by unclarity of the scope and the imperfect enforcement of rights as a cost item in investment return projections akin to a tax (or an imposed financial provision), and lower foreign investment tax leads to higher cross-border investment[109]. Therefore, the economic benefits of increased clarity and higher trust in the enforcement of investment protection will depend on the perception of investors regarding certain host states being prone to investment protection risks or not[110]. It should however be noted that investment flows are also driven by other factors which might be more or equally important as the perceived level of investment protection (see box 2 below)[111].

As substantive rules on protection of intra-EU investment and the enforcement system are strengthened, the functioning the internal market would improve through increased competition resulting from improvements in the free movement of capital. Depending on the policy option, such impact would vary in magnitude. For example, ensuring access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border investment disputes should benefit investors and therefore boost their confidence in the market.

Most policy options would also improve access to information and better possibilities to protect investments. This is particularly relevant for SMEs which are less likely to have the means, unlike large firms, to fight long legal battles. It is possible that through indirect, secondary effects the overall macroeconomic environment would also ameliorate, leading to higher economic growth and employment and conditions for investment[112] and the proper functioning of markets would improve as the barriers to cross-border investment in the form of insufficient investment protection would be removed/diminished. The overall impact on the host economy as the additional cross-border investment is unlocked will depend on whether the additional investment competes directly with national investment. But, depending on the specifics of the host country, international competition can increase economic growth through increased competition, and stabilise growth through diversification of investments sources[113]. Foreign investment is also commonly known to increase economic growth through increased technological know-how, high productivity and corresponding higher wage levels.

In addition, the economic growth impact is a function of the income level of the host country, and the degree of development of their financial and capital markets[114]. In other words, cross border

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[107] Hanousek, J., Kočenda, E. and Maurel, M., 2011. Direct and indirect effects of FDI in emerging European markets: A survey and meta-analysis. Economic Systems, 35(3), pp.301-322. https://deepblue.lib.umich.edu/bitstream/handle/2027.42/133046/wp976.pdf?sequence=1

[108] Economou, F., 2019. Economic freedom and asymmetric crisis effects on FDI inflows: The case of four South European economies. Research in International Business and Finance, 49, pp.114-126.

[109] Hajkova, D., Nicoletti, G., Vartia, L. and Yoo, K.Y., 2007. Taxation and business environment as drivers of foreign direct investment in OECD countries. OECD Economic Studies, 2006(2), pp.7-38.

[110] Poulsen, L., Bonnitcha, J. and Yackee, J., 2013. Analytical framework for assessing costs and benefits of investment protection treaties. https://discovery.ucl.ac.uk/id/eprint/1471852/1/bit%20framework.pdf

[111] Johnson, L., Sachs, L., Güven, B. and Coleman, J., 2018. Costs and Benefits of Investment Treaties: Practical Considerations for States. Available at SSRN 3277965.

[112] Pradhan, R.P., Arvin, M.B., Hall, J.H. and Nair, M., 2017. Trade openness, foreign direct investment, and finance-growth nexus in the Eurozone countries. The Journal of International Trade & Economic Development, 26(3), pp.336-360.

[113] Stiglitz, J.E., 2000. Capital market liberalization, economic growth, and instability. World development, 28(6), pp.1075-1086.

[114] Azman-Saini, W.N.W. and Law, S.H., 2010. FDI and economic growth: New evidence on the role of financial markets. Economics letters, 107(2), pp.211-213.

investments, and direct investments in particular, generate more economic growth for host countries with lower GPD and good capital markets, and less growth among the high-income countries[115]. For some high-income countries, it is possible that, all else equal, additional FDI would not result in additional economic growth.[116] [117]

Social impacts

In terms of social impact, the most significant impacts are expected to be in employment with new jobs in host countries being created as a result of increased economic activity generated by higher cross-border investment (under the condition that the cross-border investment does not crowd-out or replace the investment that would have taken place domestically otherwise). Positive social impacts are far from automatic[118], and negative social impact cannot be excluded. The positive social effect of capital flows depends on the nature of the economic impact and is strongly affected by conditions in the host country[119]. Elements of governance, participation and good administration would also be impacted. In particular, implementation of options related to problem B would positively affect public institutions and administrations, in particular the quality of judicial proceedings should lead to an improvement, or case load could also decrease (options B3, B4).

Environmental impacts

The environmental impact of the implementation of policy options is difficult to estimate as it depends on the type of investments that would be made. The possibility of positive environmental impact is conditional on the type of FDI projects and their potential for green investments[120]. With green investment projects and the growing market for sustainable products becoming more prominent as a result of the EU Green Deal, if investment protection is properly enforced, the impact of the initiative on the environment can be considered to be positive. Overall, the net effect of the various options on the environment can be considered to be either neutral or positive (if green investments will become more prominent in the future and the initiative will foster more cross-border investment).

Fundamental rights

The proposed initiative is likely to have positive impact on the compliance of administrations with the principles of good administration (cf. Article 41 of the EU Charter of Fundamental Rights, e.g. right to be heard, right to have a reasoned decision in writing and within a reasonable time), although Article 41 applies to EU institutions, the good administration principle as a general principle of EU law also applies to national administrations, when acting in the scope of EU law. Thus, it makes the administrative procedures and their outcome less prone to error and more transparent and predictable for cross-border investors, thus, less burdensome. With regard to the individual's access to justice including right to an effective remedy before a court or tribunal, option B should lead to an improvement in enforcing investment protection rights and obtaining a remedy thus contributing to the right to an effective remedy (Article 47). Finally, the initiative is also expected to impact positively on the protection of other fundamental rights under the EU Charter of Fundamental Rights,

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[115] EIB, 2020, Impact of FDI on economic growth: The role of country income levels and institutional strength, https://www.eib.org/attachments/efs/economics_working_paper_2020_02_en.pdf

[116] Carbonell, B.E.R.M.E.J.O., J., & Werner, RA (2018). Does Foreign Direct Investment Generate Economic Growth? A New Empirical Approach Applied to Spain. Economic Geography, pp.1-32.

[117] Sokhanvar A., 2019. Does foreign direct investment accelerate tourism and economic growth within Europe? Tourism

[118] UNCTAD., United Nations Conference and Development Staff, 2003. Foreign direct investment and performance requirements: new evidence from selected countries. https://unctad.org/system/files/official-document/iteiia20037_en.pdf

[119] Pohl, J., 2018. Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence. OECD Working Papers on International Investment.

[120] Paramati, S.R., Ummalla, M. and Apergis, N., 2016. The effect of foreign direct investment and stock market growth on clean energy use across a panel of emerging market economies. Energy Economics, 56, pp.29-41.

notably the freedom to conduct a business (Article 16), the right to property (Article 17) by further clarifying and developing their protective scopes for investors.

Box 5 Drivers of cross-border investments

When assessing whether to invest into a new country, Multinational Enterprises (MNEs) generally aim at one or more of the following goals[121]:

- Accessing new markets;
- Acquiring new/improving existing assets;
- Accessing natural resources;
- Seeking higher efficiency.

Academic literature has identified which factors are the most important in driving companies selecting one country rather than the other. The following table lists the most recurring items, providing a qualitative explanation of their importance and an indication of the level of academic consensus on the impact each driver has on the level of FDI[122].

Driver	Description	Expected impact	Level of consensus
Incentives and regulation	Governments can either encourage or not FDI by influencing barriers to entry or by protecting some sectors, deemed of strategic importance. FDI-friendly regulatory frameworks are an effective way to attract foreign investment.	+	High
Size of domestic market / demand	Bigger markets (i.e. countries and/or areas densely populated) represent a bigger pool of customers for MNEs to sell their products to.	+	Medium-high
Tax regime	A favourable tax regime, encompassing reduced costs for MNEs, is expected to attract FDI. Studies suggests that, on average, a 1% increase in the tax rate on FDI entails a 3,7% FDI decrease.[123] This average value, however, comes from studies presenting rather different results.	+	Medium
Low labour costs and wage rates	The assumption that countries with low levels of labour costs and wages attract more FDI is not confirmed by literature, as MNEs seem to value other aspects more.	+	Mixed
Political stability and quality of the institutions	A stable and controlled political environment is expected to attract FDI, as companies are less likely to see their property expropriated or to deal with systemic issues such as corruption, excessive red tape, and bureaucracy.	+	High

[121] See Dunning, J.H., "The Eclectic Paradigm of International Production: A Restatement and Some Possible Extensions", *Journal of International Business Studies*, Vol. 19(1), 1988, pp. 1-31, and https://www.ecb.europa.eu/pub/economic-bulletin/articles/2018/html/ecb.ebart201804_01.en.html#toc4

[122] This will be partly based on Nielsen *at al.* (2017) The Location choice of foreign direct investments: Empirical evidence and methodological challenges, available here.

[123] https://www.oecd.org/daf/inv/investment-policy/40152903.pdf

Quality of labour, education and skills	An increasing number of studies has pointed out that the quality of the workforce, rather than its cheap availability, is valued more by companies. However, this heavily depends on the type of product and/or service the MNE is selling.	+	Medium
Infrastructure	High quality infrastructures such as roads, ports and, in some cases, digital connectivity serve as an incentive for companies investing either in industrialised or emerging countries. That is due to reduced time.	+	High
Border region (EU)	In the EU, border regions could be less likely to be recipients of investments, due to their decentralised position.[124]	-	Medium
Industry clusters and global cities	Agglomeration of networks in the same region or city is generally perceived as a positive factor in attracting FDI. This is due to the presence of early adopters and competitors, together with the existence of a good track record of the area, which will be considered as more reliable and less risky.	+	Medium-high
Dominance of incumbent firms	While the presence of competition attracts FDI, the same does not apply if the market it too overcrowded or dominated by existing firms.	-	Medium-high
Access to the Single Market (EU)	An important reason for firms to invest in the European Union is the possibility to access to its Single Market, which features low non-tariff barriers, free movement of people and capital, and harmonised rules.	+	High

4.2 Assessment of options

4.2.1 Option 0 - Do nothing

Under this option, no policy is implemented. The problems A and B would continue to prevail. Investors would continue to have concerns and factor in high investment risks in some MS, and incur certain indirect costs along the investment process. As a result, the cross-border investment flows would evolve as described in the baseline scenario (see section 2.6.2 for the baseline). The investment flows would continue to generate an FDI flow about 17% below potential (EUR 20.5 to 32.8 billion), which might represent an unachieved potential GDP amount of EUR 2.1 to 3.3 billion across the EU (indirect cost of doing nothing). This doing nothing is not associated to particular direct costs or benefits for the EU institutions, the MS public authorities or the citizens.

4.2.2 Option A.1 - Increasing visibility of existing EU and national rules

Under this option, all EU and national rules relating to investment protection would be made accessible in one single access point managed by the Commission with Member States' input (e.g. via the Single Digital Gateway). The access point could also facilitate identifying investment

[124] The World in Europe, global FDI flows towards Europe - Drivers and impacts of intra-European FDI

opportunities at EU level and national level (e.g. through enhanced EU match-making tools on InvestEU Portal).

- Investors would have an easier access to investment protection rules, especially national rules.
- Member States' Public authorities would face a lower cost when assessing EU and domestic rules and avoid errors in evaluating investment situations. Having access to all relevant rules in a centralised portal would make their work faster, less prone to error. This should result in a more effective decision process, more aligned to the investment protection rules.
- Companies and citizens would benefit from increased foreign investments.

In addition, the portal could facilitate identifying investment opportunities at EU level and national level resulting in:

- Investors would have easier access to more investment projects. This should lower search costs for investments opportunities. The average investor would also have access to more opportunities.
- Member States' Public authorities could have access to a broad dissemination channel to advertise investment opportunities. It could amplify the message of promotion agencies. This should lead to more investments attracted in host countries.
- EU institutions might benefit from an indirect impact: an enhanced visibility and value-added of the investment opportunities portal, through the provision of this additional service.
- Companies and citizens would benefit from increased foreign investments.

Contribution to operational objectives: This option would contribute to Operational Objective 1 (++) and 2 (+), i.e. investors would have an easier access to investment protection rules (O1) and the overall scope of application of the protection rules would become to some extent clearer (O2).

Costs and benefits of option A.1

This option could be complementary to other options, accompanying and complementing other measures, by addressing unique aspects such as the access to opportunities. The direct benefits of this option are the lower information search costs. The indirect benefits are increased investments flows unlocked by higher market efficiency. Increased visibility of existing EU and national rules should translate into a lower cost of assessing relevant EU and national rules when planning or implementing an investment project and a lower number of lawyer/days for assessing regulation and finding relevant legal information. Companies, especially smaller companies, will be better informed about their rights and how to enforce them. It would also lower the likelihood of a local court to be mistaken about a specific EU rule or even certain domestic rules. This should result in more effective investment decisions.

Enhancing information on investment opportunities translates into a lower cost (number of person/day) to search for investment opportunities. Greater flow of information would reduce frictions on the Single Market. This should result in more cross border investments. Large investors are assumed to already have access to relevant information and monitor opportunities. The impact is therefore expected to be more significant for small and medium-sized investors.

The main costs of this option are the one-off costs of up-grading existing EU web pages (add-on to existing platform), which hence will be limited, while the recurrent costs are the maintenance costs of the rules and investment opportunities directories.

The direct and indirect benefits and one-off and recurring costs are summarised in the table below.

Specific impacts (main changes)	Direct benefits
During any phase of the investment process, investors would have an easier access to relevant protection rules. The centralization of rules would also bring more clarity. Investors would have a simpler access to more investment projects. Having access to all relevant rules in a centralized portal might also ease the work of some Member States' Public authorities. If a feature is developed to provide an overview to national investment promotion services, such as for instance advisory services they also would have access to a broader dissemination channel to advertise investment opportunities in the respective Member State. It could amplify the message of promotion agencies.	Reduced number of days spent on the assessment of the legal aspect of investment protection, at any phase of the investment cycle. Reduced number of days to search investment opportunities. It would reduce the search costs especially for smaller companies.
General impacts (main changes)	**Indirect benefits**
This should result in more effective investment decisions. The subsequent indirect impact could be an increase of cross-border investments.	A very small increase of cross-border investments.
Direct one-off costs	**Direct recurring costs**
As direct one-off costs for Member States the following items have been identified: 1. identification and publication online of relevant investment protection rules in all 27 Member States and providing links to these websites to a single repository. Member States could also provide information on investment promotion services they offer to promote investment opportunities at national level. Total direct one-off costs for all Member States together are estimated to € 82,992.00. This value has been estimated by using Member State specific costs for FTE and assuming the need of 1 FTE for 1 months per Member State for each item. Costs of FTE have been retrieved from Eurostat (2020). Direct one-off costs for EU institutions have been estimated to total to € 7,845.00 representing the costs for upgrading existing pages summarizing the EU rules (based on the Communication on protection of intra-EU investment) and enhancing some features relating to investment opportunities on InvestEU Portal.[125]	The following items have been identified as direct recurring costs of the policy option for Member States: 1. Maintaining the rules listings per Member State and These costs are estimated to total to €8,296,00. This value has been estimated by using Member State specific costs for FTE and assuming the need of 0.1 FTE for the rules listings for 1 month. Costs of FTE have been retrieved from Eurostat (2020). Direct recurring costs for the EU institutions will be emerging from an increased amount of project to be processed under the existing portals. They are estimated to total to € 40,000.00.

[125] These estimates are based on the assumption that for summarizing the rules and the opportunities of the 27 EU Member States, 2 FTE are needed each for 2 months. The cost of 1 FTE in EU institutions is based on Eurostat (https://ec.europa.eu/eurostat/documents/10186/7970019/Guideline-unit-costs.pdf).

4.2.3 Option A.2 - Specify and improve rules - Targeted approach

This option goes a step further than option A.1 by harmonising some of the most important existing rules. It would introduce more specific rules on key aspects impacting cross-border investments. The direct change would be the passing of a new EU legislation that would clarify whenever necessary a number of rules relevant to investment protection and currently found within the TEU, TFEU, the Charter of Fundamental Rights, and sector-specific secondary legislation; as interpreted by the CJEU as well as in various judgments. For all stakeholders, this would reduce the level of uncertainty and the margin for interpretation of the EU law relating to investment protection. These changes would affect the action of public authorities and investors. The expected impact of these changes is on the behaviour of investors and public authorities and on the outcome of amicable dispute settlement or court procedures at national level.

- Investors would benefit from improved clarity on the level of investment protection across the EU thanks to more clarity on the rules, increased legal certainty, faster procedures due to less time spent on assessing the legal situation. This should result in more effective investment decisions. It would reduce the search costs especially for smaller companies, and it would make to rules easier to understand. The subsequent indirect impact would be an increase of cross-border investments. Among the companies and investors responding to our survey 55% indicated that they redirected, delayed, or divested their investments in the EU due to investment protection and enforcement concerns.
- Member States' Public authorities would also benefit from more clarity on the rules, increased legal certainty, faster procedures due to less time spent on assessing the legal situation. It would affect the outcome of amicable dispute settlement or court procedures at national level. This should result in faster and more legally correct administrative decisions. A possible indirect impact for Member States would be the need to adjust the transposition of EU law into national regulation.
- Companies and citizens would benefit from increased foreign investments.

Contribution to operational objectives: This option would contribute to Operational Objective 1 (+), 2 (++) and 3 (++). It would introduce more specific rules on key aspects impacting cross-border investments (e.g. on compensation for expropriation, type of protection given for legal certainty including legitimate expectations, rights stemming from the principle of good administration) thus making access to investment protection rules easier (O1) and bringing greater clarity (O2) on the scope of investment protection rules (compared to the baseline and Option A1) and by making the rules more consistent across MS (O3). This option would not specify and clarify all the rules identified as problematic in the problem assessment section. And effectiveness regarding consistency would also be contingent of the application of the rules at national level.

Costs and benefits of option A.2

The direct benefits of this option are reduction in the legal search and assessment of costs, especially for smaller companies. In addition, the stability and clarity of the legal framework would lower the risk factor at the assessment stage and increase the probability of adequate treatment.

The main costs of this option are the one-off costs that would arise if when MS had to implement the EU measure (be it directive or regulation). In addition, if EU law improves standards of administration etc this could also entail significant costs (e.g. training, IT, more compensation to be paid.) for a MS. No costs were identified for the EU institutions, aside from their normal activity.

The direct and indirect benefits and one-off and recurring costs are summarised in the table below.

Specific impacts (main changes)	Direct benefits
For all stakeholders, this would stabilise and reduce the level of uncertainty and the margin of interpretation of EU law relating to investment protection. Investors would benefit from improved clarity on the level of investment protection across the EU thanks to more clarity on the rules, increased legal certainty, faster procedures due to less time spent on assessing the legal situation. Member States' Public authorities would also benefit from more clarity on the rules, increased legal certainty, faster procedures due to less time spent on assessing the legal situation.	It would reduce the legal search and assessment of costs, especially for smaller companies. The stability and clarity of the legal framework would lower the risk factor at the assessment stage and increase the probability of adequate treatment.
General impacts (main changes)	**Indirect benefits**
This option should result in more effective investment decisions. The improved clarity, certainty, and resulting confidence would reduce risk factors in the investment decisions, which could lead to a subsequent increase of cross-border investments.	The lower assessment costs, lower risks and enhanced stability could lead to an increase of cross-border investments. Depending on the type of unlocked cross-border investment, this could lead to high economic growth, more jobs and environmental benefits.
Direct one-off costs	**Direct recurring costs**
Implementing the EU measure is the one-off costs for the MS, no costs are expected for the EU institutions	No recurring costs are expected.

4.2.4 Option A.3 - Specify and improve rules - Comprehensive approach

This option is a more potent version of option A.2. It envisages a more comprehensive EU regulatory framework on investment protection, which, in addition to the rules envisaged under option A.2, would include rules further specifying the EU Treaties' rules on free movement of capital and other fundamental freedoms and EU principles relevant for intra-EU investment protection in a legislative package. It involves legislative activity, consolidating existing secondary legislation on investment protection, specifying rules on investment protection in EU primary law, codifying case-law of the CJEU, removing inconsistencies, filling legislative voids, updating legislation to most recent standards. This would include the definition of specific types of non-justified restrictions or restrictions that may be justified. The implementation of this option would stabilise and reduce the level of uncertainty and the margin for divergent interpretation of EU law relating to investment protection. These changes would affect public authorities and investors. The expected impact of these changes is on the behaviour of public authorities and on the outcome of amicable dispute resolution or court procedures at national level.

- Investors would benefit from an improved level of investment protection across the EU thanks to more clarity on the rules, increased legal certainty, faster research procedures due to less time spent on assessing the legal situation. This should result in more effective investment decisions. The subsequent indirect impact would be an increase of cross-border investments. Among the companies and investors responding to our survey 55%

indicated that they redirected, delayed, or divested their investments in the EU due to investment protection and enforcement concerns.

- Member States' Public authorities would also benefit from more clarity on the rules, increased legal certainty, faster procedures due to less time spent on assessing the legal situation. This should result in faster and also more legal correct administrative decisions.
- Companies and citizens would benefit from increased foreign investments.

Contribution to operational objectives: This option would contribute to Operational Objective 1 (+), 2 (+++) and 3 (+++). Compared to Option A2, this option envisages a more comprehensive EU regulatory framework, which, in addition to rules under Option A2, would include rules specifying the Treaty rules on free movement of capital and other fundamental freedoms and EU principles relevant for intra-EU investment protection in a legislative package leading to even greater clarity on scope of investment protection rules (O2) and on making them even more consistent across EU (O3). The effectiveness regarding consistency would also be contingent of the application of the rules at national level.

Costs and benefits of option A.3

The direct benefits of this option are reduction in the legal search and assessment of costs, especially for smaller companies. In addition, the stability and clarity of the legal framework would lower the risk factor at the assessment stage and increase the probability of adequate treatment.

The main costs of this option are the one-off costs that would arise if when MS had to implement the EU measure (be it directive or regulation). In addition, if EU law improves standards of administration etc this could also entail significant costs (e.g. training, IT, more compensation to be paid.) for a MS. No costs were identified for the EU institutions, aside from their normal activity.

The direct and indirect benefits and one-off and recurring costs are summarised in the table below.

Specific impacts (main changes)	Direct benefits
For all stakeholders, this would stabilise and reduce the level of uncertainty and the margin of interpretation of EU law relating to investment protection, to a larger extent than option A.2 Investors would benefit from improved clarity on the level of investment protection across the EU thanks to more clarity on the rules, increased legal certainty, faster procedures due to less time spent on assessing the legal situation. Member States' Public authorities would also benefit from more clarity on the rules, increased legal certainty, faster procedures due to less time spent on assessing the legal situation.	It would reduce the legal search and assessment costs, especially for smaller companies.

General impacts (main changes)	Indirect benefits
This option should result in more effective investment decisions. The improved clarity, certainty, and resulting confidence would reduce risk factors in the investment decisions, which could lead to a subsequent increase of cross-border investments.	An increase of cross-border investments. Depending on the type of unlocked cross-border investment, this could lead to high economic growth, more jobs and environmental benefits.
Direct one-off costs	**Direct recurring costs**
The implementation of the EU measure is considered as direct one-off costs for EU Member States. No direct costs are expected for EU institutions, however indirect costs may arise (increased certainty in rules could lead to more red tape if rights were further specified where previously was just a grey area)	No recurring costs are expected.

4.2.5 Option B.1 – Investment SOLVIT

This option seeks to help avoid issues or resolve them at an early stage. It could include specialised SOLVIT centres for investors to resolve individual investment protection cases. It would increase the level of problem solving and resolutions before going to adversarial dispute resolution, like courts. This option envisages developing a specialised branch of SOLVIT which would exist in each MS. In addition to a specific service on individual disputes tailored to investment cases, it would also include additional functionalities for structured feedback and follow-up on issues of general concern regarding the investment environment. This additional mechanism would facilitate discussions between stakeholders and public authorities. The contact point would be set up by public authorities within national administrations, with coordination support from the European Commission. The mechanism would be activated by investors when facing an investment protection issue. These changes would affect public authorities, investors and companies & citizens recipient of investments or affected by the investments. The main changes (specific impacts) are found in the conflict management phase of the investment process. The expected impact of these changes is a lower number of cases reaching national courts and a more efficient level of problem resolution.

- Investors would face a larger set of options to protect their investments, with one additional path to resolve issues. This would decrease the overall cost of investment protection and potentially constitute more efficient mechanism to resolve disputes. The facilitation mechanism would help solving disputes amicably and avoid litigation costs and delays.
- Member States' public authorities would benefit from lower caseloads in national courts and shorter procedures when the issue can be effectively resolved by the SOLVIT mechanism.
- Companies and citizens would benefit from increased foreign investments.

Contribution to operational objectives: This option would to some extent contribute to Operational Objective 5 (++). The option would introduce a new possibility to prevent problems and resolve disputes amicably, through the expansion of the SOLVIT system. It would however not significantly affect the type of disputes pertaining to the compliance of national legislation with EU law. Even though SOLVIT also deals with cases related to structural problems due to written rules/legislation incompatible with EU law and recurrent problems when administrative practice incompatible with EU law, its informal approach does not always succeed to resolve these problems.

In addition, SOLVIT is unavailable when the investors seek compensation for damages or take the case to court in parallel.

Costs and benefits of option B.1

The direct benefits of this option are lower average cost of investment protection thanks to more disputes amicably resolved. There is potentially a difference to be made between big companies and SMEs. Big companies can reach out more easily directly to governments and negotiate directly with them, while SMEs may benefit more often from an institutionalised amicable dispute resolution.

The main costs of this option are the one-off costs for Member States of setting up the mechanism. One-off costs for EU institutions are composed of coordination costs for the support of the setup and promotion costs of the mechanism. Direct recurring costs for Member States refer to the costs of management of the SOLVIT mechanism. Finally, access to SOLVIT might have a cost for investors.

The direct and indirect benefits and one-off and recurring costs are summarised in the table below.

Specific impacts (main changes)	Direct benefits
Investors would face a larger set of options to protect their investments, with one additional path to resolve issues before resorting to adversarial action. This would decrease the overall cost of investment protection and potentially constitute more efficient mechanism to resolve disputes. Member States' Public authorities would benefit from lower case-load in national courts and shorter period for dispute resolution when the issue can be effectively resolved by the SOLVIT mechanism.	Lower average cost of investment protection thanks to more disputes amicably resolved. The option is unlikely to bring benefits for all instances of national legislations infringing investment protection rights., as the feedback and follow-up mechanism on general issues would only aim to achieve amicable solutions to general problems and would depend on the willingness to cooperate for both sides.
General impacts (main changes)	**Indirect benefits**
The knowledge of the existence of a prevention mechanism would reduce risk factors in the investment decisions, which could lead to a subsequent increase of cross-border investments.	An increase of cross-border investments. Depending on the type of unlocked cross-border investment, this could lead to high economic growth, more jobs and environmental benefits.
Direct one-off costs	**Direct recurring costs**
The costs of setting up the mechanism, training of staff, as well as promoting the mechanism to investors are the direct one-off costs for Member States. As outlined in further detail in Annex VII of this report these would amount to € 414,925. [126] One-off costs for EU institutions are estimated to total € 31,380.00 and are composed of coordination costs for the support of the setup and promotion costs of the mechanism.[127]	Direct recurring costs for Member States refer to the costs of management of the Service, and total € 56,766 in the upper bound scenario. The costs are estimated in the relation to current SOLVIT contributions, for further detail please refer to Annex VII. No recurring costs are expected for EU institutions.

[126] Refer to Annex VII of this report for further detail on the cost items as well as on the approach and assumptions for the cost estimates.

[127] Refer to Annex VII of this report for further detail on the cost items as well as on the approach and assumptions for the cost estimates.

4.2.6 Option B.2 - Improving enforcement before national courts

This option would harmonise selected procedural rules relevant for access to remedies for investors before national courts. For instance, it could streamline procedures to obtain remedies; improve rules on legal standing to bring investment protection claims, and rules ensuring (more effective) interim measures. The direct change would be found in new legislation, should a new directive be created, that would streamline some rules and procedures. This would reduce the level of uncertainty and the margin for interpretation of such rules which serve the enforcement of investment protection law.

- Investors would benefit from the higher minimum level of enforcement. In some case, they will be able obtain remedies where it might not have been possible before.
- Member States' Public authorities would apply investment protection rules more effectively.
- Companies and citizens would benefit from increased foreign investments

Contribution to operational objectives: This option would contribute to Operational Objective 4 (++), and 6 (+++). By harmonising selected procedural rules relevant for access to remedies for investors before national courts, this option would to some extent improve effectiveness of enforcement mechanisms for investment protection cases (O4). The enforcement mechanism is wider than just the access to remedies, but access to remedies has been identified as an important driver of the problem in the survey. The option would also achieve the sixth objective, which is focused on the improvement of procedural rules in national courts (O6).

Costs and benefits of option B.2

The main changes (specific impacts) and thus direct benefits are found in the dispute resolution phase of the investment process, namely in time saved in court and during better procedures and increased probability of obtaining compensation in case of violation of investment protection rules by an EU Member State.

This option would entail costs at Member State level, which will vary, inter alia based on the measures that will need to be introduced and the changes that will need to be made to national legislation. One-off costs for Member States are expected to arise from: conducting the streamlining exercise, training the staff for new procedural rules, administrative costs following the streamlining exercise, the promotion of the new guidelines.

The direct and indirect benefits and one-off and recurring costs are summarised in the table below.

Specific impacts (main changes)	Direct benefits
Investors would benefit from the higher minimum level of enforceability of their rights. In some case, they will be able obtain remedies where it might not have been possible before. This changes the dispute resolution process for investors and would increase the probability of adequate compensation.	Time saved in court and during better procedures Damages for violation of investment protection rules received.
General impacts (main changes)	**Indirect benefits**
Enhanced trust in the enforcement of investment rights in national courts would reduce risk factors in the investment decisions, which could lead to a subsequent increase of cross-border investments.	A medium increase of cross-border investments. Depending on the type of unlocked cross-border investment, this could lead to high economic growth, more jobs and environmental benefits.

Direct one-off costs	Direct recurring costs
One-off costs for Member States are expected to arise from: • training the staff for new procedural rules (1 FTE for 1 month), The costs are estimated to total € 82,922. No one-off costs are expected for EU institutions.	No recurring costs are expected for this policy option.

4.2.7 Option B.3 - European investment board

This option would establish a specialised mechanism in investment protection, operating at EU level, and competent to examine individual cases in the field of investment protection, complementing national enforcement systems. It could include a mediation role and would have the competence to suggest how the alleged violation of EU law could be remedied. The activities of the European Investment Board would affect public authorities, investors and companies & citizens recipient of investments or affected by the investments. The main expected impact is larger set of options for investors to protect their investments, with one additional path to resolve issues. This would decrease the overall cost of investment protection and potentially constitute more efficient mechanism to resolve disputes.

- Investors would have access to a new tool for investment protection. The risk of losing the investment would be reduced. The duration of national court cases could also be reduced if the output of the European investment board can weight in the procedure.
- Members States' Public authorities would benefit from lower case load in national courts, and a better investment climate.
- Companies and citizens would benefit from increased foreign investments.

Contribution to operational objectives: This option would contribute to Operational Objective 4 (+) by complementing national enforcement systems in Member States and Operational Objective 5 (+++). A European investment board would typically have more formalised procedures and possible power to ask for documents, however, its potency would eventually depend on design which is not known yet. The option would introduce a new possibility to prevent problems and contribute to resolving disputes through the issuance of specialised opinions of a neutral third party. The effectiveness of this option is limited by the non-binding nature of opinions/advice. Furthermore, according to consulted stakeholders in the focus group (see Annex IV for more details), a European investment board (in the focus group referred to as Ombudsman-like body) would be a more effective instrument if there was a large group of affected stakeholders, but if there is only one investor having a single issue, administrative burden of bringing a complaint could be very high.

Costs and benefits of option B.3

Investors would face a larger set of options to protect their investments, with one additional path to resolve issues before resorting to legal action. This would decrease the overall cost of investment protection and potentially constitute more efficient mechanism to resolve disputes. The body would also contribute to more consistent and coherent application of EU law through issuing specialised opinions.

The main costs of this option are the one-off costs related to the creation of such a body and translation costs as well as promotion costs. Assuming that the body would be an EU institution, one-off costs for EU institutions would refer to the creation of the platform and guidelines, the

translation of lists and guidelines as well as the promotion of the body. In addition, the annual staff costs of the body will be recurring direct costs for the EU institutions. The costs of supporting the creation and the setting up of such a body at European level and translation costs as well as promotion costs are direct one-off costs for Member States. Finally, access to a European investment board might have a cost for investors.

The direct and indirect benefits and one-off and recurring costs are summarised in the table below.

Specific impacts (main changes)	Direct benefits
Investors would face a larger set of options to protect their investments, with one additional path to resolve issues before resorting to legal action. This would decrease the overall cost of investment protection and potentially constitute more efficient mechanism to resolve disputes.	Lower average cost of investment protection thanks to more disputes not resolved in court. The option could also contribute to more consistent application of EU law, including by national courts thanks to opinions issued by the European Investment board.
General impacts (main changes)	**Indirect benefits**
The knowledge of the existence of a prevention mechanism would reduce risk factors in the investment decisions, which could lead to a subsequent increase of cross-border investments.	An increase of cross-border investments. Depending on the type of unlocked cross-border investment, this could lead to high economic growth, more jobs and environmental benefits.
Direct one-off costs	**Direct recurring costs**
The costs of supporting the creation of such a body from national level, costs for the setting up of the body as well as translation costs and promotion costs are direct one-off costs for Member States and are estimated to total to €414,892.00. One-off costs for EU institutions refer to the creation of the platform and guidelines, the translation of lists and guidelines as well as the promotion of the body and are expected to total to €227,514.00. [128]	While no recurring costs are expected for the EU Member States, the annual staff costs of the body will be recurring direct costs for the EU institutions. They are estimated to total to €2,694,328 in the middle scenario and are further explained in Annex VII.[129]

4.2.8 Option B.4 – EU investment court

This option would establish a specialised EU Investment Court as an alternative to national courts. It would enable investors to bring claims against Member State measures that may violate their rights under EU law directly before a fully-fledged court, which would be competent for all aspects of a case, including possible infringement of the EU investment rules and remedies in an individual case. It could be modelled on the Unified Patent Court and established through an international agreement between MS. As with the Unified Patent Court, the new Investment Court would be set up as a court common to the Member States. As a result, it will not be possible for its decisions to be directly appealed before the Court of Justice, but it will be able to address preliminary questions

[128] For further detail on the single cost items as well as on the exact estimation and assumptions for the cost estimates please refer to Annex VII of this report.
[129] For further detail on the single cost items as well as on the exact estimation and assumptions for the cost estimates please refer to Annex VII of this report.

to the Court of Justice under Article 267 TFEU. This option would affect public authorities, investors and companies & citizens recipient of investments or affected by the investments.

- Investors would have access to a specialised court in a form of a "one stop shop". Investors could bring claims directly and obtain compensation through a binding decision. They would also benefit from an increased level of enforcement of investment protection rules and from the stability provided by the existence of the court (deterrent effect). Finally, they would also benefit from higher expertise of the adjudicators dealing with investment cases compared to ordinary MS judges' expertise.
- Members States' public authorities would benefit from lower case load in national courts and a better investment climate.
- Companies and citizens would benefit from additional cross border investments unlocked by the guarantee provided the existence of the court.

Contribution to operational objectives: This option would contribute to Operational Objective 4 (+++), and 6 (++). By opening the possibility of bringing cases at EU level, this option would improve effectiveness of enforcement mechanisms for investment protection cases (O4). It would also somewhat strengthen safeguards in procedural rules (O6), through a possible deterrent effect.

Costs and benefits of option B.4

The main changes (specific impacts) and thus direct benefits pertain to investor's being able to appeal national court outcomes and thus increase the probability of obtaining compensation.

The main costs of this option are the one-off costs of training people for specialisation and the promotion of the court. Similarly, the costs of setting up the court, training staff and promoting the court are one-off costs for the EU institutions.[130] There will be significant recurring costs for judges as well as for staff members of the court are yearly recurring direct costs (estimated to total €32,059,086 per year).

The direct and indirect benefits and one-off and recurring costs are summarised in the table below.

Specific impacts (main changes)	Direct benefits
Investors would be able to bring their dispute to the specialised court. They would also benefit from an increased level of enforcement of investment protection rules and from the stability provided by the existence of the court (deterrent effect).	The Court would be able to deal with the case in a holistic manner, including to award compensation in the same proceedings, a possibility that did not exist before.
General impacts (main changes)	**Indirect benefits**
The knowledge of the existence of a prevention mechanism would reduce risk factors in the investment decisions, which could lead to a subsequent increase of cross-border investments. A deterrent effect might increase the stakes in the adjudication process, for all parties involved, and lead to more effective investment right protection.	A strong increase of cross-border investments. Depending on the type of unlocked cross-border investment, this could lead to high economic growth, more jobs and environmental benefits.

[130] We assume the EU will set up the court, if it was the MS that would set the court up in an international agreement, then they would also pay its costs.

Direct one-off costs	Direct recurring costs
Direct one-off costs for Member States are emerging from the promotion of the court and are estimated to total to €165,983.00. Similarly, the costs of setting up the court, training staff and promoting the court are one-off costs for the EU institutions totalling to €266,743.00.[131]	The costs for judges as well as for staff members of the court are yearly recurring direct costs and are estimated to total to €30,477,638 in a medium scenario as outlined in Annex VII of this report.[132]

[131] For further detail on the single cost items as well as on the exact estimation and assumptions for the cost estimates please refer to Annex VII of this report.

[132] For further detail on the single cost items as well as on the exact estimation and assumptions for the cost estimates please refer to Annex VII of this report.

5 COMPARISON OF OPTIONS

5.1 Effectiveness

This section summarises the key impacts presented in the preceding chapter and discusses the contribution of each policy option towards the operational objectives that the initiative aims to achieve, as a measure of their effectiveness. The contribution to each operational objective of the initiative is gauged on a tree levels scale and a total score is attributed based on the overall contribution to the relevant objectives.

Table 1: Summary of options addressing problem A in terms of effectiveness

Options	Operational Objective 1	Operational Objective 2	Operational Objective 3	Score
0 – Do nothing	0	0	0	0
A.1 – Visibility	++	+	≈	3
A.2 – Targeted approach	+	++	++	5
A.3 – Comprehensive approach	+	+++	+++	7

Magnitude of impact as compared with the "do nothing" scenario (the "do nothing" scenario is indicated as 0): +++ strongly positive (score 3); ++ positive (score 2), + somewhat positive (score 1); ≈ neutral (score 0)

Option A.1 mainly contributes to OO1 but would not significantly change the information already available, but it would contribute to an easier access to information. Options A.2 and A.3 both contributes to OO1, OO2 - clearer scope of investment protection under EU law and OO3 - more consistent investment protection rules across Member States, but A.3 is considered more effective as its scope is broader. The effectiveness of these two options however would depend on the degree to which they affect national procedures. In other words, they would be effective only if the problem was caused by a lack of clarity or by the scope for interpretation, and if the national authorities and investors adjust their assessment of the rules.

To meet all objectives to the largest degree, option A1 could be combined with option A3.

Table 2: Summary of options addressing problem B in terms of effectiveness

Options	Operational Objective 4	Operational Objective 5	Operational Objective 6	Score
0 – Do nothing	0	0	0	0
B.1 – Investment SOLVIT	≈	++	≈	2
B.2 - Streamlining procedural rules	++	≈	++	4
B.3 – European investment board	+	+++	≈	4
B.4 – EU Investment Court	+++	≈	+	4

Magnitude of impact as compared with the "do nothing" scenario (the "do nothing" scenario is indicated as 0): +++ strongly positive (score 3); ++ positive (score 2), + somewhat positive (score 1); ≈ neutral (score 0)

Option B.1 contributes only to OO5, by offering a new possibility to prevent problems at an early stage. Similarly, option B3 contributes to OO5, but it is more effective in doing so (as explained in Section 4.2.5 and 4.2.7), and it also contributes somewhat to OO4 as it would complement national enforcement systems. Options B2 and B4 contribute to OO4 and OO6. Option B4 would improve effectiveness of enforcement mechanisms for investment protection (OO4) cases by opening the possibility of bringing cases at EU level, and it would also somewhat strengthen safeguards in procedural rules (OO6), through a possible deterrent effect. Option B2 would achieve OO4 and OO6 by harmonising selected procedural rules.

To meet all objectives to the largest degree, option B2 could be combined with option B3.

5.2 Efficiency

This section summarises the costs and benefits of the considered options and thus their efficiency in achieving the operational objectives. Only indirect benefits could be estimated in monetary terms and they capture the additional GDP at the EU level that would result from additional FDI should the given option be applied. Depending on the type of unlocked cross-border investment, this could lead to more jobs and environmental benefits, however estimating such benefits is not feasible. The main stakeholders that would bear the costs of the initiative are the EU Member States authorities and the EU institutions. In certain cases (option B1, B3 and B4) investors may also bear some costs depending on the final design of the options. The methodology for calculations is included in Annex VI and Annex VII.

Table 3 Summary of options addressing problem A in terms of efficiency

Options	EU investors	EU Member States	EU Institutions	EU citizens	Cost /benefit ratio
0 – Do nothing					
A.1 – Visibility					
Costs	-	EUR 82 992 (one-off) EUR 8 296 (yearly)	EUR 7 845 (one-off) EUR 40 000 (yearly)	-	0.135
Benefits	EUR 103 million				
A.2 – Targeted approach					
Costs	-	Transposing the directive into national law and applying the recommendation	-	-	
Benefits	EUR 205 million				
A.3 – Comprehensive approach					
Costs	-	The implementation of the directive, the mode or modification into the national legislation	-	-	
Benefits	EUR 308 million				

Note: The calculations of costs can be found in Annex VII. The calculations of benefits can be found in Annex VI. The reported values are based on Method 1 (Baseline trend).

To ease readability, the cost/benefit ratio was multiplied by 100.

The efficiency of different options A cannot be compared as the costs for option A.2 and A.3 were not estimated, however given that the benefits of option A.3 are expected to be much more significant than those resulting from option A.2, while the costs related to the two options can be assumed similar, thus option A.3 is likely to be more efficient.

Table 4 Summary of options addressing problem B in terms of efficiency

Options	EU investors	EU Member States	EU Institutions	EU citizens	Cost /benefit ratio
0 – Do nothing					
B.1 – Investment SOLVIT					
Costs	Possible fee structure	EUR 414 925 (one off) EUR 56,766 (yearly)	EUR 31 380 (one off)	-	0.201
Benefits	EUR 205 million				
B.2 - Streamlining procedural rules					
Costs	-	EUR 82,922 (one off)	-	-	0.0270
Benefits	EUR 307 million				
B.3 – European investment board					
Costs	Possible fee structure	EUR 414 892 (one-off) EUR 2 694 328 (yearly)	EUR 227 514 (one-off)	-	1.628
Benefits	EUR 205 million				
B.4 – EU Investment Court					
Costs	Possible fee structure per case brought to court	EUR 165 983 (one-off) EUR 30 477 638 (yearly)	EUR 266 743 (one off)	-	6.025
Benefits	EUR 513 million				

Note: The calculations of costs can be found in Annex VII. The calculations of benefits can be found in Annex VI. The reported values are based on Method 1 (Baseline trend).

To ease readability, the cost/benefit ratio was multiplied by 100.

The most efficient option among those addressing problem B is option B.2 − Streamlining procedural rules (it has the lowest cost/benefit ratio), followed by option B.1 and B.3. Option B.4 is the least cost-effective given the high recurring costs of running an investment court.

5.3 Overall assessment

The table below presents the overall assessment of options.

Options	Effectiveness	Efficiency	Total score
Options addressing problem A			
A.1 - Visibility	3	++	Medium (5)
A.2 – Targeted approach	5	+++	Medium (8)
A.3 – Comprehensive approach	7	+++	High (10)
Options addressing problem B			
B.1 – Investment SOLVIT	2	++	Medium (4)
B.2 - Streamlining procedural rules	4	+++	High (7)
B.3 – European investment board	4	+	Medium (5)
B.4 – EU Investment Court	4	≈	Medium (4)

Note: Efficiency score based on the cost/benefit ratios.

In light of their effectiveness and efficiency characteristics, we see some possible combinations of policy options to be recommended when addressing each problem (ordered by preference):

Problem A:

- A.1 and A.3 - Option A.3 – Comprehensive approach combined with option A.1 – Visibility would be the best combination of options to implement. A codified and clarified set of existing EU investment protection rules is expected to resolve the first identified problem, while increasing visibility of existing EU and national rules would ensure that the information on the rules is up-to-date, accurate and reliable and presented in an understandable manner. In addition, the access point could facilitate identifying investment opportunities at EU level and national level (e.g. through enhanced EU match-making tools). Clarification at EU level and increased visibility should trickle down to any national context where uncertainty was affecting investors.
- The combination of A.1 and A.2 would also be effective, but to a lower extent, given that option A.2 is less comprehensive than option A.3.

In terms of stakeholders'[133] views, option A3 is the most preferred followed by option A2 and A1.

Problem B:

- B.2 and B.3. With regards to problem B, combining Option B.2 and B.3 would resolve the remaining issues identified in the problem assessment that prevented the satisfactory application of investment protection rules by harmonising selected procedural rules relevant for access to

[133] Stakeholders refer to intra-EU investors. Assessment based on study's survey results and focus group discussions. Stakeholders expressed their preferences only about individual options, not combinations.

remedies for investors before national courts and by improving possibilities to prevent problems and resolve disputes amicably, respectively.

Other possible combinations (ordered by preference):

- B1 and B2. The combination of B.1 and B.2 would also be effective, but to a lower extent compared to B.2 and B.3; on the other hand, B.1 and B.2 combination is somewhat more efficient compared to B.2 and B.3.
- B.4 and B.2. This combination could also be considered but it would be a less efficient approach given the high costs of setting up and operating a dedicated investment court.
- B.1 and B.4. This combination could also be considered but it would be a less effective and less efficient given the high costs of setting up and operating a dedicated investment court.
- B.1 and B.3. This combination would be efficient, however it would not be very effective as it would not address all operational objectives under Problem B.

In terms of stakeholders'[134] views (investors perspective mostly), option B4 is the most preferred. Options B1, B2 and B3 are perceived favourably as well by most.

[134] Stakeholders refer to intra-EU investors. Assessment based on study's survey results and focus group discussions. Stakeholders expressed their preferences only about individual options, not combinations.

6 MONITORING FRAMEWORK

6.1 Introduction and context

This chapter aims to introduce a proposed monitoring framework for the policy intervention to be adopted in order address the problems and drivers, identified in chapter 2 of this report. This framework has been created based on the assessment of policy options described in chapters 4 and 5 of this report. If different policy interventions are retained, the monitoring framework will need to be slightly fine-tuned accordingly. As specified in the Better Regulation Guidelines, monitoring generates evidence on an intervention's activities and impacts over time, in a continuous and systematic way. Therefore, it is suggested that the monitoring system is built in a way allowing to:

- Identify whether a policy is being applied on the ground as expected;
- Addressing any implementation problems of an intervention; and/or
- Identifying whether further action is required to ensure that it can achieve its intended objectives. [135]

Monitoring needs to consider the objectives of the intervention and what evidence needs to be collected to track its progress and performance. This is linked to understanding both the logic of the intervention and how the evidence collected will be used. It is suggested that consideration is given to the frequency and method of collection, different sources of evidence taking into account what is already available and cost for different parties involved. This leads to a series of key questions that is suggested to be addressed by the monitoring framework, including:

- What evidence needs to be collected?
- When and how should evidence be collected?
- Who will collect the evidence and from whom? [136]

In order to address the above-mentioned questions and assess to what extent the policy option achieves its objectives and delivers the expected results, this chapters focuses on the two following steps foreseen:

- Step 1: Understanding the type of evidence to be collected and establishing indicators to measure the success of the initiative in the future;
- Step 2: Defining an approach for the monitoring and retrospective evaluation.

6.2 Evidence to be collected and indicators to measure the success of the initiative in the future

6.2.1 What evidence needs to be collected?

According to the Better Regulation Guidelines on monitoring, consideration should be given to what evidence needs to be gathered to give reliable and consistent measurement against the objectives of a given intervention.[137]

In order to understand what evidence needs to be collected to monitor the success of this initiative in the future, a first step would be to examine whether the intervention logic of this policy initiative is still valid. To do that, it is essential to assess whether the objectives of this initiative still exist

[135] Better Regulation Guidelines, Tool #41. Monitoring arrangements and indicators
[136] Better Regulation Guidelines, Tool #41. Monitoring arrangements and indicators
[137] Better Regulation Guidelines, Tool #41. Monitoring arrangements and indicators

and whether the identified policy options would help achieve these objectives (see detailed objectives in chapter 3.1). Briefly, the specific objective of this initiative is twofold:

a) Investors are protected when they invest cross-border and they feel confident about the rules protecting them.

b) Investors can obtain effective remedies for cross-border investments and investment protection rules are enforced across Member States.

Once it is determined that the policy objectives still exist, the second step would be to examine whether the foreseen steps/milestones of the preferred policy options have been completed successfully or whether their progress is well on track. The foreseen milestones of the policy options are presented in detail in chapter 3.2.

The third set of evidence to be collected in order to monitor this initiative is linked to the stakeholders affected by these policy options, in terms of numbers and characteristics. In the previous chapter, the impact assessment has identified four main categories of stakeholders affected, being a) EU investors, b) EU Member States, c) EU institutions and d) EU citizens. It would, therefore, be needed to examine whether this assessment is still valid.

The fourth and final step would then be to collect evidence on the impacts of this intervention on society and each stakeholder category, including one-off and recurring costs, direct and indirect benefits, as well as potential wider impacts. This would allow to monitor whether the initial impact assessment (described in detail in chapters 4 and 5) has been proven correct or whether additional or lower levels of (unexpected) impacts have emerged.

6.2.2 Establishing indicators for measuring the success of the initiative in the future

Once the type of evidence needed is clear, careful consideration needs to be given to the timing and process of its collection. Monitoring requires a clear link to be established between objectives and indicators bearing in mind the arrangements needed to collect the necessary new evidence in time to meet reporting requirements. These indicators include:[138]

- Output indicators: These relate to the specific deliverables of the intervention;
- Outcome indicators: These match the effects of the intervention;
- Impact indicators: These relate to the intended outcome the intervention would contribute to in terms of impact on the wider economy/society beyond those directly affected by the intervention.

For this particular initiative, the link between objectives and established indicators is presented in the following table.

[138] Better Regulation Guidelines on Monitoring

Table 5 Link between objectives, key outputs, outcomes and potential monitoring indicators

Initiative's Objectives	Key Outputs	Key Outcomes	Monitoring Indicators
Investors are protected when they invest cross-border and they feel confident about the rules protecting them. This translates into the following operational objectives: • Objective 1: Improve access to information on investment protection rules (at EU and national level) and investment opportunities • Objective 2: Clearer scope of investment protection under EU law; • Objective 3: More consistent investment protection rules across Member States: o Rules governing compensation for restrictions of property and other economic rights are transparent and clear across MS; o Administrative conduct safeguards are set and implemented; o The regulatory framework is predictable and stable and legitimate expectations are clear	• EU legal instrument (directive or regulation) establishing a comprehensive EU regulatory framework specifying and improving rules on investment protection, entailing: o Specific rules on key aspects impacting cross-border investments (e.g. on compensation for expropriation, on protection of legitimate expectations, on rights stemming from the principle of good administration). o Rules further specifying the EU Treaties' rules on free movement of capital and other fundamental freedoms and EU principles relevant for intra-EU investment protection in a legislative package. o Consolidation of relevant CJEU case-law on free movement of capital (e.g. clarifying types of justified and unjustified restrictions).	• Stabilisation and reduction of the level of uncertainty and the margin of interpretation of EU law relating to investment protection. • Improved clarity on the level of investment protection across the EU thanks to more clarity on the rules, increased legal certainty, faster procedures due to less time spent on assessing the legal situation. • More effective investment decisions. The improved clarity, certainty, and resulting confidence would lead to reduction of risk factors in the investment decisions and subsequently to increase of cross-border investment.	• Level of resources dedicated to legal search assessment of costs of cross-border investments. • Amount of time needed for intra EU cross border investment, including time for both research and administrative procedures • Level of intra EU cross-border investments (in terms of number and amount of investments). • Level of economic growth/ business revenue • Level of jobs created
Investors can obtain effective remedies for cross-border investments and investment protection rules are enforced across Member States. This translates into the following operational objectives: • Objective 4: Improve effectiveness of enforcement mechanisms for investment protection cases	• Streamlining of selected enforcement procedural rules in relation to specific matters for which an internal market issue has been detected. This entails: o Harmonised procedural rules relevant for access to remedies for investors before national courts. (e.g. streamlining of procedures to obtain remedies; improving rules on legal standing to bring investment protection claims, rules ensuring - more effective- interim measures).	• Higher minimum level of enforceability of investors' rights. o In some case, obtaining remedies where it might not have been possible before. o Change of the dispute resolution process for investors o Increase of the probability of adequate compensation.	• .Amount of time needed during investment protection enforcement procedures. • Number of investment cases where remedies have been obtained • Number of dispute resolution cases

Initiative's Objectives	Key Outputs	Key Outcomes	Monitoring Indicators
• Objective 5: Improve possibilities to prevent problems and resolve disputes amicably • Objective 6: Strengthen safeguards in procedural rules to improve enforcement in national courts		• Enhanced trust in the enforcement of investment rights in national courts o Leading to reduction of risk factors in the investment decisions and subsequently to increase of cross-border investments.	• Level of intra EU cross-border investments (in terms of number and amount of investments) • Level of economic growth/ business revenue • Level of jobs created

Table 6 Link between policy objectives and outcome indicators

Specific Objectives	Operational Objectives	Outcome Indicators
Investors are protected when they invest cross-border and they feel confident about the rules protecting them	Clearer scope of investment protection under EU law	• Level of resources dedicated to legal search assessment of costs of cross-border investments • Amount of time needed for intra EU cross border investment procedures
	More consistent investment protection rules across Member States o Rules governing compensation for restrictions of property and other economic rights are transparent and clear across MS o Administrative conduct safeguards are set and implemented o The regulatory framework is predictable, stable and legitimate expectations are clear	
	Improve access to information on investment protection rules (at EU and national level) and investment opportunities	
Investors can obtain effective remedies for cross-border investments and investment protection rules are enforced across Member States	Improve possibilities to prevent problems and resolve disputes amicably	• Number of dispute resolution cases
	Improve effectiveness of enforcement mechanisms for investment protection cases	• Amount of time needed during investment protection enforcement procedures
	Strengthen safeguards in procedural rules to improve enforcement in national courts	• Number of investment cases where remedies have been obtained

Table 7 Link between policy objectives and impact indicators

General Objectives	Impact Indicators
Investors trust the preventive, protective and enforcement rules and systems	• Level of intra EU cross-border investments (in terms of number and amount of investments)
Predictable, stable, and clear investment protection framework for cross-border investors	
Cross-border investments are not more costly than national investments	
The potential of the Single European Market is leveraged and the Capital Markets Union is achieved	
There is growth in jobs, businesses, and infrastructure projects in the host countries	• Level of economic growth / business revenue
The EU has sustainable economic and social growth, with a competitive business landscape	• Level of jobs created

6.3 Approach for the monitoring and retrospective evaluation – When, how and by whom will the evidence by collected?

A final question to be addressed by the proposed monitoring framework is how and when this evidence will be collected, as well as who will have the responsibility for gathering data and who will be responsible for providing it.

In order to monitor this particular policy initiative, evidence can be collected centrally, at EU level, by the European Commission's responsible directorate or service, upon request to the national authority of each Member State, competent for providing the required monitoring data. Whenever needed, additional types of stakeholders such as private sector companies, citizens or non-governmental organizations might also be consulted or involved as evidence providers.

With regard to the sources of data, it is suggested, in line with better regulation guidelines, to use existing data sources as much as possible in order to reduce costs and avoid creating additional unnecessary administrative burdens. Therefore, it is important to know what is already being collected and when, to avoid asking for the same data several times or creating new burden by asking for extra data when existing data broadly cover the same ground.[139] In particular, with regard to the indicators established in the previous sub-section of this chapter, Eurostat is already collecting information on the level of inward and outward intra-EU cross-border investments (including flows and stocks).[140] With regard to the remaining indicators, the European Commission can be collecting the required data from Member States' competent authorities that might be already collecting them or wherever this is not possible, by the means of a survey. Additionally, smart use of technology which can reduce costs is suggested. In particular, electronic data capture at the point of origin is cheaper than periodic interviews or surveys. For every initiative, checks on existing tools, systems, practices, standards or databases (e.g. Eurostat statistics) are suggested to be made in order to identify what can be reused and avoid reinventing the wheel or developing new systems.[141] It should be mentioned that due to the nature of this particular initiative, the monitoring indicators have a broad scope and it might not always be easy to link them exclusively to this initiative, and sometimes the collection of some indicators might be costly or burdensome. However, in cases where quantitative evidence on the monitoring indicators is difficult to be collected, the collection can be complemented by qualitative feedback retrieved from the relevant stakeholders.

It is suggested that the frequency of measurement of the new evidence is collected on a yearly basis. However, based on the new monitoring data collected, the European Commission can prepare an implementation and evaluation report every five years. This report will be providing up-to-date information of the existing situation and changes in Member States related to intra-EU cross-border investments, showing whether the policy initiative achieves its objectives.

The detailed proposed approach for the collection of required evidence to allow monitoring and prospective evaluation is presented in the following table.

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[139] Better Regulation Guidelines on Monitoring, https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-monitoring.pdf and Better Regulation Toolbox https://ec.europa.eu/info/files/better-regulation-toolbox-41_en

[140] More info on: https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=bop_fdi6_geo

[141] Better Regulation Guidelines on Monitoring, https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-monitoring.pdf and Better Regulation Toolbox https://ec.europa.eu/info/files/better-regulation-toolbox-41_en

Table 8 **Monitoring indicators' system for collecting the necessary new evidence**

Impact Indicators	Definition	Unit of measurement	Source of Data	Frequency of measurement	Baseline	Target
Amount of resources dedicated to legal search and assessment of costs of cross-border investments	This indicator refers to the resources working on legal search and assessment of costs of cross-border investments, which is expected to decrease due to the improved clarity of the level of investment protection rules across the EU, as well as due to stabilization and reduction of the level of legal uncertainty and the margin of interpretation of EU law relating to investment protection.	Number of employees and working days/hours	EU Member States' competent authority	On a yearly basis	Status of the year before the adoption of the policy initiative	Investors/ Businesses (including both large companies and SMEs)
Amount of time needed for intra EU cross border investment procedures, including time for both research and administrative	This indicator refers to the time needed for intra EU cross border investment procedures that is expected to decrease due to faster procedures arising from less time spent on assessing the legal situation, as well as from faster administrative conduct due to the clear and comprehensive regulatory framework.	Number of working days/hours	EU Member States' competent authority	On a yearly basis	Status of the year before the adoption of the policy initiative	Investors/Businesses (including both large companies and SMEs)
Amount of time needed i during investment protection enforcement procedures	This indicator refers to time spent in relation to data protection rules' enforcement, which is expected to decrease due to higher levels of enforceability of investors' rights.	Number of working days/hours	EU Member States' competent authority	On a yearly basis	Status of the year before the adoption of the policy initiative	Investors/Businesses (including both large companies and SMEs)
Number of investment cases where remedies have been obtained	This indicator refers to number of cases obtaining remedies due to higher levels of enforceability of investors' rights.	Number of cases	EU Member States' competent authority	On a yearly basis	Status of the year before the adoption of the policy initiative	National Competent Authorities and Investors/Businesses (including both large companies and SMEs)

Impact Indicators	Definition	Unit of measurement	Source of Data	Frequency of measurement	Baseline	Target
Number of dispute resolution cases	This indicator refers to the number of dispute resolution cases, which is expected to increase due to the change of the dispute resolution process for investors.	Number of cases	EU Member States' competent authority	On a yearly basis	Status of the year before the adoption of the policy initiative	National Competent Authorities and Investors/Businesses (including both large companies and SMEs)
Level of intra-EU cross-border investments	This indicator refers to the number and amount of intra-EU cross-border investments, (taking into account FDI flows and stocks) that are expected to be increased due to the improved clarity of the level of investment protection rules as well as due to higher levels of enforceability of investors' rights.	Number and amount of investments	Eurostat[142] or EU Member States' competent authority	On a yearly basis	Status of the year before the adoption of the policy initiative	National Competent Authorities and Investors/Businesses (including both large companies and SMEs)
Level of business revenue/economic growth	This indicator refers to additional revenue and economic growth, which is expected to be generated due to the improved clarity of the level of investment protection rules as well as due to higher levels of enforceability of investors' rights.	Amount of additional revenue in EUR	EU Member States' competent authority	On a yearly basis	Status of the year before the adoption of the policy initiative	National Competent Authorities and Investors/Businesses (including both large companies and SMEs)
Level of jobs created	This indicator refers to the new jobs that are expected to be created due to the improved clarity of the level of investment protection rules as well as due to higher levels of enforceability of investors' rights.	Number of jobs	EU Member States' competent authority	On a yearly basis	Status of the year before the adoption of the policy initiative	National Competent Authorities and Investors/Businesses (including both large companies and SMEs)

[142] https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=bop_fdi6_geo

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ANNEX II: CASE STUDIES

Case Study I

Case: European Court of Human Rights ("ECtHR"), Judgment of 19.01.2017, *Werra Naturstein GmbH & Co KG v Germany*, No. 32377/12 ("*Werra Naturstein*").

This case study may serve as an illustration of the following drivers: Insufficient clarity in scope of investment protection rights under EU law; lack of clarity on legitimate expectations; ineffective safeguards in some procedural rules; and concerns about the effectiveness of national enforcement mechanism in cases involving investment protection.

Werra Naturstein concerned the utilisation of private land for public road construction purposes in Germany.

The owner of the land, a company[143], used its land for limestone mining and landfill activities. This activity required a mining licence. The company received said license despite ongoing public road planning for a potentially interfering motorway ("Autobahn"), although the precise location of the new Autobahn was not set at that time.

While the company's land was seized by the government as soon as the final location of the Autobahn was fixed, the company remained in formal possession of the mining license. The license could, however, not be used anymore. Around 67 percent of the limestone deposit remained in the ground as no longer accessible due to the Autobahn running across the deposit. A "court-sworn expert's report recorded losses and additional costs amounting to 3,589,566.42 EUR"[144].

The company was compensated for the expropriation of the land. The compensation amounted to 22,800.00 EUR. No compensation at all was paid, inter alia, for the futile mining license, and forgone profits from landfill. After the company was involved in over a decade of domestic litigation and spent around 470,000 EUR on legal costs[145], in 2017, the ECtHR ruled that not compensating for the unusable mining license amounted to breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR")'s Protocol No. 1[146]. Article 1 of Protocol No. 1 to the ECHR entitles everyone to a peaceful enjoyment of its property. Deprivation of someone's property by government must be compensated. Ultimately, the case was closed by an offer of the government "to pay compensation in the amount of 1,000,000 EUR to the Applicant if the Court, on condition of payment of that amount, strikes the Application out of the [Court's] list pursuant to Article 37 (1) c) of the Convention"[147]

Werra Naturstein may serve as an illustration of (1) latent insufficient clarity in scope of investment protection rights under EU law, in particular with respect to the scope of property protection and more specifically in this case whether the licence and forgone profits were covered and therefore had to be compensated for, (2) a potential deficit in clarity on legitimate expectations, (3) potential challenges when it comes to effective safeguards in some procedural

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[143] For the purposes of illustrating the drivers of (1) latent insufficient clarity in scope of investment protection rights under EU law, (2) a potential deficit in clarity on legitimate expectations, (3) potential challenges when it comes to effective safeguards in some procedural rules, and (4) concerns about the effectiveness of national enforcement mechanism in cases involving investment protection it is immaterial whether a company, such as the one at hand, is a foreign or a domestic entity to or of the EU Member State which took the measure. Fundamental rights under EU law apply in a cross-border situation as well as in an internal context.

[144] *Werra Naturstein*, para. 12.

[145] *Werra Naturstein*, para. 59.

[146] See also Council of Europe, Protocol No. 1 to the Convention, available at https://www.coe.int/en/web/echr-toolkit/protocole-1.

[147] ECtHR, Fifth Section, Werra Naturstein GmbH & Co Kg v. Germany, No. 32377/12, Judgement of 19.07.2018, para. 7

rules and (4) concerns about the effectiveness of national enforcement mechanism in cases involving investment protection.

An insufficient clarity in scope of investment protection rights and a potential deficit in clarity on legitimate expectations may be seen in the misperceived protection of mining rights under EU (and ECHR) law[148] by the EU Member State. According to domestic law, "mining rights under the terms of [. . . the Federal Mining] Act were granted only on the statutory condition that they would have to yield to a public infrastructure project without compensation."[149] Consequently, the mining right – granted only under the condition that no public road (here i.e. the Autobahn) or other infrastructure project interferes with such mining right – and the linked costs and losses due to the interference could not be compensated. "While the acquired mining rights constituted [protected] 'property' under Article 14 of the Basic Law [i.e. the German Constitution], the holder of a mining licence could not rely on making unhindered use of his or her mining rights; he or she could only operate under the limitations stipulated, inter alia, under [. . .] the Federal Mining Act."[150] The planning decision was therefore merely "activating" the statutory caveat and limit under which the mining license was granted in the first place.

The ECtHR held, however, that the lack of usability of the mining right without any compensation resulted in a substantial deprivation of the company's property.[151] Although the company had "knowledge or potential knowledge of potential future restrictions"[152] of the mining right, "the mining authority was or could have reasonably been aware of the planned motorway when granting the [mining] licence. It issued the [mining] licence [for 25 years] despite the uncertainty as to where exactly the motorway would be built and how the quarrying operation would be affected."[153]

What the ECtHR essentially said was that it is insufficient to simply add a "general disclaimer" in a law, that a mining right may be turn futile in the future when conflicting with public infrastructure projects. In such general fashion a government cannot prevent the emergence of legitimate expectations in the right's continuing usage and avoid compensation when the government chooses to interfere with said right.

In contrast, in ECtHR cases in which the competent authority made it more specific that the mining license may turn futile, for example by allowing explicitly for a re-examination of the right with a view to its possible termination[154], or by appending of the plans on road construction[155], the respective respondent states could avoid paying compensation for the futile mining licence.

What concerns the drivers of concerns about the effectiveness of national enforcement mechanism in cases involving investment protection and potentially ineffective safeguards in some procedural rules, "[u]nder domestic law [applicable to the situation in *Werra Naturstein*], the claim for compensation [as such] had to be decided in administrative proceedings firstly, and on the amount in subsequent expropriation proceedings".[156] Also, potential legal redress against the two decisions are allocated to different branches of the judiciary.[157] Such a "two step approach" may

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[148] According to Article 6(3) of the Treaty on European Union ("TEU"), "[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [. . .], shall constitute general principles of the Union's law."
[149] *Werra Naturstein*, para. 15.
[150] Ibid.
[151] *Werra Naturstein*, para. 49.
[152] *Werra Naturstein*, para. 52.
[153] *Werra Naturstein*, para. 52.
[154] Fredin v. Sweden, no. 12033/86, 18 February 1991, para. 18 and 54.
[155] Łączv. Poland (dec.), no. 22665/02, 23 June 2009.
[156] [Emphasis added] *Werra Naturstein*, para. 27.
[157] Due to Article 14(3), sentence 4 of the German Basic Law (*Grundgesetz*) the ordinary courts (for private law matters) decide on the amount of compensation; on the question of whether the expropriation itself was lawful, administrative

be said to lead, first, to lengthy proceedings of – in this case – around a decade, and, second, to potential uncertainties and, consequently, inefficient safeguards as to when – at the various levels of the proceedings – "comprehensive compensation"[158], included such as for the futile mining licence, should have been addressed for the first time.

In the case at hand, compensation for the mining license was neither explicitly referred to in the administrative planning decision nor in the administrative court decision. The company learned at the level of the proceedings about the amount of compensation for the expropriation before the private law courts "that for reasons of proportionality the planning decision might in a case like the present one call for a formal expropriation of the mining rights with corresponding compensation", however, "such a claim – as well as the issue of disproportionality as such – should have been raised in the proceedings concerning the planning decision before the administrative courts".[159] Since there has never been an administrative decision to formally expropriate the mining licence, no claim to compensation as such arose, which could have been determined in terms of its specific amount later on in the expropriation proceedings, as already explained above. As the administration and the respective administrative court apparently did not address the matter of the mining license question, the company ended up between chairs.

Case Study II

Cases: CJEU, Case C-179/14, ECLI:EU:C:2016:108 – *European Commission v. Hungary*; ICSID Arbitration, ICSID Case No. ARB/13/35, Award of 09 October 2018 – *UP and C.D Holding Internationale v. Hungary* (annulment proceedings pending as of 10 November 2020).

This case study may serve as an illustration of the following drivers: Uneven/inadequate investment protection rules in different Member States: Differences in compensation for restriction of property and other economic rights; (Concerns about effectiveness of national enforcement mechanism in cases involving investment protection).

Both cases concern, among others, the conditions for issuing meal vouchers, and may illustrate inadequate investment protection rules in EU Member States, coupled with concerns about effectiveness of national enforcement mechanisms as the undertakings acting as claimants in *UP and C.D Holding Internationale v. Hungary* chose to initiate an investment arbitration based on an international agreement rather than sticking to domestic and EU court proceedings.[160]

The cases at hand relate to the following: An EU Member State, by national legislation, effectively established a monopoly in favour of a public body for the issuance of vouchers for ready-to-eat meals, the so-called Erzsébet vouchers.[161] Such vouchers intended to allow employers to provide their employees, under favourable tax conditions, with benefits in kind, in the form of ready-to-eat meals. According to the newly introduced national legislation, the purchase of ready-to-eat meals was only receiving favourable tax treatment if made in exchange for Erzsébet vouchers.[162] Similar ready-to-eat meals vouchers were issued by for-profit companies in the past, some of

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courts decide according to Section 40(1) of the German Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*).

158 *Werra Naturstein,* para. 30; see also para. 31.

159 *Werra Naturstein,* para. 18.

160 At least with regard to the investors which initiated the investment arbitration in *UP and C.D Holding Internationale v. Hungary*, they never seem to have approached a domestic court. Ibid., para. 127: "Claimants state that, in November 2010, the Hungarian government adopted a constitutional amendment limiting the scope of the Constitutional Court's review of acts and decisions related to central taxes"; Ibid., para. 406: "The [Hungarian] judiciary had no role in the present case. Claimants never approached the judiciary, despite being entitled to do so."

161 *European Commission v. Hungary*, para. 119; *UP and C.D Holding Internationale v. Hungary*, para. 155.

162 *European Commission v. Hungary*, para. 120; *UP and C.D Holding Internationale v. Hungary*, para. 345, 347.

which of foreign origin. Under the new legislative regime, vouches issued by these undertakings would not benefit from favourable comparable tax treatment anymore. The Erzsébet vouchers, however, were introduced "without any appropriate transitional period, thereby generating heavy losses for the undertakings that had hitherto been present on the market concerned"[163], also to foreign undertakings active in the market.

The cases at hand may illustrate inadequate investment protection rules in EU Member States when it comes to the impact of significant legislative changes on ongoing businesses unaccompanied by transitional measures and effectively creating a monopoly for parts of the market. Also, concerns about the effectiveness of national enforcement mechanisms may be illustrated, as some of the undertakings affected by the legislative changes chose to resort to initiate investment arbitration rather than domestic and EU court proceedings.

The CJEU held "that national legislation such as that at issue, under which exclusive rights to carry on an economic activity are conferred on a single, private or public, operator, constitutes a restriction, both, of the freedom of establishment, and of the freedom to provide services"[164] according to the Articles 49 TFEU and 56 TFEU. Obviously, undertakings from other EU Member States wanting to issue for vouchers ready-to-eat meals could not benefit from a similar advantageous tax treatment of their vouchers compared to the Erzsébet vouchers. Since the establishment of such a voucher monopoly could not be justified by any overwriting public interests, the CJEU found a violation of the aforesaid freedoms.[165]

Due to the nature of the procedure before the CJEU, which aims merely at ending violations of, and ensuring compliance with, the Member States' obligation towards the EU and the other Member State, it was not possible for the CJEU to award damages directly to the individual undertakings that had hitherto been present on the market and suffered significant losses. However, on the basis of the CJEU's judgment, the individual undertaking may claim damages suffered due to a violation of EU law by the EU Member State. This must be done in the courts of the respective EU Member State, though.

In contrast, damages can be directly claimed and awarded in so-called investor-State arbitration, which can be initiated by a foreign investor against its host State on the basis of an international agreement, concluded between the investor's home State and host State, seeking to protect investments and investors in the respective other State's territory. And, indeed, the arbitral tribunal in *UP and C.D Holding Internationale v. Hungary*, having to deal with the same underlying facts as the CJEU, did so. The tribunal found that the establishment of the monopoly for Erzsébet vouchers, together with other measures by the EU Member State, resulted in a violation of the international treaty concluded between France and Hungary[166], as the (French) claimants undertakings "were evicted from the [Hungarian] meal voucher market"[167], *i.e.* their investment was expropriated.[168] As a consequence, the arbitral tribunal awarded damages to the claimant undertakings of around 23 million Euros.[169]

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[163] *European Commission v. Hungary*, para. 126.
[164] *European Commission v. Hungary*, para. 164.
[165] *European Commission v. Hungary*, para. 174.
[166] In light of the CJEU's judgment in C-284/16, ECLI:EU:C:2018:158 – Achmea, it must be stressed that the arbitral tribunal in *UP and C.D Holding Internationale v. Hungary* issued an award despite a clear lack of jurisdiction, acting ultra vires.
[167] *UP and C.D Holding Internationale v. Hungary*, para. 352.
[168] *UP and C.D Holding Internationale v. Hungary*, para. 419.
[169] *UP and C.D Holding Internationale v. Hungary*, para. 585.

Case Study III

Case: CJEU, C-57/15, ECLI:EU:C:2016:611 – *United Video Properties Inc. v. Telenet NV* ("*United Video*").

This case study may serve as an illustration of the following driver: Procedural rules. Ineffective safeguards in some procedural rules such as lack of legal standing to challenge laws, remedies not in the same procedure, interim measure.

United Video relates to a patent dispute. A patent holder "brought an action [. . .] in Belgium seeking, in essence, a finding of an infringement by [. . . another business] of that patent, an injunction requiring [. . .] to cease that infringement and an order [. . .] to pay the costs."[170] The patent holder lost the case as its patent was declared invalid by the court. The business defending itself against the claim of the patent holder had total costs of 230,000 EUR, of which 11,000 EUR out of 185,000 EUR – or 6 percent – for lawyers' fees could be reclaimed, according to domestic legislation. Costs for technical advisory in the field of patents of about 45,000 EUR could not be reimbursed according to domestic legislation as this required "fault" on the side of the unsuccessful party (here the patent holder) to the dispute.

United Video may serve as an illustration of potentially ineffective safeguards for investors in some procedural rules of the EU Member States. The fair allocation of legal costs potentially occurring when investors seek to defend their investment-related rights and interests will be determinative, among others, for their effective safeguarding and enforcement. The Belgian legislation in the case at hand fell short of this.

The CJEU, when asked to rule on compatibility of the Belgian procedural rules dealing with the allocation of legal costs with EU law[171], stated that EU law[172] requires that "the unsuccessful party must bear 'reasonable' legal costs"[173] "[L]egislation imposing a flat-rate significantly below the average rate actually charged for the services of a lawyer in that Member State"[174] in this sense is not anymore "reasonable". This follows from the fact that EU Law[175] calls for procedures and remedies to be dissuasive. "However, the dissuasive effect of an action for infringement [of a patent] would be seriously diminished if the infringer could be ordered only to reimburse a small part of the reasonable lawyer's fees incurred by the injured right holder."[176] Thus, Member State legislation which allows for reimbursement of merely a fraction of the real costs relating to lawyers' fees undermines "a high level of protection of intellectual property rights in the internal market [. . .] in accordance with Article 17(2) of the Charter of Fundamental Rights of the European Union [("Charter")]."[177] As the Belgian procedural rules were running counter EU law, the EU Member State court was especially precluded from limiting the reimbursement of legal costs to the flat-rate foreseen in its domestic procedural rules. In the same vein, the CJEU held that, "to the extent that the services [. . .] of a technical adviser [in the field of patents] are essential in order for a legal action to be usefully brought [up,] seeking [. . .] to have such a [intellectual property] right upheld", the respective costs must also be borne by the unsuccessful party.[178] Thus, the Belgian court could not make the reimbursement of costs for technical advisor dependent on "fault" as foreseen in the domestic legislation. Rather, with regard to both, the

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[170] *United Video*, para. 14.
[171] The CJEU was ruling in a so-called preliminary reference procedure according to Article 267 TFEU which is an intermediate step in the national proceedings.
[172] Cf. Article 14 of Directive 2004/48.
[173] *United Video*, para. 26.
[174] Ibid.
[175] Cf. Article 3 (2) of Directive 2004/48.
[176] *United Video*, para. 27.
[177] *United Video*, para. 27. Article 17(2) of the CFR reads: "Intellectual property shall be protected."
[178] Cf. *United Video*, para. 39.

lawyers' fees and the technical advisors' costs, the Belgian court had to find a way to provide for a 'reasonable' reimbursement of legal costs.

Case Study IV

Case: CJEU, Case C-230/18, ECLI:EU:C:2019:383 – *PI v. Landespolizeidirektion Tirol* ("*PI*").

This case study may serve as an illustration of the following driver: Administrative conduct. Ineffective safeguards related to administrative conduct. Procedural rules. Ineffective safeguards in some procedural rules.

The *PI* case concerns the lawfulness of the closure of a commercial establishment in Austria, managed by the Bulgarian national PI, and potentially ineffective safeguards related to administrative conduct and ineffective safeguards in procedural rules. In 2017, police conducted a check in PI's massage salon. Officials believed that in that salon, sexual services were being offered illegally. They, therefore, decided to close that salon instantly, based on suspicion of infringement of relevant laws regulating sexual services. PI was verbally informed of that decision immediately before the closure of the salon. No documents setting out the reasons for the adoption of that decision were provided.

Later, PI's lawyer, several times, attempted to gain access to the police file. Access was refused "on the ground that, in the case of administrative measures such as those that PI was subject to, access to files was not permissible since no criminal proceedings had been initiated against her."[179]

Eventually, upon PI's motion, the closure decision was annulled by the police itself. No reasons concerning the closure decisions or grounds for its annulment were given.

PI brought an action before the competent administrative court seeking a declaration that the closure of its massage salon was unlawful. In the judicial proceedings, the police did not provide documents and facts relevant to the case.

Unlike in other national procedures, "the legislation governing the [administrative] procedure at issue in the main [judicial] proceedings does not require that [. . . the police], following the exercise of such power, justify their decision in writing."[180] The administrative court cannot "review the merits of the facts that led to the adoption of the [police] decision since that court is only competent to assess whether a police officer had, in that instance, reasonable grounds for suspecting illegal activity."[181]

PI may serve as an illustration of ineffective safeguards related to administrative conduct. In exercise of its rights under EU law, especially the fundamental freedoms, the PI provided certain services though a fixed establishment in another EU Member State. In the case at hand, the PI did not receive any reason or justification as to why the administration interrupted the economic activity. Without such information, an economic actor cannot itself assess the legality of the administrative conduct and effectively defend itself against it. Further, the procedural rules governing the subsequent court proceedings did not allow the EU Member State court to request such information from the administration, which also prevented it from reviewing the merits of the facts that led to the adoption of the administrative decision.

The CJEU in *PI* held that, "Article 41 of the Charter [of Fundamental Rights of the European Union ("Charter")] . . . reflects a general principle of EU law to the effect that the right to good

[179] *PI*, para. 25.
[180] *PI*, para. 31.
[181] *PI*, para. 35.

administration encompasses the obligation of the administration to give reasons for its decisions . . . The obligation of the administration to state reasons for a decision which are sufficiently specific and concrete to allow the person concerned to understand the grounds of the individual measure adversely affecting him is thus a corollary of the principle of respect for the rights of the defence, which is a general principle of EU law" [182] and "the effectiveness of the judicial review guaranteed by Article 47 of the Charter also requires that the person concerned be able to ascertain the reasons upon which the decision taken by an administrative authority in relation to him is based, either by reading the decision itself or by communication of those reasons on its request."[183] In this way the person is enabled "to defend his rights in the best possible conditions and to decide in full knowledge of the circumstances whether it is worthwhile applying to the court having jurisdiction, and in order to put the latter fully in a position to carry out the review of the lawfulness of the national decision in question".[184]

"Moreover, the right to be heard in all proceedings, which is affirmed by Articles 47 and 48 of the Charter [of Fundamental Rights of the European Union ("Charter")] and which forms an integral part of respect for the rights of the defence [. . .] requires the authorities to pay due attention to the observations submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision; the obligation to state reasons for a decision are sufficiently specific and concrete to allow the person concerned to understand the reasons for the refusal of his request is thus a corollary of the principle of respect for the rights of the defence."[185]

The CJEU went on stating that the "requirement that the national administrative authorities state reasons is particularly important in a case [. . . at hand], in which it must be determined whether a restriction of the freedom of establishment within the meaning of Article 49 TFEU and the rights of establishment and to conduct a business, enshrined in Article 15(2) and Article 16 of the Charter respectively, is justified and proportionate."[186]

Therefore, the CJEU held, that the domestic "legislation [in the case at hand] does not ensure that the addressee of [. . . a police] decision can ascertain the reasons upon which it is based, to enable him to defend his rights and to decide whether it is appropriate to refer the matter to the competent court". Accordingly, in the present case, domestic legislation does not make it possible to ensure the effectiveness of the judicial review or the safeguarding of the rights of the defence, guaranteed by Articles 47 and 48 of the Charter and the general principles of EU law, potentially illustrating ineffective safeguards related to administrative conduct and to some procedural rules of the EU Member States. Although the case may not resemble a typical investment situation, nonetheless, the relevance of this issue for the exercise of economic rights and fundamental freedoms in the Single Market – also with regards to investments – is palpable: insufficient safeguards which ensure that administrative decisions are well-reasoned can detrimentally impact cross-border economic activity in the Single Market.

[182] *PI*, para. 56-57.
[183] *PI*, para. 78.
[184] Ibid.
[185] *PI*, para. 79.
[186] *PI*, para. 81.

Case Study V

Case: CJEU, Joined Cases C-372/09 and C-373/09, ECLI:EU:C:2011:156 – *Josep Peñarroja Fa*

This case study may serve as an illustration of the following drivers: Administrative conduct. Ineffective safeguards related to administrative conduct. Concerns about effectiveness of national enforcement mechanism in cases involving investment protection.

The case concerns the insufficient judicial reviewability of administrative decisions in an EU Member State, possibly also caused by a lack of a requirement under any statutory or legislative provision to state the reasons for an administrative decision.

"Mr. Peñarroja Fa lives in Barcelona and, for over twenty years, he has pursued the profession of accredited expert translator in Catalonia. After passing a competitive public examination, he was officially appointed to that position by the Spanish Ministry of Foreign Affairs and the Catalonian Government. He translates French into Spanish and Spanish into French. Mr. Peñarroja Fa applied for initial enrolment, for a period of two years, in the register of court experts of the Cour d'appel de Paris, as a Spanish-language translator. His application was rejected by "[. . .] the Cour d'appel de Paris [. . .] acting in not a judicial but an administrative capacity. At the same time, Mr. Peñarroja Fa applied for enrolment as an expert Spanish-language translator in the national register of court experts maintained by the Bureau of the Cour de Cassation."[187] His application was likewise rejected. Mr. Peñarroja Fa challenged both decisions before the Cour de Cassation.[188]

According to case law of the Cour de Cassation, there "was no requirement under any statutory or legislative provision to state the reasons for a decision refusing initial enrolment in those registers; that the procedure for enrolment does not involve any act which might come within the scope of the French procedure for accessing administrative documents; and that, when hearing an action contesting a decision refusing enrolment, the Cour de Cassation merely confirms that the proper procedure was followed for consideration of the application and, in consequence, does not address issues such as the professional attributes of the candidate."[189]

Josep Peñarroja Fa may illustrate concerns about the effectiveness of national enforcement mechanisms in cases involving investment protection revealing areas excluded from legal review. While this case at hand relates to the provision of cross-border services, for the purposes of illustrating the driver at hand, it does not make a difference as to whether the Spanish entrepreneur is established in France ,or whether provides its services cross-border from Spain, as the decision of the domestic authority and the response of the CJEU would arguably be the same.

Speaking about the latter, the CJEU found it incompatible with EU law – *i.e.* the freedom to provide services set forth in Article 56 TFEU, interpreted in light of Article 47 of the Charter of Fundamental Rights of the European Union ("Charter"), providing for the right to an effective remedy and to a fair trial – "that decisions refusing enrolment of court expert translators in the registers of experts [. . .] are not open to effective review by the courts as regards the taking into account of the experience and qualifications obtained and recognised in other Member States."[190]

In particular, "the consideration and taking into account of the qualifications obtained in other Member States must be properly carried out by the national authorities in accordance with a

[187] *Josep Peñarroja Fa*, para. 16-18.
[188] Ibid.
[189] *Josep Peñarroja Fa*, para. 60.
[190] *Josep Peñarroja Fa*, para. 61.

procedure which complies with the requirements of EU law concerning the effective protection of the fundamental rights conferred on EU citizens and, in particular, with Article 47 of the Charter".[191] Therefore, "all decisions must be open to judicial scrutiny enabling their legality under EU law to be reviewed. In order to ensure that such review by the courts is effective, the interested party must be able to obtain the reasons for the decision taken in relation to him, thus enabling that interested party to defend himself under the best possible conditions and to decide, with full knowledge of the relevant facts, whether it is worth applying to the courts. Consequently, the competent national authority is under a duty to inform that interested party of the reasons upon which its refusal is based, either in the decision itself or in a subsequent communication made at the request of that party"[192].

Thus, the CJEU found that the Member State's legislation does not establish mechanisms to ensure effective judicial scrutiny when it comes to Member States' restrictions on the entrepreneurial freedom to resort to personnel who are qualified in a Member State other than the one in which they are active.

Case Study VI

Case: CJEU, Case C-235/17, ECLI:EU:C:2019:432 – *Commission v. Hungary*.[193]

This case study may serve as an illustration of the following drivers: Scope of protection. Insufficient clarity in scope of investment protection rights under EU law. Inadequate Investment protection rules in an EU-Member State.

Commission v. Hungary concerns the cancellation of rights of usufruct over agricultural land and may illustrate insufficient clarity as regards the scope of investment protection rights under EU law, and/or inadequate investment protection rules in an EU Member State. A holder of a right of usufruct is entitled to use the property concerned, as well as to collect revenue from it.[194] In the case at hand, this means that the holders of such rights – the usufructuaries – can farm the land and keep the harvest.

By operation of law of an EU Member State, such rights of usufruct were cancelled, as from the date in which such law became enforceable, as regards cases in which such rights of usufruct had been agreed upon between persons who are not close members of the same family.[195] At the time of acquisition of the right of usufruct no such "close family ties" were required by law between the owner of the land and the usufructuaries.[196] "[T]he usufructuaries affected [… by the cancellation] include a great many nationals of Member States other than [. . . the concerned Member State], who have acquired rights of usufruct either directly, or, indirectly, through a legal person created in [. . . the concerned Member State]."[197]

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[191] *Josep Peñarroja Fa*, para. 62.
[192] *Josep Peñarroja Fa*, para. 63.
[193] See also CJEU, C- 52/16 and C- 113/16, EU:C:2018:157 – *SEGRO and Horváth* ("*SEGRO*").
[194] *Commission v. Hungary*, para. 81.
[195] *Commission v. Hungary*, para. 21-22.
[196] The acquisition of such rights was also lawful and no circumvention of existing legislation. Cf. *Commission v. Hungary*, para. 74-75, 77. See also the parallel case *SEGRO*, para. 15: "SEGRO is a commercial company with its seat in Hungary. Its members are natural persons who are nationals of other Member States and resident in Germany."
[197] *Commission v. Hungary*, para. 57. See also *Commission v. Hungary*, para. 58, which reads: "By providing for the extinguishment, by operation of law, of rights of usufruct [. . .] by nationals of Member States other than Hungary, the contested provision restricts, by virtue of its very subject matter and by reason of that fact alone, the right of the persons concerned to the free movement of capital guaranteed by Article 63 TFEU. Indeed, the contested provision deprives those persons both of the possibility of continuing to enjoy their rights of usufruct, by preventing them, inter alia, from using and farming the land concerned or from letting it to tenant farmers and thereby making money from it, and of the possibility of alienating that right, for example by transferring it back to the owner. That provision is, moreover, liable to deter non-residents from making investments in Hungary in the future".

The EU Member State argued, among others, that the cancellation of rights of usufruct which lacked "close family ties" between the owner of the land and the usufructuary, was necessary to secure the effective use of agricultural land for its intended farming purpose.

Commission v. Hungary may serve as an illustration of insufficient clarity in scope of investment protection rights under EU law as apparently the legislating EU Member State considered its actions, here with regard to the interferences with rights of usufructuaries, lawful. It may also illustrate inadequate investment protection rules in an EU-Member State as the measures illegal under EU law were not prevented and/or remedied in the EU Member State concerned.[198]

The CJEU in *Commission v. Hungary* found a violation of the right to property enshrined in Article 17 of the Charter [of Fundamental Rights of the European Union ("Charter)] by the EU Member State.

Under this provision "everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions and no one may be deprived of his or her possessions, except in the public interest, and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. In addition, the use of property may be regulated by law in so far as is necessary in the general interest."[199]

In the case at hand, before the government interfered with their rights, it was not disputed that the usufructuaries had, as a matter of fact, generally been able peacefully to enjoy those rights and "had, in some cases, done so for many years."[200] Among others, their rights were included in the land registries and Member State authorities did not challenge such rights within a reasonable time. The CJEU explained that the protection of Article 17(1) of the Charter extended, therefore, to the concerned rights of usufruct.[201] The cancellation of the rights of usufruct brought about by the domestic law constituted a deprivation of property within the meaning of Article 17(1) of the Charter for which no compensation was paid in good time for the losses suffered by the usufructuaries.

The CJEU did not fail to point out that the requiring "close family ties" between the owner of the land and usufructuaries, cannot guarantee that the usufructuary will farm the land concerned themselves or that they have not acquired the right of usufruct at issue for purely speculative purposes. Similarly, it cannot be assumed that a person outside the land owner's family, who has purchased a right of usufruct over such land, would not be in a position to farm that land themselves and that the purchase would necessarily have been made for purely speculative purposes, without any intention of cultivating the land.

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198 However, from the parallel judgement of the CJEU in *SEGRO* it becomes evident that the domestic legislative measures relating to the cancelation of the rights to usufruct were not fully in line with the Hungarian Constitution. Cf. *SEGRO*, para. 19-22.

199 *Commission v. Hungary*, para. 67.

200 *Commission v. Hungary*, para. 80,

201 *Commission v. Hungary*, para. 69

ANNEX III: SURVEY RESULTS ANALYSIS

This document presents an updated analysis of the survey results of the EU Investor Survey. This formed part of the interim deliverable.

Guide to the Reader:

This document is structured across 4 chapters:

- Chapter 1 i.e. this section outlines the scope and methodology of the survey. In addition, we present the key characteristics of the respondents;
- Chapter 2 outlines the main findings of the survey;
- Chapter 3 presents the analysis of the impact of investment protection and enforcement issues;
- Finally, chapter 4 presents the results of the policy options

In addition, Annex 1 presents additional comments received by survey respondents. Annex 2 provides the raw survey results in a separate Excel file.

Scope

The purpose of this survey is to support the study on investment protection and facilitation in the EU. The aim of the survey was to assess:

- The key challenges;
- The extent of the problem i.e. scale of the issues and the consequences;
- The key drivers that hinder potential and on-going investment behaviour;
- Type of measures used to mitigate the challenges
- inputs on the policy options related to investment protection and enforcement

The survey was launched 23 September and it was closed on 25 October, allowing companies and investors with one month to respond. In total we received 77 responses, two of these responses came from associations and one from a legal firm advising cross-border investors. The rest came from companies or individual investors.

Methodology

The detailed methodology of the survey was outlined in the inception report, the below provides the summary of the approach to set the context.

Target Group: the survey focuses on cross border investment within EU and targets investors within the EU. It targeted:

- Investors of all sizes (individual investors, SMEs and large companies);
- Investors across sectors;
- Investors that operate with cross-border investment in MS;
- Investors potentially interested to engage in cross border investments.

Sample frame: The study team engaged chambers and business associations to support the development of the sample frame. Given that the main source for roll out of the survey was through Chambers of Commerce and Business Associations, the sample frame is based on random sampling.

Company size (Excl. four individual investors and two associations)

The sample includes 68 companies, among which 33 are SMEs and 35 are large companies. In this study, we consider the companies with an annual turnover below 50 million euros as SMEs and those with a larger turnover as large companies. Three companies are not classified in any of the two categories as they do not report their annual turnover. In the sample, there are also 4 individual investors and 2 associations, which are not considered when we compare the responses for SMEs and large companies.

Company size	Number of respondents
SMEs (Annual turnover <= € 50 million)	33
Large companies (Annual turnover > € 50 million)	35
Company with no information on turnover	3
Individual investors	4
Associations	2

Questionnaire design: A questionnaire was developed using the skeleton outlined in the ToR consisting of three parts: (i) key information indicating characteristics of investors and investment behaviour (ii) investment challenges and consequences and (iii) measures used to mitigate these challenges. The final questionnaire was accompanied with a glossary ad privacy note.

Roll out: The survey was launched on 23 September, and was sent out to our established list of contacts with an invitation email through the online survey tool. In addition the survey link was distributed via social media channels. The list of contacts initially contained 168 contacts, which included business associations and chambers of commerce from every Member State as well as other relevant associations at EU and Member State level. The list was subsequently extended to include about 500 contacts that also contains contact points from the Enterprise Europe Network, investment promotion agencies, and contacts of experts familiar with the topic. In the invitation email, these contacts were asked to share the survey with their respective organisations' members as well as in their network. In addition, multiplier associations were asked to use the survey link and the introductory messages to share the survey in their network through their websites, newsletters and social networks. In addition, a virtual session was organised with business associations to promote the survey among their members, follow up calls were carried out with the business associations, and the survey link was circulated via DG FISMA newsletter with 10 000 subscribers and to Member States in the Expert Group on intra-EU investment environment.

Challenges and limitations:

- Despite the long list of contacts, a major challenge is bias towards companies that have experienced problems and therefore interested in responding to the survey.
- Discussions with several investment promotion agencies already showed a lack of awareness of any investment protection related problems in their respective countries, particularly Eastern Europe, which could however also be due to limitations of competencies of such agencies which are not always dealing with dispute resolution and prevention. While these agencies promised to share the survey, they indicated that their company contacts would not be interested in responding as they generally do not have a problem. Therefore a major challenge was either lack of interest, engagement or awareness.
- While the survey allows companies to express that they have not encountered problems, it is less likely for a company without problems to take the time to respond.
- It is likely that larger companies have the resources and means to engage in discussions related to investment protection and enforcement. It is also probably that the problem is more pronounced for large companies, due to volume and focus on cross-border investment. While attempts have been made to engage SMEs and we have presented the impact on SMEs separately, the findings should not be treated as representative or a standalone conclusion
- While the focus of the study is on investment protection and enforcement issues, it is impossible to fully separate other factors such as taxation, costs of investment and business environment challenges. We have attempted to focus on investment protection and enforcement drivers, however it is clear that these factors cannot be seen in complete isolation.
- Finally, the data is not sufficient and representative to draw country specific conclusions, even though respondents provided information on a wide range of EU Member States, based on their cross-border activity.

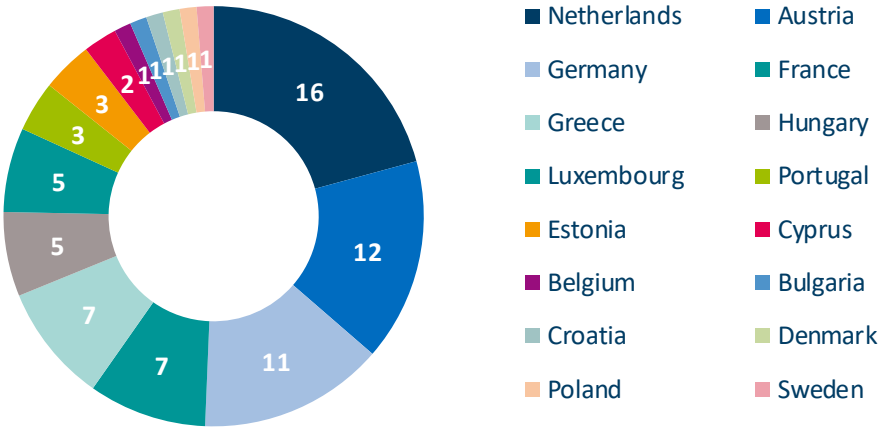
Key characteristics of respondents

This section presents key information regarding the survey respondents to set the context. This includes geographical coverage, sectoral distribution, size of investors/companies, followed by type of investments.

Geographical coverage

The 77 responses came from 16 different Member States with the majority coming from the Netherlands, Austria, Germany, France and Greece. Despite repeated reminders and direct contacts, we did not receive any responses from the following Member States: Czechia, Finland, Ireland, Italy, Latvia, Lithuania, Malta, Romania, Slovakia, Slovenia, and Spain. This seem to have been partially due to lack of interest in the Member States as some local associations informed us that their members are not interested in the topic and were reluctant to distribute the survey amongst investors.

Figure 25: Member States of establishment of responding companies and investors



Source: Ecorys, EU Investor Survey. Note: n=77.

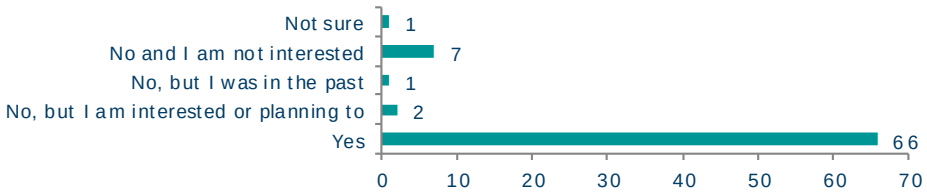
Type of Investment

As outlined in the table below, about 50 respondents were involved in direct investment and 29 in portfolio investment. Among the companies surveyed, 5 are involved in the real estate industry and 2 provide credit for financial loans. It is important to note that respondents with a larger scope of activities selected two or more answers.

Type of investment	Number of respondents
Direct investment	50
Portfolio investment	29
Real estate	5
Credit provided for commercial transactions or other financial loans	2

Almost all respondents (65) were actively investing in another EU Member State. Only 12 respondents did not at the time of the survey have investments in another Member State. They had either invested in the past, planning to invest, not sure about it, or not interested in cross-border investment.

Figure 26: High share of company respondents investing in another EU Member State



Source: Ecorys, EU Investor Survey. Note: n =77.

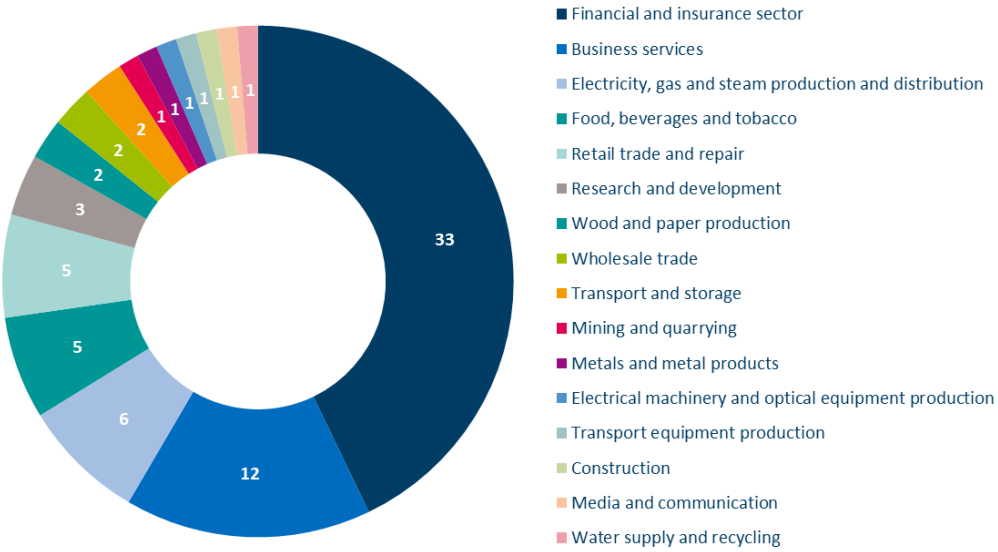
Of the 65 companies already investing in another EU Member State, most are active in direct investment followed by portfolio investment. Often investors and companies were involved in multiple types of investments and no companies were solely

involved in real estate investment or the provision of credit. These two types were always combined either with direct investment, portfolio investment or both.

Sectoral distribution

The majority of the companies and investors that responded to the survey are active in the financial and insurance sector as well as business services. These are followed by food, beverages and tobacco, electricity, gas and steam production and retail, trade and repair.

Figure 27: Economic sectors of responding companies

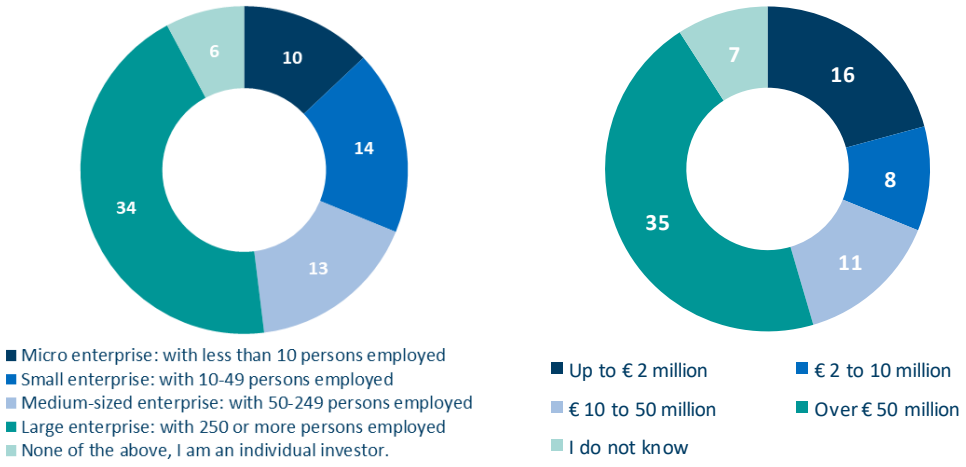


Source: Ecorys, EU Investor Survey. Note: n=77; No respondents came from the following sectors: Textile, clothing, leather and shoe production, Fuel processing and chemicals production; Rubber and plastic production; Glass, ceramic, clay and cement production; Fabricated metal product manufacturing; Furniture, jewellery, musical instruments, sports goods, toy production; Motor and fuel retail trade; Hotel, restaurant and catering services; Real estate, renting and leasing.

Size of investors

Finally, the majority of the respondents were large companies with 250 or more employees and a turnover of over EUR 50 million. 33 of the respondents represented SMEs (with turnover less than EUR 50 million). In addition, four respondents identified themselves as individual investors.

Figure 28: Size and turnover of the responding companies



Source: Ecorys, EU Investor Survey. Note: n=77.

Main Findings

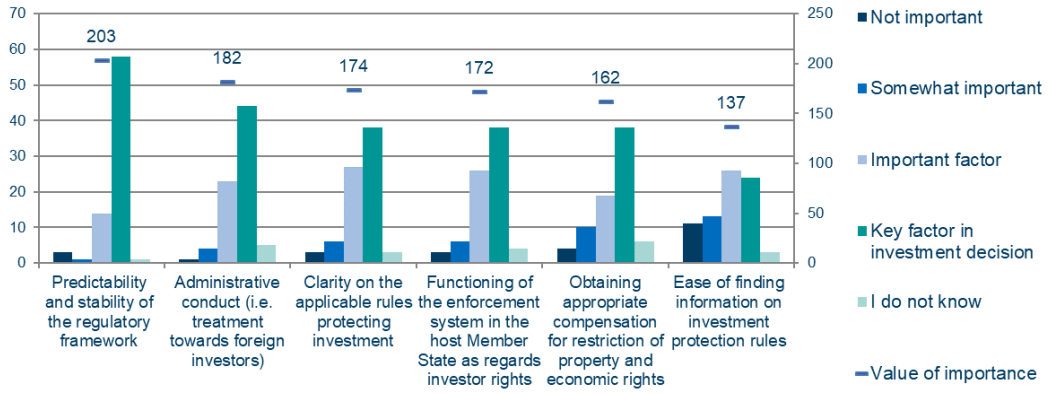
This chapter presents a preliminary analysis of the investment protection and facilitation factors. We examine the investment behaviour and confidence linked to protection and investment issues. In addition, we dive deeper to assess the factors across SMEs and large investors.

Factors influencing investment decisions

Investment decisions can be influenced by a multitude of factors. These span across internal factors such as business strategy, access to resources and size, as well as external factors such as the business enabling environment, economic situation and external shocks. For the purpose of this study, we focused the survey questions on factors related to investment protection and enforcement and their impact on investment decisions. Figure 29 presents six investment factors related to investment protection and enforcement. The figure highlights that *predictability and stability of the regulatory framework* is the most important factor among these for investment decisions with 75% of respondents seeing it as a key factor in their decisions.

This is followed by *administrative conduct and the treatment of foreign investors*, which is perceived by 57% as a key factor.

Figure 29: Importance of investment protection and enforcement factors



Source: Ecorys, EU Investor Survey. Note: n=77; The value of importance was calculated by assigning values to response categories and multiplying it with the amount of responses, e.g. the response "Not important" has the value 0, while the response "Key factor in investment decision" has the value of 3.

Overall, respondents rated all factors at least as somewhat important with only on average 5% of respondent choosing the answer not important. The least important factor is *ease of finding information on EU investment protection rules*, where 14% see it as not important compared to 82% who see it as somewhat important or more.

> "Lack of research capacity that hinders individual investors to invest cross-border as they simply are not aware of investment opportunities abroad. A centralised information mechanism which includes easily accessible, reliable, understandable and comparable public information both for companies and individual investors would be beneficial." – Association representing investors

When asked about additional factors, respondents highlighted several other factors for investment decisions. These mainly included issues related to taxation, factors linked to administrative conduct and the need for a harmonised investment protection regime.

> "A key factor hurting any development of cross border investment by EU citizens within the EU are administrative barriers to cross-border investments and discrimination within the single market for capital, especially in the taxation area. [...] double taxation, administrative illegal harassment, and tax discrimination are widespread within the EU: that is a major deterrent to invest cross-border." – Association representing investors

It is clear that investment decisions, as evidenced globally, are hindered by costs. Several respondents cited the issue of movement of capital and tax treaties which withhold taxation. Although, not necessarily linked to the drivers within the scope of this study, the issue cannot be seen in isolation. Requesting refunds and reclaiming back foreign withholding taxes on dividends, interest and royalties was mentioned several times as a factor.

> Costs and investment decisions: "Art. 63 of the Treaty on the Functioning of the European Union is clear: 'all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.' The tax treaties that for example one Western European Member State has with almost all countries prescribe a maximum withholding rate of 15%. In practice much more is withheld. And it is complex, expensive and time consuming to get the difference back. In fact, it blocks the inhabitants in this Member State to invest outside it as shown by Central Bank statistics. I ran a lawsuit about this case up to the highest court, but the case was dismissed as not admissible. In fact because the Court has no capacity. A parallel case is running for the Council of State with a hearing end of October. – Small Western European company

Finally, the possibility of resorting to international arbitration, particularly in EU Member States which do not comply with the rule of law was also mentioned by one respondent.

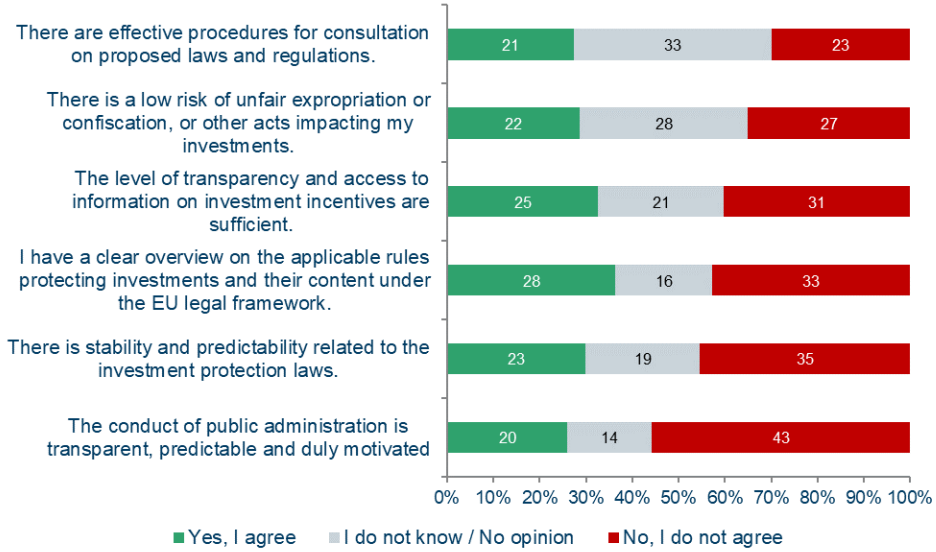
Confidence of businesses regarding EU cross-border investment

To assess the confidence of investors in relation to EU cross-border investments, we asked them about their perception on the protection of their investments and the enforcement of their rights in the EU. Respondents were asked to agree or disagree with a set of statements about investment protection and enforcement of investor rights.

Investment protection

To examine the key drivers related to investment protection, we asked respondents to react to a set of statements on investment protection in the EU. In the responses, we see that there is a lack of confidence in relation to *the conduct of public administrations is transparent, predictable and duly motivated* with 42 of the respondents (55%) disagreeing with this statement and only 20 (26%) agreeing with it (See Figure 30). Similarly, there is a lack of confidence in the related topic of *stability and predictability of investment protection laws* with 45% disagreeing with the statement.

Figure 30: Confidence in investment protection factors



Source: Ecorys, EU Investor Survey. Note: n=77; Respondents were asked to either agree or disagree with each of these statements.

We also see some contrast between the opinion of large companies and SMEs regarding the confidence in investment factors:

- While most large companies interviewed have a *clear overview of the applicable rules protecting their investments*, the majority of SMEs do not agree with this statement.
- Large companies tend to disagree on the fact that there are *effective procedures for consultation on proposed laws and regulations*, while most SMEs do not think that it is an issue.
- A majority of the large companies surveyed stated that they do not trust the *stability and predictability in investment laws*, while for SMEs the result is less clear cut and there is a significant part of SMEs that mentioned that they do not know or do not have an opinion.

Table 9: Confidence in investment protection factors by company size

Statement	Company size	I do not know / No opinion	No, I do not agree	Yes, I agree
I have a clear overview on the applicable rules protecting investments and their content under the EU legal framework.	SMEs	8	16	9
	Large companies	4	14	17
The conduct of public administration is transparent, predictable and duly motivated	SMEs	6	17	10
	Large companies	6	20	9
The level of transparency and access to information on investment incentives are sufficient (e.g. clear laws and regulations, information on funding opportunities).	SMEs	10	11	12
	Large companies	8	15	12

Statement	Company size	I do not know / No opinion	No, I do not agree	Yes, I agree
There are effective procedures for consultation on proposed laws and regulations (such as adequate minimum times for consultation, publication of comments received, and requirement to respond to comments).	SMEs	14	6	13
	Large companies	12	15	8
There is a low risk of unfair expropriation or confiscation, or other acts impacting my investments (e.g. such as revocation of licenses).	SMEs	12	10	11
	Large companies	11	13	11
There is stability and predictability related to the investment protection laws (changes are not frequent).	SMEs	10	12	11
	Large companies	5	19	11

Source: Ecorys, EU Investor Survey. Note: Among the respondents, 33 were SMEs and 35 were large companies. Individual investors and companies that did not indicate their annual turnover are excluded from this table.

Looking in more detail into the individual investment protection factors, we see that *lack of access to information and transparency on investment incentives* is less of a widespread problem with it being mentioned the least (28 times).

> "The different treatment of delisting rules in various Member States is a problem - individual investors should have a common/harmonised level of safeguards when having invested in companies who plan to exit capital market financing." – Association representing investors

Regarding a perceived *lack of effective procedures for consultation on proposed laws,* 46 respondents mentioned to be concerned about that in several Member States.

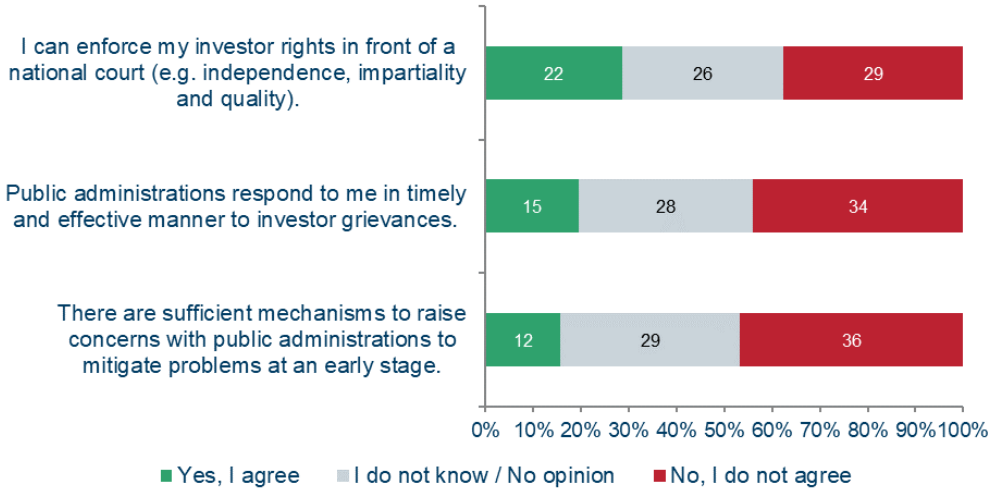
Respondents are more concerned *about risk of expropriation of investments* and a *lack of stability and predictability related to investment protection laws*, which are mentioned 50 and 61 times respectively.

Finally, *lack of transparency, predictability or due motivation of public administrations* is the largest concern among the responding companies and investors (114 times).

Enforcement of investor rights

Similar to investment protection factors, we asked respondents to reflect on statements about the enforcement of investor rights. Figure 31 presents the results. 35 respondents (46%) do not think that *there are sufficient mechanisms to raise concerns with public administrations*, while only 12 (16%) think there are. Moreover, with 34 respondents (45%) the majority does not believe that *public administrations respond in a timely and effective manner to their grievances*.

Figure 31: Confidence in enforcement factors

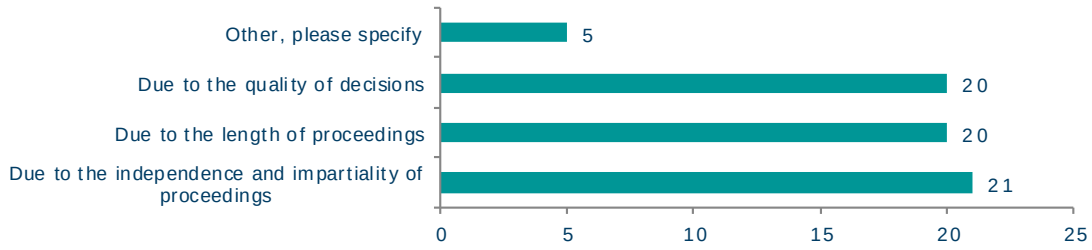


Source: Ecorys, EU Investor Survey. Note: n=77; Respondents were asked to either agree or disagree with each of these statements.

Respondents indicated a lack of confidence in relation to being able to *enforce their investor rights in front of a national court* with 38% over 29% disagreeing with the specific statement. Here we asked respondents to indicate the reason(s) for this. Figure 32 shows that perceived lack of independence and impartiality, length of proceeding as well as low quality of decisions are factors behind this lack of confidence. Companies and investors attribute this lack of confidence to all three reasons with many selecting all three of them.

> "Especially Eastern European countries often apply protective measures in the form of laws and (emergency) government orders. They aim to protect and favour national interests (protecting domestic entities) rather than providing a fair competitive environment for international investors. Consequently, when an international investor takes domestic court action, the impartiality of national courts is questionable. They way through all instances to the European Court of Justice takes a long time, which effectively makes business impossible." – Large Austrian company

Figure 32: Reasons for lack of confidence in national courts



Source: Ecorys, EU Investor Survey. Note: n=30; multiple selection possible.

A few companies also provided other reasons and comments:

Complexity of the forms and procedures to bring court actions:

- National courts are subject to national laws imposed by governments that one is in a dispute with (linked to independence and impartiality);
- Too costly for private investors, and some Member States do not accept the court decision. In local administration [linked to implementation of the ruling];

- National governments are increasingly taking protectionist measures against international investors. Especially in the Central and Eastern European region there is quite a track record of measures, which hamper legitimate interests of investors. These measures are not necessarily such clear-cut breaches of EU law. As intra-EU BITs are no longer to be enforced, this leaves a significant gap for having access to effective remedies and compensation;
- Courts on national level sometimes have only insufficient knowledge of EU principles and investors' rights and do not apply European law and procedures correctly [quality of the rulings];
- Corruption is still a problem in some Member States.

When comparing large companies to SMEs, we observe a deviation in the perception on investment enforcement issues. While the majority of large companies surveyed think that they cannot enforce their rights properly in Member States they invest in, the majority of SMEs do not consider this as a problem (see Table 10 below). However, the majority of SMEs and large companies think that there are not sufficient mechanisms to raise concerns with public administration to mitigate problems at an early stage.

Table 10: Confidence in investment enforcement factors by company size

Statement	Company size	I do not know / No opinion	No, I do not agree	Yes, I agree
I can enforce my investor rights in front of a national court (e.g. independence and impartiality of proceedings, quality of decisions, reasonable length of proceedings).	SMEs	10	9	14
	Large companies	12	16	7
Public administrations respond to me in timely and effective manner to investor grievances (before grievances become legal disputes).	SMEs	12	12	9
	Large companies	11	18	6
There are sufficient mechanisms to raise concerns with public administrations to mitigate problems at an early stage.	SMEs	15	13	5
	Large companies	11	19	5

Source: Ecorys, EU Investor Survey. Note: Among the respondents, 33 were SMEs and 35 were large companies. Individual investors, associations and companies that did not indicate their annual turnover are excluded from this graph.

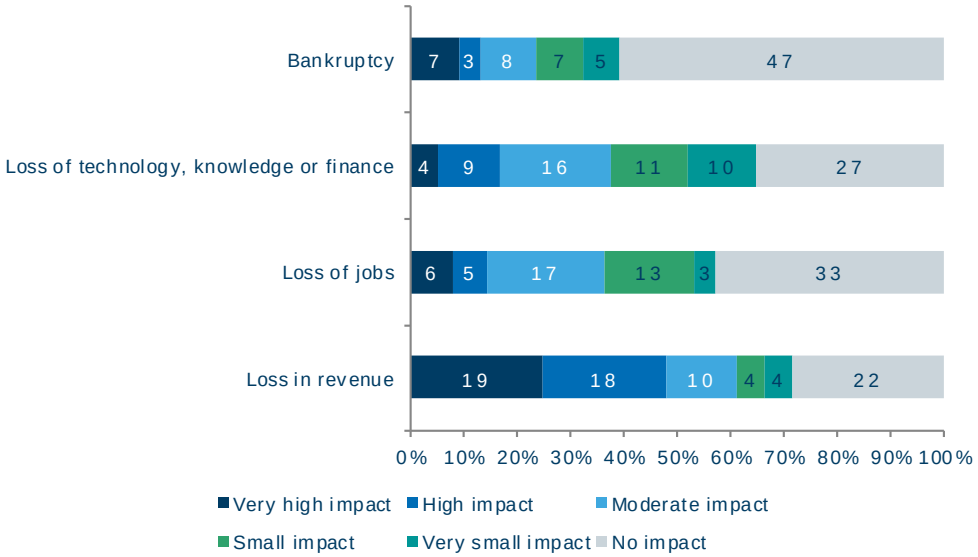
Impact

This chapter dives into the scale of the problem by examining the reported impacts. We start with analysing the impact of challenges related to investment protection and enforcement issues at the level of businesses, sectors, investment behaviour, amongst others. Finally, we examine the mitigation measures used by investors to address these impacts.

Impact on businesses

Given the apparent challenges related to investment protection and enforcement, we asked respondents to rate the extent to which these have already impacted their business. Figure 33 presents the results highlighting that 71% of respondents reported a negative impact on revenue with over half of the respondents (47) indicating it to be a moderate to very high impact. Among the respondents, 65% also indicated to have experienced a loss of technology, knowledge or finance with about one third being moderately to very highly impacted. In terms of reduced employment, 57% were negatively impacted and again, one third reported a moderate to very high negative impact. Finally, with regards to bankruptcy, over half of the respondents had no impact, while 30 respondents indicated to have been impacted by bankruptcy due to investment protection challenges.

Figure 33: Impacts to businesses caused by investment protection challenges



Source: Ecorys, EU Investor Survey. Note: n=77.

Several respondents cited additional impacts mainly linked to high costs attributed by the time taken to invest, double taxation, amongst other. The following impacts were mentioned:

- Loss of opportunity to provide cross-border and local financing to customers;
- Loss of cross-border intra-group financings;
- Loss of stock market value;
- General uncertainty and legalisation procedures impacting decision to invest;
- Loss of reputation due to legal disputes, making it more difficult to do business in other EU countries;
- Loss in company asset values;
- Loss from retroactive obligation to change business model and make additional investments to comply with new regulations.

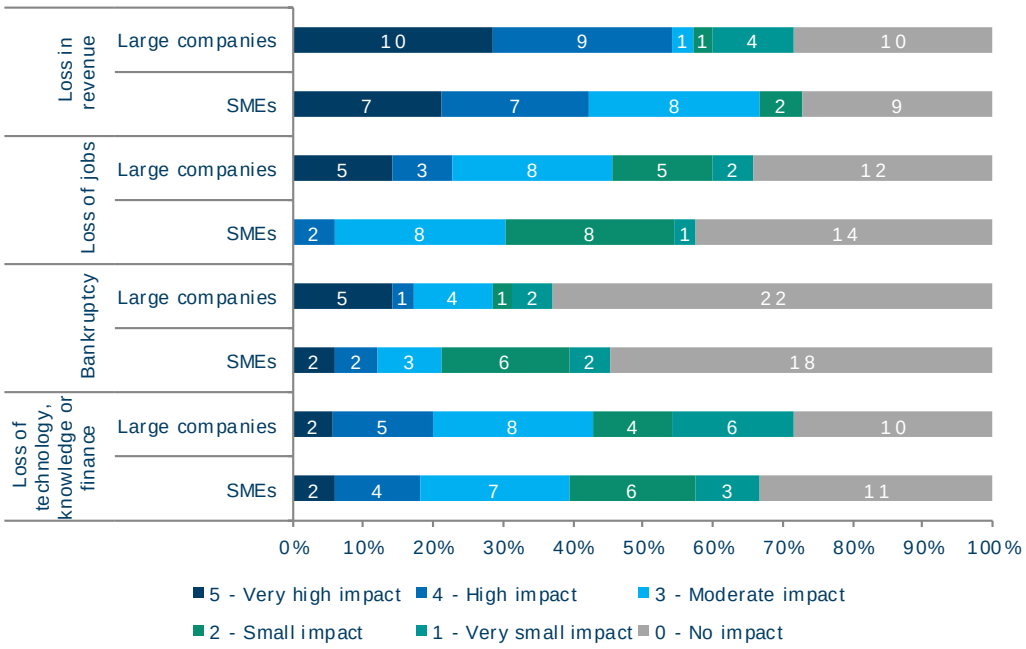
Impact by company size

Looking into the size of companies and possible impacts, large companies report a stronger impact, in particular when it comes to loss in revenue, and to a lesser extent, loss of jobs.

1) About 50% of the large companies surveyed estimated a high to very high impact on their revenue, while the rate is about 40% for SMEs. SMEs have reported a more moderate impact on their revenue, with more than a quarter of respondents reporting a small to moderate impact (against less than 20% for large companies).

2) 5% of SMEs report a high to very high impact on job losses, the figure is about 20% for large companies. Close to 50% of SMEs report no impact at all on job losses against 35% for large companies. This is possibly attributed to the fact that SMEs have little opportunity and resources to engage in high volumes when it comes to cross border investment. Therefore, even though the impact in comparison to larger companies is lesser, it is relative- any small impact on revenue or loss of jobs can potentially impact SMEs investment behaviour.

Figure 34: Impact caused by investment protection issues, by company size

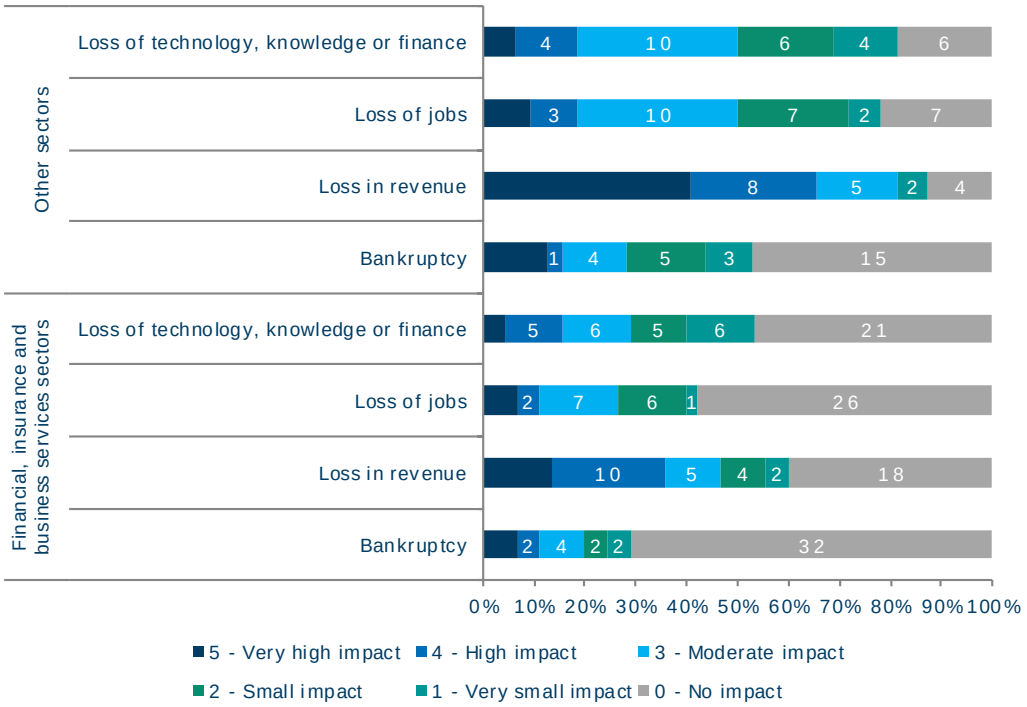


Source: Ecorys, EU Investor Survey. Note: Among the respondents, 33 were SMEs and 35 were large companies. Individual investors, associations and companies that did not indicate their annual turnover are excluded from this table.

Impact by sectors

Given that 60% of the sample consists of companies from the financial, insurance and business services sectors, they may strongly influence the findings on the impact of investment protection and enforcement issues. In Figure 35, we look at the remaining sectors as one group (Other sectors).

Figure 35: Impacts of investment protection challenges per sector



Source: Ecorys, EU Investor Survey. Note: 45 respondents are from the financial, insurance and business sectors and 32 are from Other Sectors.

We see that the *other sectors* are relatively more affected by the issues related to investment protection and enforcement, than financial, insurance and business sectors. The below provides an analysis of the impacts:

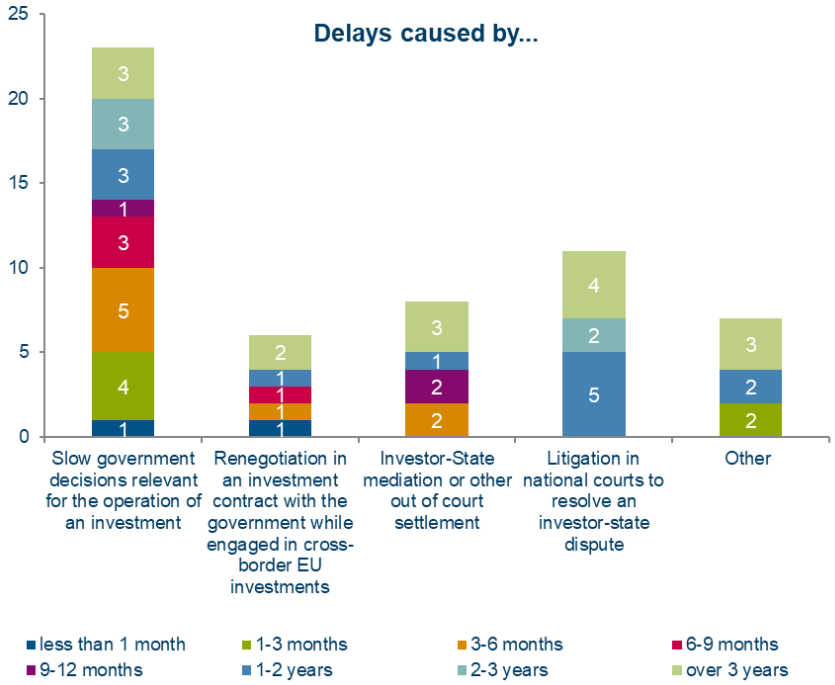
- *Loss in revenue.* The contrast is particularly strong when it comes to the loss in revenue. While more than 50% of respondents from *Other sectors* report a high to very high impact on revenue, the figure is about a quarter for the companies in the financial, insurance and business service sectors.
- *Bankruptcy.* 32% of the companies in the financial, insurance and business service sectors report no impact on bankruptcy, while close to 50% of the companies in Other sectors experienced an impact there (the majority report a very small to moderate impact).
- *Loss of jobs.* More than half of the companies in the financial, insurance and business service sectors report no impact on job losses, while 55% of companies in Other sectors felt a small to moderate impact.
- *Loss of technology, knowledge and finance.* 46% of companies in the finance, insurance and business service sectors report no effect on the loss of technology, knowledge and finance. In contrast, only 20% for Other sectors report no impact. Two thirds of companies from Other sectors report to have experienced a very small to moderate impact.

Delays of investment activities

We also asked companies about their experiences when investing in other Member States and if they encountered any delays in their investment activities while engaging with public administrations in these Member States. While 45 respondents reported no delays, 32 companies experienced such delays, some of which

encountered multiple types of delays. Figure 23 highlights the type of delays encountered as well as the duration thereof. Most delays were caused by slow government decisions on issues relevant for the investment, which was reported 23 times. In addition, 11 respondents encountered delays caused by actual investor state disputes. Here the delays were also on average the longest compared to the other types of delays including government decisions which causes in most cases a few months of delays. Investor state disputes resolution on average caused delays of 1.6 years.

Figure 36: Type and duration of delays encountered by companies and investors



Source: Ecorys, EU Investor Survey; Note: n=32; selection of multiple types of delays was possible.

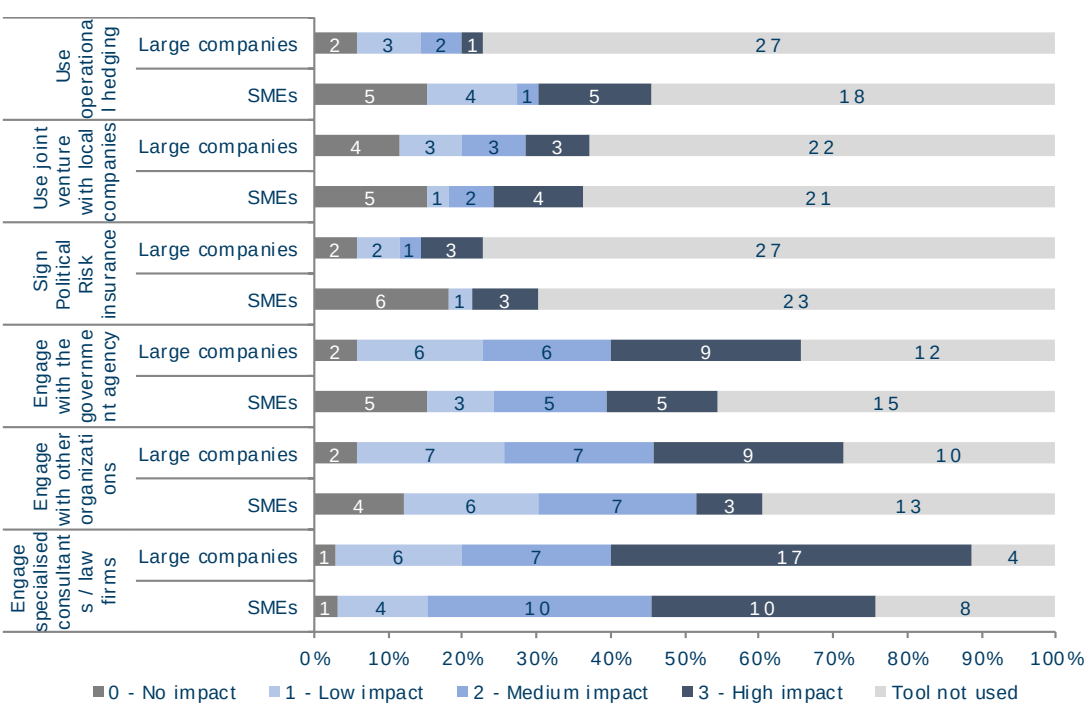
As highlighted in Figure 36, respondents encountered delays caused by other reasons. These were the following:

- 1-3 months delay, due to lack of accessibility to information on specific investment opportunities;
- 1-3 months delay, because of a different regulatory / tax regime relating to employee equity in a venture;
- 1-2 years, because Western European Member State is slow in terms of refunding withholding taxes;
- 1-2 years delay caused by time needed for recovering amounts due by the EU Member State pursuant to an ICSID arbitral award;
- Over 3-year delay after an EU-law infringement of a Member State, and after having filed an official complaint at DG GROW. Five years have passed without a decision on the European level and the Member State keeps on infringing EU law;
- Over 3-year delay, due to a lawsuit on the withholding tax rate surpassing the permitted maximum in the company's Member State of establishment, which in the end was dismissed due to lack of capacity of the courts;
- Over 3-year delay, due to recovering VAT taxes taking time in Eastern European Member State, even after ECJ decided in the investors favour.

Mitigation or prevention measures by companies

In light of the encountered challenges, respondents were asked to share how they tried to mitigate or prevent these challenges, as well as the perceived impact of mitigation measures. Figure 37 showcases that most companies engaged specialised consultant or law firms to support them, and majority also felt the impact of this was medium to high. A number of companies also engaged with other organisations (e.g. business associations) or government agencies, and majority reported a medium to high impact. Other mitigation measures such as using a joint venture, operational hedging, or political risk insurances were also used but less frequently with their impacts being lower.

Figure 37: Company mitigation and prevention measures and their impact, by company size



Source: Ecorys, EU Investor Survey. Note: Among the respondents, 33 were SMEs and 35 were large companies. Individual investors, associations and companies that did not indicate their annual turnover are excluded from this table.

The use of operational hedging seems to be more widespread among SMEs. 43% of SMEs use this tool, against only 24% for large companies. Among SMEs, 14% of SMEs report a high impact and 14% report no impact at all. Among large companies, only 3% report a high impact for the use of this tool.

Large companies tend to engage more with government agencies to mitigate the impact of issues related to investment (65% of respondents from large companies have used this tool, against 51% for SMEs). 42% of large companies report a medium to high impact of this tool, while less than 30% of SMEs rate this tool in the same way. However, it is clear that SMEs have a lot less engagement with government agencies (more than 48% did not use this tool), possibly due to lack of resources and access to such agencies.

Engaging with specialized consultants and law firms is the most used tool by both SMEs and large companies. 89% of large companies engage with specialised consultants and law firms, and 49% felt that it has a high mitigation impact. A relatively

smaller, but still large, share of SMEs use this tool (74%) and a little less than 30% of them think that it has a high impact.

Companies were also asked to indicate other measures or provide other feedback on this topic. The following responses were recorded:

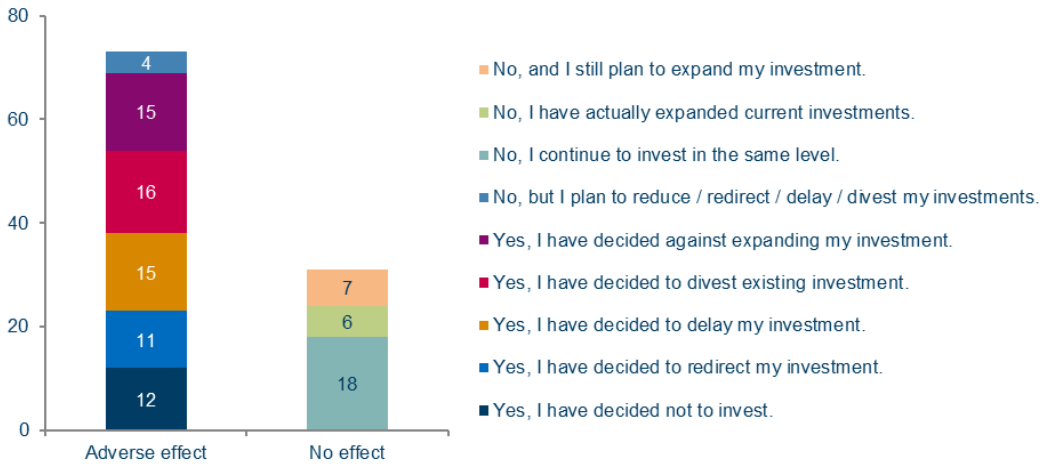
- To involve EU institutions:
  - "Filing EU complaints"
  - "Launch infringement procedures with the European Commission"
  - "Handling in complaints to the European Commission"
- "Engage international financial institutions such as EBRD, EIB, EIF, NIB, etc."
- "Engage in investment treaty arbitration"
- "Invest in third countries such as USA or China"
- "We have not used these mitigation measures when investing in EU Member States in the past, as our investments were made prior to the Achmea decision. We however use such measures when investing outside of the EU."

Impacts across the EU

Companies were asked how concerns about investment protection and enforcement factors have influenced their investment behaviour. 41 of the respondents indicated that their investments were adversely affected, as they either reduced, redirected, delayed, or divested their investments. Two further respondents said they plan to do so. Meanwhile, 26 respondents did not report any adverse effects as they are either continuing to invest at the same level, expanded or plan to expand investments.

Figure 38 presents all the responses provided by companies. In some cases, a combination of answers were received, for example, some companies both divested or delayed their investments. Interestingly, most respondents indicated that their investment behaviour has not changed, however, for the majority of the companies the investment behaviour seems to have been negatively impacted.

Figure 38: Effect on the investment behaviour



Source: Ecorys, EU Investor Survey. Note: n=70; multiple selection possible.

Reasons for change in investment behaviour

When respondents were asked to explain their changed investment behaviour, those that expanded investments mentioned the following reasons:

- Investment expansion was driven by "in-house" business funding;
- Growth of the business (mentioned twice);
- Low prices;
- larger fund and opportunities available outside their Member State;
- good liquidity position and strong capital, therefore continuing their acquisition plans;
- Mixed approach of a larger company in retail, where some chains expanded in some Member States while in other Member States investments were withdrawn.

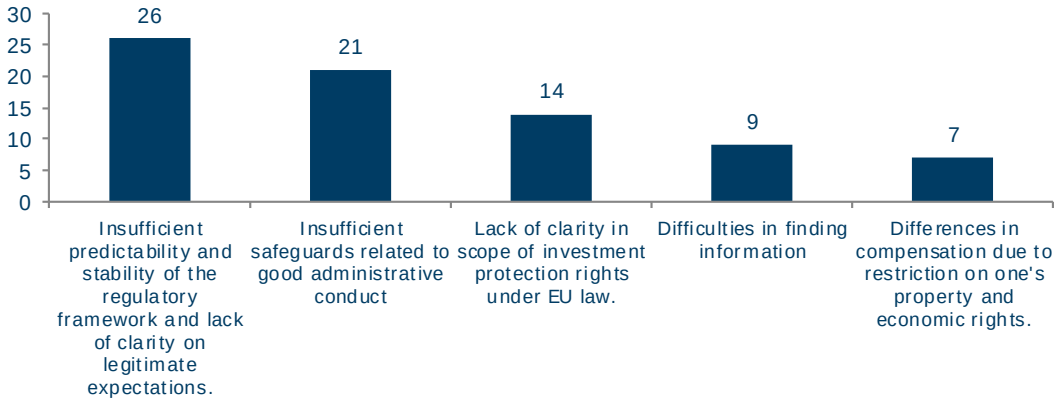
For those respondents that either planned to or already delayed, divested or halted investments we asked them to select which *investment protection* and *enforcement* factors were the main drivers for their decisions. The results are presented in Figure 39 and Figure 40. When it comes to investment protection, according to respondents, their decisions were mainly driven by:

1. Insufficient predictability and stability of the regulatory framework and lack of clarity on legitimate expectations;
2. And insufficient safeguards related to good administrative conduct (e.g. non-discriminatory treatment of foreign investors, adoption of administrative decisions within reasonable time).

Meanwhile, for enforcement of investor rights, several factors adversely impacted investment decisions. These included:

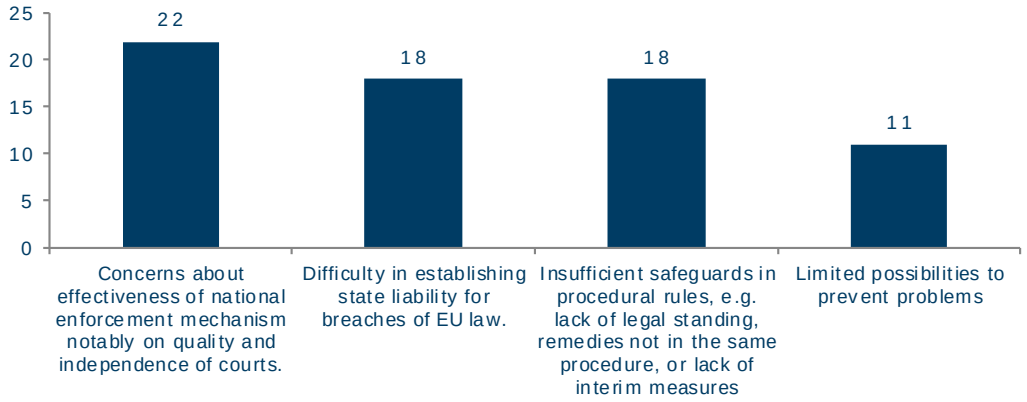
1. Concerns about effectiveness of national enforcement mechanism notably on quality and independence of court decisions;
2. Difficulties in establishing state liability for breaches of EU law;
3. And insufficient safeguards in procedural rules.

Figure 39: Main investment protection factors for adverse investment decisions



Source: Ecorys, EU Investor Survey. Note: n=44; Selection of multiple factors possible.

Figure 40: Main investment enforcement factors for adverse investment decisions



Source: Ecorys, EU Investor Survey. Note: n=44; Selection of multiple factors possible.

Several respondents identified other factors driving their investment decisions. These related to tax systems, unequal standing, government restrictions, delisting rules, lack of market surveillance, and administrative conduct. Specifically, respondents quoted:

- Tax systems:
- "Too many differences in treatment between Member States of dividend taxes and returns"
- "Refunds of foreign withholding taxes"
- "Inefficient and cumbersome withholding tax procedures on interests and dividend payments which leads to divestment in those Member States which build up hurdles for individual investors to reclaim their double taxed dividend/interest income."
- Inequal standing: "Hidden protection of local manufacturers."
- Restrictions: "The new land law in an Eastern European Member State which restricts free capital flow by restricting to whom one can sell property" Unequal standing: "Hidden protection of local manufacturers."
- Restrictions: "A new land law which restricts free capital flow by restricting to whom one can sell property" in an Eastern European Member State
- Delisting rules: "The different treatment of delisting rules in various Member States is a problem - individual investors should have a common/harmonised level of safeguards when having invested in companies who plan to exit capital market financing."
- Market surveillance: "The Wirecard case is an example that raises severe concerns about the effectiveness of national/EU supervisory mechanisms and their endowment with sufficient powers and governance structures to oversee large companies with complex business models acting worldwide."
- Administrative conduct:" A key factor hurting any development of cross border investment by EU citizens within the EU are administrative barriers to cross-border investments and discrimination within the single market for capital, especially in the taxation area."
- Insufficient predictability and stability of the regulatory framework: "We have decided to freeze our future investment. Frequent retroactive changes to the regulations have

introduced new requirements to the investment objects created in the recent past, well before the payback of the investment has been reached."

Reasons for adverse investment decisions by company size

In general, a bigger share of large companies reported a negative behaviour related to investment protection. About 40 % of SMEs reported no negative impact, against only 27 % of large companies.

- The insufficiency in the predictability and stability of the regulatory framework and lack of clarity on legitimate expectation was the most cited reason by both large companies and SMEs, however large companies clearly dominate.
- The next most important reason for large companies is the concern about the effectiveness of national enforcement mechanisms on the quality and independence of court decision. The third most important reason is the difficulty in establishing state liability for breaches of EU law.
- For SMEs, the issues of safeguards related to good administrative conduct, procedural rules of EU MS and the limited possibilities to prevent problems are the next most important reasons for negative investment behaviour.

Table 11: Reasons for negative behaviour, by company size

Reasons for negative behaviour	Large companies	SMEs	Total
Insufficient predictability and stability of the regulatory framework and lack of clarity on legitimate expectations.	18	8	26
Concerns about effectiveness of national enforcement mechanism notably on quality and independence of court decisions.	16	3	19
Difficulty in establishing state liability for breaches of EU law.	13	3	16
Insufficient safeguards related to good administrative conduct (e.g. non-discriminatory treatment of foreign investors, adoption of administrative decisions within reasonable time).	12	5	17
Insufficient safeguards in procedural rules of the EU Member State(s), such as lack of legal standing to challenge laws which are contrary to EU law, remedies not in the same procedure, or lack of availability of interim measures	11	5	16
Lack of clarity in scope of investment protection rights under EU law.	10	3	13
Limited possibilities to prevent problems	6	5	11
Differences in compensation due to restriction on one's property and economic rights.	6	1	7
Difficulties in finding information (e.g. on market opportunities, business partners, investment protection rules).	5	4	9
Other factor(s) then the ones in this list.	2	3	5
Total	99	40	139

Source: Ecorys, EU Investor Survey. Note: Among the respondents, 33 were SMEs and 35 were large companies. Individual investors, associations and companies that did not indicate their annual turnover are excluded from this table.

Policy options for EU cross-border investment

This chapter presents an analysis on the policy options and additional recommendations from respondents.

Investment protection

> "Lack of investor protection, in particular through the absence of an impartial, effective and timely investor-state dispute settlement mechanism, is the main obstacle to cross-border investment in the EU. Today, European investors investing in another EU country can no longer resort to arbitration courts in the event of disputes and can only bring cases before national courts. They are therefore less well protected than non-European investors investing in Europe. Evidently, the post-Achmea situation has led to a substantial difference in treatment between EU countries vis-à-vis third countries emerges." – Large French company

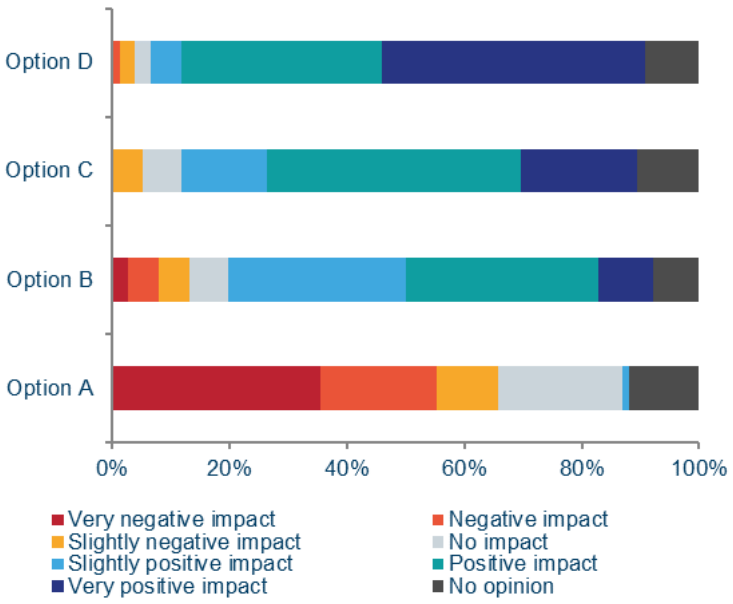
Responding companies and investors were also asked to rate a set of policy options that aim to *address the problem of an uneven level of investment protection in different Member States*. These options include:

1. Option A: Do nothing - Baseline position, including existing investment protection rights.
2. Option B: Increase visibility and transparency of existing EU and national rules without changing the content of the rules - Under this option, all EU and national rules relating to investment protection would be made accessible in one single access point. In addition, information on investment opportunities could be consolidated in a single access point.
3. Option C: Targeted specification and improvement of some rules on investment protection related to cross-border investments - This option would specify EU investment protection rules in key areas of concern and relevance for investors (e.g. Specifying the rules on compensation awarded expropriation, specifying the type of protection given for legal certainty and legitimate expectations, clarifying the rights stemming from the principle of good administration).
4. Option D: Specification and improvement of investment protection rules in a more comprehensive way (e.g. by also clarifying types of justified and unjustified restrictions to free movement of capital) - This option envisages a Code in a single comprehensive legislative package, which would include all rules on free movement of capital and intra-EU investment protection.

While these policy options are not mutually exclusive, the favoured policy option of respondents is Option D, i.e. a single comprehensive legislative package of rules on free movement of capital and intra-EU investment protection. 84% of the respondents felt the policy option would lead to a positive impact on investment. This is followed by Option C (specification of rules) and Option B (improved accessibility of rules), which were perceived to have a positive impact by 78% and 72% of respondents respectively.

The majority of the respondents are against the baseline option of not changing the current protection system, with 66% saying it would have a negative impact on investments. The figure below presents the overview of the responses in relation to the options.

Figure 41: Policy options for investment protection



Policy Option	Average rank
Option D	2,23
Option C	1,74
Option B	1,09
Option A	-1,76

Source: Ecorys, EU Investor Survey; Note: Average ranks were assigned by giving a value ranging from -3 to +3 to each response with 'No opinion' being not scored and 'No impact' having the value 0.

> "In addition to the measures suggested above (which are all for themselves useful mitigating factors), a new structural framework for investor protection on EU/international level against national measures of EU Member States needs to be established and encompassed with the respective (a) substantive rights and (b) procedural rights for investors/enterprises. Such new framework ideally could to fulfil in particular the following functions: Award compensation for losses; fitting within the overall EU Court framework, i.e. referrals to the CJEU can be made; availability of interim measures; standing of investors in such proceedings; enforceability on national level." – Large Austrian company

Several respondents included additional recommendations. These are quoted below:

- Codifying investor's rights within European Law, Creating alternative mechanisms for the existing intra-EU BITs
- More than EU investment protection rules on fund level, there are several factors decelerating investments at asset level, due to local and national legislations, which are often in contrast within the same country. Of course, most of the time, this has a little impact on fund/investors level, however is usually a break to invest more cross-boarding in general. The result is that, managers are usually reluctant to invest in those countries where legislation is more difficult, unless the money come from those countries. This on average means that, the countries who are relatively poorer receive less investments (with on top of this the disadvantage to borrow constantly at higher rates compared to the wealthier countries).
- Higher protection for ESG compliant or social impact companies would incentivize investors to invest more into opportunities with positive impact (environmental, inclusive) and report accordingly.
- If Bilateral Investment Treaties are no longer allowed, strong investment protection within the EU is required. Otherwise, intra-EU investment is in a disadvantage to national investments as well as investments from outside the EU with existing investment-protection agreements.

- We rather prefer actions taken by EU institutions to enforce MS governments to apply policies in line with EU regulations.

Impact of policy options for investment protection per company size

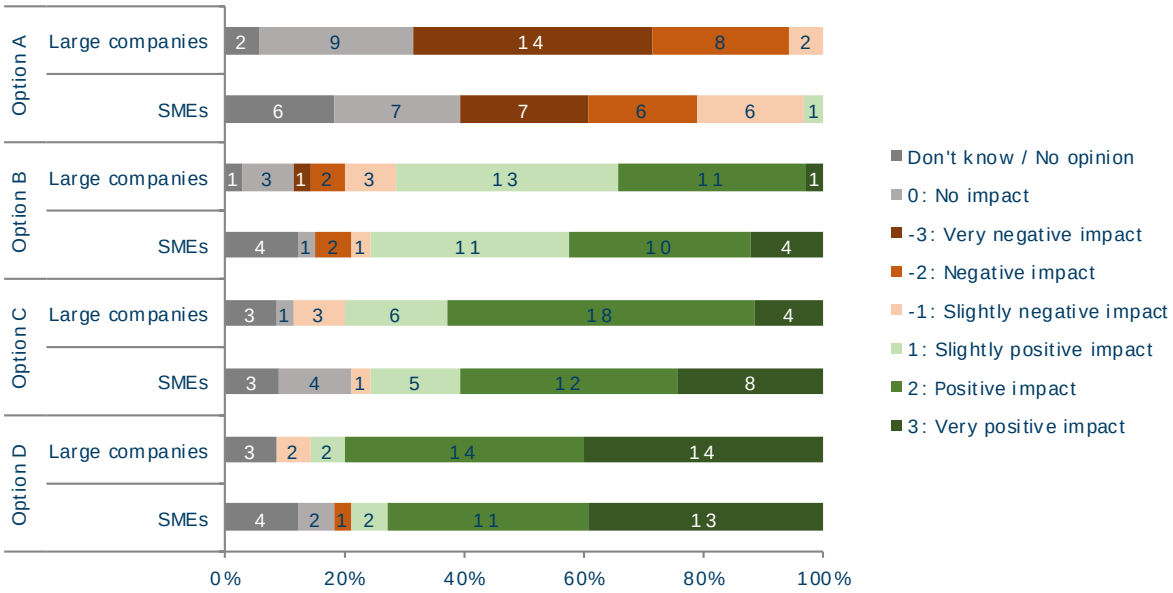
Option A. The large majority of SMEs and large companies predict either no impact or a negative impact for the option "do nothing". Large companies are more negative about this option, with 63% of them predicting a negative to very negative impact, against 40% for SMEs.

Option B. 64% of SMEs think that increasing the visibility and transparency of existing EU and national rules without changing the content of the rules will have a slightly positive to positive impact, and 12% of them think that this policy would have a very positive impact. Among large companies, 70% think that option B will have a slightly positive to positive effect, but a relatively lower share of companies think that it will have a very positive effect (3%).

Option C. About a quarter of SMEs think that this option will have a very positive impact, against only 11% for large companies. The majority of the latter group see a more moderate positive impact, with 50% choosing a positive impact.

Option D. The majority of both SMEs and large companies see a positive to very positive impact for option D.

Figure 42: Impact of policy options for investment protection per company size



Source: Ecorys, EU Investor Survey. Note: 33 respondents are SMEs and 35 respondents are large companies. Individual investors, associations and companies that did not indicate their annual turnover are excluded from this graph

Economic, environmental and social impacts:

We asked respondents to reflect on the economic, environmental and social impacts of the policy options. In short though, their inputs can be summarised as follows:

- Economic impacts: Respondents believe options C and D will provide economic benefits, due to increased trust and an improvement of the attractiveness of the single market, which raise the competitiveness of the EU and. For Option B the opinions are mixed between it having positive and negative impacts. For Option A,

respondents see a negative economic impact with it deteriorating the attractiveness of the Single Market.

- Environmental impacts: Some respondents see a positive impact from options C and D (and B) as this would increase trust and thereby also green investments. However, others believe this is an independent factor, as investment rules would coexist with environmental rules. Finally, for Option A (and B) some respondents think decreasing trust will also lead to less green investments.
- Social impacts: Some respondents believe that options B, C and D can lead to more jobs and therefore social security and stability, however one also thinks that B would lead to more differences in wealth and income. Finally, all believe A would lead to adverse social impacts as it would mean loss of investments and thereby jobs, higher prices for consumers and protection of local companies leading to bribery.

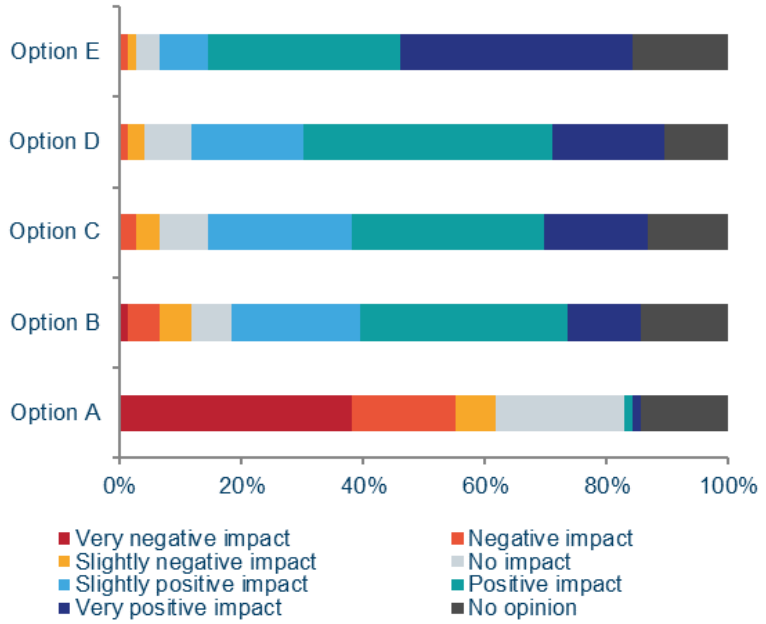
Enforcement of investor rights

Regarding solutions aiming to *address investor concerns on enforcement of rights and availability of effective remedies*, respondents were asked to rate a selection of policy options. These options include:

1. Option A: Do nothing - Baseline position, including existing enforcement mechanisms in the EU.
2. Option B: Enhancing mechanisms to prevent problems or resolve investor-to-state disputes amicably - This will help avoid and resolve issues at an early stage (for instance, specialised SOLVIT for investments to resolve individual cases; investment contact points to enable dialogue between investment stakeholders and public authorities on structural issues which affect the investment environment).
3. Option C: Improving enforcement of rights before national courts by streamlining selected procedural rules in relation to specific matters for which an internal market issue has been detected.
4. Option D: Creating a European investment Board (an Ombudsman-like EU administrative body) where investors could bring cross-border investor-to-State complaints - This option would establish specialised mechanism in investment protection operating at EU level and competent to deal with individual cases. It could include mediation and would suggest how the alleged violation of EU law could be remedied (before bringing a case to court).
5. Option E: Creating a specialised investment court at EU level - This option would establish an investment court at EU level that would deal with individual cases. Investors can bring claims in relation to intra-EU investments directly and obtain compensation through a binding decision.

While policy options are not mutually exclusive, 78% of the respondents believed that both, Option E (setting up an investment court) and Option D (establishing an European investment board), would have a positive impact on investment. However, for Option E, the share of respondents that see a very positive impact (38%) is higher than for Option D (18%), therefore Option's E average rank is also higher as is shown in Figure 43. These two options are followed Options C (streamlining procedural rules) with 72% of respondents believing it would have a positive impact and B (investment contact point) with 67%. Finally, for the baseline option of no action 62% of respondents it would have a negative impact indicating that respondents agree that EU action in this area is needed.

Figure 43: Policy options for enforcement of investor rights



Policy Option	Average rank
Option E	2,16
Option D	1,68
Option C	1,48
Option B	1,23
Option A	-1,74

Source: Ecorys, EU Investor Survey; Note: Average ranks were assigned by giving a value ranging from -3 to +3 to each response with 'No opinion' being not scored and 'No impact' having the value 0.

> "We believe that the establishment of a new EU court possibly modelled after the Unified Patent Court or a specialised ECJ court chamber (Art. 257 TFEU) dedicated to intra-EU investment disputes would have significant advantages compared with procedures before national courts." – Large German company

Several additional recommendations and comments were put forward from respondents - a full list of which are included in an Annex at the end of this analysis. Some key highlights included:

> "Allowing EU investors to resort to international arbitration against EU Member States, before a neutral and independent arbitral tribunal, applying international law". – Large French company

> "Specifically enforce green deal and directive 2018/1999 measures to achieve 2030 and 2050 sustainability targets. There is a feeling that the government in e.g. one Northern Member State will not do anything for years, as they think they will not be punished for targeting renewable energy investors." – Small Estonian company

> "Make legal procedures for private investors free of costs and submit lawyer at the costs of the member state you want to fight the laws of." – Dutch private investor

> "In addition, we urge the EU Commission to also look at ways on how to ensure that rulings at EU level can be properly enforced in Member States. To this end, consideration should be given to the possibility of introducing an instrument that can guarantee a degree of conditionality vis-à-vis Member States. Current discussions on linking the provisioning of EU funds to pre-determined political criteria, such as respect for the rule of law, should be extended in a such way as to take account of a number of substantial rights guaranteed to investors under the EU treaties and the EU Charter of Fundamental Rights." - Large German company

> "Introduce an EU-wide collective redress mechanism also for individual investors wanting to invest cross-border in listed securities (which is currently not the case, and not in the recent EC CMU Action Plan despite being clear priority recommendation from the HLF CMU to stop

discriminating individual non-professional equity and bond investors in the draft EU Directive on collective redress, and despite the Wirecard scandal that happened in between)." – Association representing investors

Impact of policy options for enforcement per company size

Option A. The option "Do nothing" is perceived as the worse option by both SMEs and large companies. However, large companies are more averse to the option with 63% reporting a negative to very negative impact, while the figure is 40% for SMEs. A quarter of SMEs have no opinion or do not know and an important 20% do not report any impact of this option.

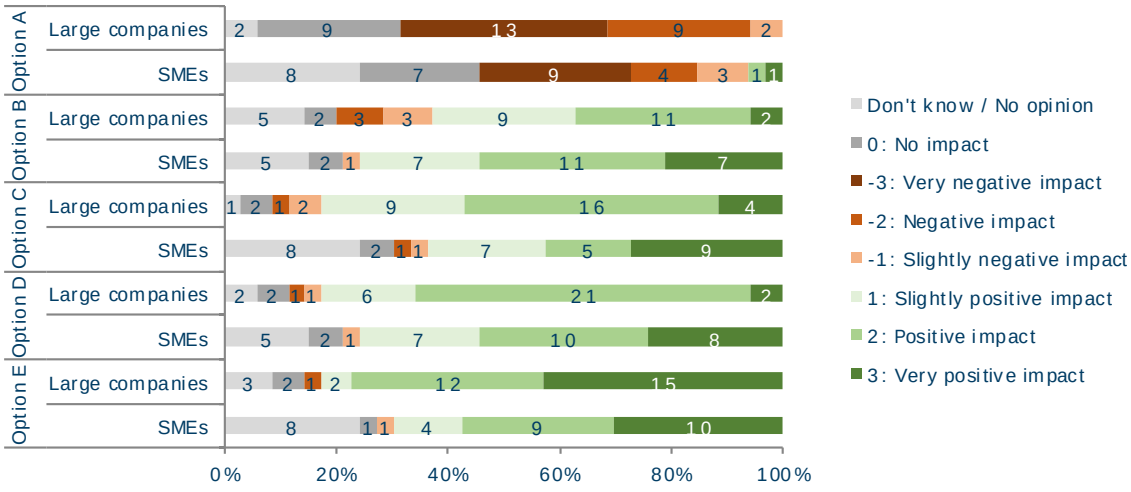
Option B. Relative to large companies, a bigger share of SMEs thinks that putting in place enhancing mechanisms to prevent problems or resolve investor-to-state disputes amicably is a good option. 55% of the SMEs surveyed think that it has a positive to very positive impact, and among them 21% responded perceive it as an option with a very positive impact. About 37% of large companies responded the same, with a smaller share rating the impact as very positive (6%). On the other hand, 17% of large companies report a slightly negative to negative impact, against only 3% for SMEs.

Option C. The majority of both SMEs and large companies think that improving enforcement of rights before national courts has positive impact (slightly positive to very positive). However, a quarter of SMEs have no opinion or do not know, which might suggest that smaller companies are less exposed to proceedings.

Option D. 66% of large companies and 55% of SMEs think that creating a European investment board where investors could bring cross-border investor-to-State complaints would have a positive to very positive impact, which includes 60% of large companies choosing the more moderate option (positive) and 24% of SMEs choosing mentioning that it would have a very positive impact.

Option E. Creating a specialised investment court at EU level is a positive option for a bigger share of large companies compared to SMEs, with 77% of the former reporting a positive to very positive impact, against 58% of SMEs. Similar to option C, a quarter of SMEs do not know or have no opinion on this option, which suggest that they are less exposed to proceedings in the issues they face.

Figure 44: Impact of policy options for enforcement per company size



Source: Ecorys, EU Investor Survey. Note: 33 respondents are SMEs and 35 respondents are large companies. Individual investors, associations and companies that did not indicate their annual turnover are excluded from this graph

Economic, environmental and social impact

We asked respondents to reflect on the economic, environmental and social impacts of the policy options. In short though, their inputs can be summarised as follows:

- Economic impacts: Some respondents believe that options C, D and E will have high economic impacts and increase the return on investment. However, while seeing C and D as improvements, some respondents also argue that these would overall be ineffective and inefficient solutions in securing a positive investment climate in Europe. According to the respondents, E seems to be the most positive option in terms of economic impacts. Option B is also seen as having some positive economic impact, however most respondents do not think its measures are enough to increase investor confidence sufficiently and others see negative economic impacts here. Finally, Option A is seen to have overall a negative economic impact.
- Environmental impacts: Most respondents believe that options B to E would have a positive impact on the environment by increasing investments into environmental projects which require much trust and increasing tax revenues providing Member States with more funds to invest into the environment. However, some respondents see these benefits only materialise for options C, D and E and one only for E. Finally, all believe that Option A would have a negative impact due to reduced investment into international projects.
- Social impacts: Most respondents see options C to E as having a positive social impact due to a better business environment leading to more investment, growth and jobs and therefore to better social security systems and social stability. A few believe the same also for B, however here other respondents also see a negative impact, while all respondents see a negative impact in case of Option A. Finally, one respondent believes that Option E would also be beneficial socially because the proposed dispute resolution mechanism could also defend public interests against investors that broke their obligations.

Option A	Option B	Option C	Option D	Option E
Economic impacts				
-	Medium	High		
Decreasing ROI	Increasing return on investment			
Massive deterioration of the attractiveness of the single market for investments - resulting in huge economic loss	An early stage mediation process only would not suffice and lead to massive deterioration of the attractiveness of the single market	An improvement of the conditions in front of national courts could partly help. Nevertheless, the basic problem remains that courts tend to be loyal to respective governments in trials or simply have to obey to discriminatory laws.	An ombudsman usually only sets up a mediation process with little or no binding character. Thaw would be better than no reform at all, but it would also clearly prove insufficient to secure a positive investment climate within the EU.	Clearly the best option, which would enhance legal predictability and improve the attractiveness of the single market for investment - ensure growth, wealth, economic dynamic and innovation.
Doing nothing will send the wrong message to the investor community that is nowpaying close attention to howthe EU will cover the gap it created by the termination of the intra-EU BITs.	SOLVIT is not suitable to resolve investor-State disputes. It's about solving citizen's problems.	-	Positive but inefficient option. No one has ever explained why a State would be willing to comply with a non-binding decision of the Ombudsman when it goes against it. There is no reason to believe that an investor would feel encouraged to engage in cross-border investment because of the Ombudsman existence.	It is the only option that will be perceived as a positive signal by the investor community and encourage them to continue to investor across the EU. It is also the only option that is likely to find support from other stakeholders.
International investors reducing their investments	Similar to A, might slightly reduce unfair legislation.	Gives investors more trust for future investments, but impact is limited.	Gives investors more trust for future investments, but impact is limited.	Increases trust in investments.

The Annex below provides the full responses on these impacts.

Annex– Additional comments on the policy options

Table 12 and Table 13 provide an overview on the open responses received from survey respondents to the policy options. Some of these are already integrated in the main text.

Table 12: Open responses to policy options on investment protection

Additional recommendations
Codifying investor's rights within European Law, Creating alternative mechanisms for the existing intra-EU BITs
in my opinion, more than EU investment protection rules on fund level, there are several factors decelerating investments at asset level, due to local and national legislations, which are often in contrast within the same country. Of course, most of the time, this has a little impact on fund/investors level, however is usually a break to invest more cross-boarding in general. The result is that, managers are usually reluctant to invest in those countries where legislation is more difficult, unless the money come from those countries. This on average means that, the countries who are relatively poorer receive less investments (with on top of this the disadvantage to borrow constantly at higher rates compared to the wealthier countries).
Higher protection for ESG compliant or social impact companies would incentivize investors to invest more into opportunities with positive impact (environmental, inclusive) and report accordingly.
Get rid of dividend tax in all member states. And let this income/wealth taxable in residence state. No fraud anymore, less bureaucracy, and less costly for private investor
If Bilateral Investment Treaties are no longer allowed, strong investment protection within the EU is required. Otherwise, intra-EU investment is in a disadvantage to national investments as well as investments from outside the EU with existing investment-protection agreements.
Lack of investor protection, in particular through the absence of an impartial, effective and timely investor-state dispute settlement mechanism, is the main obstacle to cross-border investment in the EU. Today, European investors investing in another EU country can no longer resort to arbitration courts in the event of disputes, and can only bring cases before national courts. They are therefore less well protected than non-European investors investing in Europe. Evidently, the post-Achmea situation has led to a substantial difference in treatment between EU countries vis-à-vis third countries emerges.
We rather prefer actions taken by EU institutions to enforce MS governments to apply policies in line with EU regulations
In addition to the measures suggested above (which are all for themselves useful mitigating factors), a new structural framework for investor protection on EU/international level against national measures of EU Member States needs to be established and encompassed with the respective (a) substantive rights and (b) procedural rights for investors/enterprises. Such new framework ideally could fulfil in particular the following functions: Award compensation for losses; fitting within the overall EU Court framework, i.e. referrals to the CJEU can be made;

Additional recommendations
availability of interim measures; standing of investors in such proceedings; enforceability on national level.
D : very positive but has to be done in addition to C, not alternatively

Table 13: Open responses to policy options on enforcement of investor rights

Additional recommendations
Take action by way of an EU enforcement procedure against a Western European Member State!
Option E would solve many outstanding issues and could contribute to a better thriving European economy.
In my view, it is a methodological mistake to look at enforcement in isolation from the rules and vice-versa, esp. as the combination of some options makes little sense. The survey also fails to ask which is the No 1 change we should make, if at all. I believe that if that question were asked, the investors would reply, almost en bloc, "we can live with the rules as they are; what we really need is a binding dispute resolution system that we can trust".
Allowing EU investors to resort to international arbitration against EU Member States, before a neutral and independent arbitral tribunal, applying international law
Specifically enforce green deal and directive 2018/1999 measures to achieve 2030 and 2050 sustainability targets. There is a feeling that the government in e.g. Northern European Member State will not do anything for years, as they think they will not be punished for targeting renewable energy investors.
Make legal procedures for private investors free of costs and submit lawyer at the costs of the member state you want to fight the laws of.
We believe that the establishment of a new EU court possibly modelled after the Unified Patent Court or a specialised ECJ court chamber (Art. 257 TFEU) dedicated to intra-EU investment disputes would have significant advantages compared with procedures before national courts: (1) There would be guaranteed independence from executive interference of the host state. (2) The court or chamber would be comprised by experts for investment disputes, who will provide profound knowledge in EU law when it comes to EU cross-border investment protection cases. (3) Such jurisdiction would ensure a more rapid examination of referred litigations. Such rapid examination is key for business continuity whatever the outcome of the judicial process. A specialised court at EU level could also use English as the main language for proceedings, avoiding the need for lengthy and costly translation services which is often needed with similar proceedings at national level. This would reduce the burden on investors, especially for SMEs. (4) A jurisdiction on EU level would establish harmonised standards for investment protection proceedings that would have to be applied on an EU wide basis. It would thus remedy discrepancies that arise from diverging legal opinions of national courts in a much more efficient way than via. Preliminary rulings or lengthy infringement procedures. (5) An EU mechanism would guarantee that the requirements of the ECJ in its "Achmea"

Additional recommendations
judgement are respected, as the ECJ would naturally hold ultimate jurisdiction over such an EU body / chamber. The need for effectiveness implies that determinations by the dispute settlement body are binding for both parties, even though they could be challenged before an appeal body. The specialised jurisdiction would hear all or most investors/host states litigations and would be given the ability to use expedited proceedings in order to sort out rapidly pending disputes. Last, we also support the establishment of an EU ombudsman-like body for mediation purposes. It might be helpful in de-escalating a situation and to potentially avert judicial proceedings. However, we believe that the creation of an EU ombudsman-like body only makes sense if it is supplementary to the establishment of a new EU court / specialised ECJ court chamber. On a stand-alone basis, the EU ombudsman-like body would not provide the necessary binding power that comes with a judicial body. We thus suggest the EU ombudsman-like body to act as first instance for investors seeking mediation. The Ombudsman body should have a clearly defined time period in which agreement between the parties can be found, upon which action will be transferred automatically to a supranational court system in case of lack of an out-of-court settlement by the end of this period. In addition, we urge the EU Commission to also look at ways on how to ensure that rulings at EU level can be properly enforced in Member States. To this end, consideration should be given to the possibility of introducing an instrument that can guarantee a degree of conditionality vis-à-vis Member States. Current discussions on linking the provisioning of EU funds to pre-determined political criteria, such as respect for the rule of law, should be extended in a such way as to take account of a number of substantial rights guaranteed to investors under the EU treaties and the EU Charter of Fundamental Rights.
We strongly believe that option E is by far the most ambitious and impactful policy option to strengthen and improve significantly the investment protection framework in the EU. European investors need legal certainty through a new European jurisprudence that would draw on the jurisprudence of the ICSID tribunals. The creation of a specialised investment court at the EU level would be more protective than a piece of legislation clarifying and specifying investment protection rules within the Single Market.
Legal protection for companies at EU level is currently quite insufficient to take effective action against national protectionism. Infringement proceedings which the EU Commission can initiate usually take a lot of time and by far not every complaint by companies/investors is taken up. Companies can only suggest. such infringement proceedings, have no possibility of interim relief and may not claim compensation. Also, preliminary rulings. of the CJEu are, in principle, an elaborated system for a uniform interpretation of EU law. In various EU Member States, however, there has been a tendency for national courts not to refer legal questions to the CJEU in the first place. In most cases, the only option available to an affected company is to request a preliminary ruling; which again means that companies do not have direct access to the CJEU in such cases. The only option left is an action for damages because of a breach of EU law by a Member State. However, such actions have to be brought. before national courts and very often the criteria (in particular the "sufficiently significant breach") are hard to be fulfilled. While a specialized EU investment court is effectively addressing the concerns, further measures might be still adopted in addition, e.g.: Extension of existing notification obligations for EU

Additional recommendations
Member States and development of effective interim prohibition possibilities for the EU Commission (extension of notification obligation, ex-ante possibilities for the Commission to temporarily prohibit legislative or other sovereign acts, strengthening the position of companies, e.g. through formal party status); Strengthening and speeding up the infringement regime. Moreover, also the option of an EU Ombudsperson could be very helpful. However, here it needs to be ensured that companies can easily access such new institution and that such institution is effective / enforceable on national level.
Introduce an EU-wide collective redress mechanism also for individual investors wanting to invest locally and cross-border (which is currently not the case, despite the respective clear recommendation of the HLF CMU and despite the Wirecard scandal)
Introduce an EU-wide collective redress mechanism also for individual investors wanting to invest cross-border in listed securities (which is currently not the case, and not in the recent EC CMU Action Plan despite being clear priority recommendation from the HLF CMU to stop discriminating individual non-professional equity and bond investors in the draft EU Directive on collective redress, and despite the Wirecard scandal that happened in between).
A first possible way to improve shortcomings in the manner that EU law offers protections and remedies to intra-EU investors while maintaining the procedural advantages of arbitration would involve the conclusion of new bilateral investment treaties between EU Member States that are specifically drafted to comply with EU law. First, such a treaty could include an applicable law clause that removes the risk of an incompatibility between the applicable law and EU law. Such a BIT could expressly provide that the tribunal must decide only on the basis of international law, including the international law of investment protection, but that in deciding a dispute the tribunal makes no determination of EU law. It could also provide that, to the extent that EU law is relevant to the tribunal's determinations, the tribunal only takes EU law into account as a factual predicate to its application of international law. Indeed, in Opinion 1/17, the CJEU found that a dispute resolution system under which a tribunal deciding an investment dispute took EU law into account merely as a fact was consistent with EU law. Second, such new BITs could specifically provide that that investor-state arbitral tribunals constituted under them would have their legal seat in an EU Member State. This would allow the national courts at the seat of the arbitration to exercise supervision over the arbitration. In exercising this supervisory jurisdiction, they would apply EU law standards, and would have the ability to make preliminary references to the CJEU under Article 267 TFEU. This is of course already the case in commercial arbitrations, which are subject to setting-aside proceedings before the national courts at the seat of the arbitration. Where that seat is within the EU, national courts have to set aside awards that fail to comply with public policy, which, according to the Eco Swiss jurisprudence, includes the fundamental principles of the internal market. In that context, national courts can, and frequently do, make refences to the CJEU. There is no systemic reason to differentiate between commercial and investment arbitrations where they are both subject to the same supervisory mechanisms that ensure the uniform application of EU law. Further, awards rendered by an arbitral tribunal under such a new BIT would in any event remain subject to the supervisory jurisdiction of the enforcement court in the EU Member State where enforcement is sought. The enforcing court could therefore, in exercising this supervisory

Additional recommendations

jurisdiction, further ensure that the enforcement of the award respects principles and rules of EU law, and would itself in any event be competent to refer questions of EU law to the CJEU under Article 267 TFEU.

An alternative option for improving investment protection under EU law would involve concluding an EU investment treaty ("EIT"). The EIT could provide for investment protection standards equivalent to those under intra-EU BITs and for the creation of a standing, specialized European Investment Arbitration Court ("EIAC") comparable to international arbitration under BITs. The conclusion of such an EIT between Member States would be in accordance with the division of competences between the EU and Member States. Further, the Member States and the Commission could ensure that such a treaty is compliant with the principles of EU law and addresses the CJEU's concerns in the Achmea judgment, in the same way as the Commission and the CJEU did with the Comprehensive Economic and Trade Agreement between the EU and Canada ("CETA").

In order to ensure compliance with the principle of autonomy of EU law, the EIAC could be established in such a way that would allow it to make preliminary references to the CJEU. The CJEU first allowed references for a preliminary ruling by a court common to several Member States in its Parfums Christian Dior judgment. In that judgment, the Court held that there was no good reason not to allow the Benelux Court – a court established by the Benelux states – to make a preliminary reference, as that court was comparable to a court of a Member State.

Table 14 and Table 15 below provide an overview over the feedback received on the economic, environmental and social impacts of the policy options.

Investment protection policy options

Table 14: Economic, environmental and social impacts of investment protection policy options

Option A	Option B	Option C	Option D
Economic impact			
Low	Medium	High	
Massive deterioration of the attractiveness of the single market for investments - resulting in huge economic loss	Any improvement of the attractiveness of the single market for investment raises the competitiveness of the EU and, hence adds to economic growth, drive and innovation		
Decreasing ROI	Increasing ROI		
International investors reducing their investments,	International investors will reduce their investments, however might slightly reduce unfair legislation.	Gives investors more trust for investments, but limited impact.	Increases trust in investments.
Encourages EU investors to invest outside the EU	Reduction in jobs	-	-
Less investments in start-ups and growth of companies	-	-	-
In the Long run: collapse of the Single Market	-	-	-
Environmental impact			
Less investment leads to less employment and less tax revenue, consequently there are fewer state funds available for ecological purposes and. Moreover, less private innovation which has a negative ecological effect.	No impact		

Option A	Option B	Option C	Option D
None, since investment protection rules - existing or to be created - will always co-exist with the EU rules on environmental protection. They will not take precedence over them but any conflicts will be resolved through a balancing exercise.			
Decreased effect	Increased effect		
International investors reducing investments in environmental projects	Decrease in investments for environmental projects, but might slightly reduce unfair legislation.	Increased trust might allow more investment in green future.	
Social impact			
Low	Medium	High	
Loss of jobs as a result of less investment - deterioration of the social climate within the EU	More attractiveness for investment leads to more jobs and therefore social security and stability.		
It will not help growth and hence employment.	None, but providing a more comprehensive intra-EU investment protection regime will contribute to stimulating growth which will produce more employment.		
Decreased effect	Increased effect		
Less jobs	More difference in income and wealth	-	-
Higher prices for consumers, protection of local companies through "their" politicians leading to bribery.		Preserves competition to the benefit of the people.	Increases fair competition to the benefit of consumers. Reduces bribery and political favours.

Investment enforcement policy options

Table 15: Economic, environmental and social impacts of enforcement policy options

Option A	Option B	Option C	Option D	Option E
Economic impacts				
-	Medium	High		
Decreasing ROI	Increasing return on investment			
Massive deterioration of the attractiveness of the single market for investments - resulting in huge economic loss	An early stage mediation process only would not suffice and lead to massive deterioration of the attractiveness of the single market	An improvement of the conditions in front of national courts could partly help. Nevertheless, the basic problem remains that courts tend to be loyal to respective governments in trials or simply have to obey to discriminatory laws.	An ombudsman usually only sets up a mediation process with little or no binding character. Thaw would be better than no reform at all, but it would also clearly prove insufficient to secure a positive investment climate within the EU.	Clearly the best option, which would enhance legal predictability and improve the attractiveness of the single market for investment - ensure growth, wealth, economic dynamic and innovation.
Doing nothing will send the wrong message to the investor community that is now paying close attention to how the EU will cover the gap it created by the	SOLVIT is not suitable to resolve investor-State disputes. It's about solving citizen's problems.	-	Positive but inefficient option. No one has ever explained why a State would be willing to comply with a non-binding decision of the Ombudsman when it goes against it. There is no reason to believe that an investor would feel encouraged to engage in cross-border	It is the only option that will be perceived as a positive signal by the investor community and encourage them to continue to investor across the EU. It is also the only option that is likely to find support from other stakeholders.

termination of the intra-EU BITs.			investment because of the Ombudsman existence.	
International investors reducing their investments	Similar to A, might slightly reduce unfair legislation.	Gives investors more trust for future investments, but impact is limited.	Gives investors more trust for future investments, but impact is limited.	Increases trust in investments.
Environmental impacts				
-	Medium	High		
Less investments lead to less employment and less tax revenue; there are fewer state funds available for ecological purposes and - also - less investment leads to less private innovation which has a negative ecological effect as well				An ensured better investment climate leads to more financial resources for states and, thus, strengthens its ability to invest in climate-related issues
Decreased effect	Increased effect			
International investors reducing investments in environmental projects	Increased trust might allow more investment in green future.			
Social impacts				
-	Medium	High		
Loss of jobs as a result of less investment, which would deteriorate the social climate in the EU. A deterioration of the investment climate within the single market would clearly endanger social stability throughout the EU.				A better business environment leads to more investment, hence to more growth and jobs and therefore to better social security systems and social stability
Decreased effect	Increased effect			

Higher prices for consumers, protection of local companies, often protected by "their" politicians, bribery.		Preserves competition to the benefit of the people.		Increases fair competition to the benefit of consumers. Reduces bribery and political favours.
-	-	-	-	A system that caters for public interest and is not only there for the interests of big business increases the confidence of the public in the dispute resolution mechanism. The Court would also be able to judge claims brought by MS against investors when they breach their obligations (labour, social, environmental etc).

ANNEX IV: STAKEHOLDER CONSULTATIONS

Overview of consultations activities

Throughout the study stakeholders were consulted on several occasions and in several rounds, in particular by means of:

- Scoping interviews
- Investor survey (see Annex II)
- Focus group

During the scoping interviews we discussed the problem assessment with nine different associations ranging from business representations, over chambers of commerce and investment agencies to NGOs. The survey was responded by 75 companies in individual investors as well as two associations representing investors. It focused on the scale of the problem, investor confidence, policy options, and their impact. Finally, during the focus group discussion, representatives from businesses associations, NGOs, and legal experts discussed shortly the problem assessment and then in more detail the policy options and their impact. The discussion was attended by 14 experts.

An overview of the results of the scoping interviews as well as the minutes from the focus group discussion are presented hereunder.

Scoping interviews results

Identifier	Organisation
[BA-1]	Industry association
[BA-2]	Association representing large companies in a Western European Member State
[BA-3]	Association representing large companies in a Western European Member State
[BA-4]	Association representing European investors
[CC-1]	Chamber of Commerce in a Western European Member State
[CC-2]	Chamber of Commerce in a Central European Member State
[IA-1]	Investment promotion agency in an Eastern European Member State (not full interview, due to lack of information on the topic)
[NGO-ENV]	Environmental NGO
[NGO-LBY]	Corporate watchdog NGO

Context

- [BA-4] The main reasons that impact investors' decision to invest are costs, risks, availability of information on exit strategies, national legislation, tax reclaims.

- [CC-2] Mainly larger companies invest abroad, because it entails a lot of effort in terms of finances, time and human resources. Nonetheless, there are also smaller companies that invest abroad and a lot of activity might actually involve smaller investments
  - [BA-2] and [BA-3] Facilitation is not an issue for large companies and there are no entry barriers into EU markets. Core issue for them is the protection of realised investments.
- [CC-2] A good and reliable investment regime is not only beneficial for the relationship between the host MS and the investors, as it avoids that problems arise and, if not, allows at least a legal recourse to dispute settlement at general EU level.
- [CC-2] The situation has also further deteriorated because of the COVID crisis.
- [CC-2] Since the increase in climate related investments, the attitude of some host countries with regards to investor protection has changed. Countries that were in favour of better protection have realised that it is inconvenient to be in the plaintiff side and their commitment to develop stable conditions for investment throughout the EU has weakened.
- [NGO-LBY] in general there is quite a lot of protection for foreign investors on different levels and this is probably more protection than non-investor citizens have within the EU market.
- [NGO-ENV] The main comment from arbitration industry and investors (which is a very narrow group of companies, mainly multinationals) is that they are being unfairly treated by national courts. In this sense it should be taken into account that it is the arbitration industry's job to use investment arbitration courts, which means that the end of BITs was the end of their job. So they need new opportunities to do their job, which in the end creates a very biased view on whether national courts are sufficient

Regulatory framework

- [CC-1] EU regulatory framework is not sufficient. National legal systems and their administrations and judiciary do not provide enough protection.
  - [CC-2] Investment protection is not sufficient. There is no equal playing field for investors, and no positive environment for EU companies' investments. It is important to re-establish the faith of investors in the investment protection regime.
- [CC-1] The Chamber voiced concerns on the termination of BITs, however there was a lack of feedback, since for many chambers and companies the problem is very abstract and there are more pressing concerns. There were already issues with BITs so it will not be terrible without them
  - [BA-1] Not sufficient, the big advantage of BITs is that you can avoid going in front of national courts which are either biased or bound to discriminatory legislation.
  - [BA-1] BITs are more independent and therefore fair. The EU regulatory framework is not enough, also as an investor one cannot appeal directly to the ECJ. The only way you could theoretical do it by saying your human rights are infringed, which is difficult to prove.

- [BA-3] Company members used the BITs quite extensively as legal framework for investing into Central and Eastern Europe

- [BA-1] By starting the infringement processes, the European Commission endorsed the view that the rule of law is not at the same level in all EU MS.
- [BA-4] The decision to implement EU key information documents made a very positive change with regards to investments on listed products. Investments in listed products have a better EU protection framework, compared to non-listed products.
  - [BA-2] The EC recognising the problem of investment protection as a close issue to the Capital Market Union and rolling out a new framework for investment protection is positive
- [BA-2] There might be cases with legitimate reasons for governments, however difficult to judge as companies only complain when there is a problem
- [NGO-ENV] ACHMEA ruling provided for huge opportunity to restore level playing field for national and intra-EU foreign investors. There is no problem with EU legal framework as it guarantees enough protection and is balanced well between the right to regulate by the states and the protection of private interests, which is not found under investment treaties
  - [NGO-LBY] Despite what is said, foreign investors do have legal standing in front of national courts, e.g. Vattenfall example in Germany highlights this.

Sectoral scope as well as examples

Sectors:

- [CC-2] The main sectors active in cross-border investments are banking, insurance, construction, property management, equipment providers, food retailers, waste collecting companies, waste water treatment, water provision.
- [IA-1] Two cases in real estate, where there is an issue with the local government on land ownership which is historically an issue in Warsaw as there has been a large nationalization of land in the 50s that caused disputes over land (inheritances etc).

Problem A and B

- [BA-2] and [BA-3] and [BA-4] and [CC-2] Agree with problem assessment
  - [BA-4] The main issues linked to cross-border investments are:

    1) not enough protection for non-sophisticated investors and non-domestic investors,

    2) not enough information on legal frameworks for non-domestic investors,

    3) limited protection especially when it comes to non-listed products
- [CC-1] Not only problems with the rule of law in countries but also simply inefficiencies in the judicial system, e.g. lengthy procedures
- [CC-1] Often national jurisdictions also lack knowledge about EU law.
- [CC-2] It is mainly an issue of rule of law as the Achmea decision and the termination of the BITs has left a legal gap in the framework.
  - This is especially the case with direct and indirect expropriation as there is no quick and reliable solution on expropriation.

- [NGO-LBY] There are problems, e.g. with rule of law, but these are problems within a country for everyone and should not be fixed for foreign investors only, but for everyone.

- [NGO-LBY] There is ample protection for foreign investors, but this does not mean there are no problems with access to justice or efficient courts in Europe.
  - [NGO-ENV] No problem, the EU legal order provides a strong legal framework for investment protection through the rules of the freedoms of the internal market. Legal order is based on rule of law and provides guarantees to investors vis a vis Member States. In particular in relation to the ACHMEA ruling and BIT termination, as that was exactly the reason why the Commission wanted to terminate BITs, as the rights granted to investors under these treaties were contradicting with EU law, overlapping and sometimes going beyond.
  - [NGO-ENV] From the wider society's interests there is no problem with investment protection framework, now that ACHMEA ruling has led to termination of intra EU BITs.
- [NGO-LBY] Recognize the story behind the problems, parts are true, but it is not the full story.
  - It simplifies the problem: if you have problems with the rule of law, you need investment protection, otherwise you would not invest. However, the example of the high investments of German car industry in Central Europe shows that despite rule of law problems, other very attractive aspects trigger investments (e.g. low wages, lax regulations). Therefore, the problem tree is very incomplete and rests on questionable assumptions.
- [IA-1] Public perception and media elevate the problem of Rule of Law, but this is not an issue for investors, more of an internal issue with the legal systems and judiciary
- [BA-1] Specifically, the problems for SMEs are the following:
  - 1) Lack of rule of law: legislation that changes in a discriminatory manner
  - 2) Lack of abilities to effectively invoke rights in front of courts: so not because of certain laws, but on how courts apply them (or do not)
  - 3) Length of processes: Often very long and for example after 10 year process your investment is worthless by then even if you win
  - 4) Equitable treatment: investment expropriation
- [NGO-ENV] One remaining problem is the Energy Charter, a multilateral investment agreement, also with non-EU countries is still being used. This is a gap which needs to be tackled by the EC
  - Another problem, which should be addressed is that we are only concerned with investment protection and not with investment governance. It is not only about the investors' rights and the protection but also about their obligations. Investors should also be made accountable for damages created by their investments or if they breach their obligations. In this sense the civil society has been largely ignored by Commission's approach to investment policy; Investment protection should be re-thought into investment governance in order to have a more holistic approach, investment protection is only one part of the story.

Problem A – uneven implementation of investment protection rules in different Member States

Drivers

- [BA-1] I would say that most of the drivers are correct, e.g. differences in compensation and codification are the most stringent ones.
  - [BA-2] Yes, lack of codified legal framework and therefore legal uncertainty among investors
  - [BA-2] Lack of predictability and stability of regulatory frameworks is a problem
  - [BA-3] Important issue is the difference in compensations (amount, calculation method, applicability of interest rates, scope of damages fit for compensation) and heterogeneity of processes creating uncertainty
  - [BA-4] Transparency and lack of information are indeed an issue (some markets are very difficult to assess from a foreign perspective – there is not enough openness), for example when it comes to exit strategies
  - [BA-4] The difference between jurisdictions, and between civil law countries and common law countries
  - [CC-2] There is too much dependence on the government in office. Agreements and/or investments carried out during one term of office can be questioned by the new government in the next term of office.
- [CC-2]:
  - Lack of clarity in scope of investment protection rights under EU law: this was a big part of the consultation. This is also due to the Commission not being really clear on what is there, and where are there deficits. e.g. expropriation (indirect and direct) and compensation for it. Preliminary rulings take too long - access for annulments are also difficult to get.
  - Differences in compensation for restriction of economic and property rights, etc.: yes, this has been said more than once, for example in the case of indirect expropriation: the new government comes in and declares the area an eco-site without any compensation. It would be useful for the Commission to provide guidelines on this (not necessarily all law because case law already exists, but it would be good to bring it together).
  - Insufficient safeguards to ensure the predictability and stability of the regulatory framework and lack of clarity on legitimate expectations: it is there, but it's not clear how to improve this. Harmonisation cannot be imposed, it needs to come from the MS, the EC can provide guidelines, incentives.
  - Incomplete safeguards related to administrative conduct: yes, it's often more difficult to come with a solution. It's a rule of law problem - problems are manifold (people who are inadequate, unwilling, who delay, etc) the administration is close to the government and it is thus difficult that they be unbiased.
- [CC-2] "Difficulties in finding information on market opportunities, business partners and investment protection rules" as mentioned in the consultation as well, this has not expressly been marked as a problem (limited feedback has been received on this). Their trade representations give proper information on this. In

addition, companies who really have the means to invest outside, they also find ways to get the necessary information. This doesn't mean that nothing should be done. The Single Digital Gateway is not completely satisfactory as it is too administrative, but an value added could exist with something that brings all information together and spreads it (can be done at EU and Member State level).

- [IA-1] Changes in regulations are sometimes a problem (especially in the tax system), but this question is more raised by domestic investors than by foreign investors as it does not affect large international companies.
- [IA-1] Slow processes when dealing with administrations. Investment agencies supports companies to speed up processes. This is the case for environmental processes in particular (large companies), but it is still faster in respective Central European Member State than in neighbouring countries and they currently plan to release a new act to speed up processes.
- [NGO-ENV]:
  - For "finding information on market opportunities, **…**", Investors have to do their own due diligence if they go to a country to invest, same for this is part of their business risk management; if there are issues of transparency that is not only for investors but also by other stakeholders that might be affected by investments
  - "Differences in compensation for restriction of property and economic rights", this very much depends on circumstances in the country, not every country faces the same problems. Each member state is competent to set up remedies for property rights and it very much depends on the country's circumstances and does not necessarily make sense to harmonise compensation at EU level.
  - "Lack of clarity in the scope of investor protection in EU law", investors can seek advice by law firms, it was clarified by the court of justice, there is tremendous amount of case law on internal market freedoms and limitational restrictions, there is no need to clarify further. Some levy is necessary for interpretation and for attention to specific circumstances.
- [BA-4] Missing drivers are cultural and language barriers and bankruptcy laws

Problem B – Insufficient enforcement of investor rights

Drivers

- [BA-1] I would say that most of the drivers are correct, e.g. limited possibilities to preliminary rulings, effectiveness of national courts are the most stringent ones.
  - [BA-2] Most important issue is the efficiency of law enforcement as investor rights are there but not efficiently enforced
  - [BA-3] Protection of substantive rights for investors is there on paper, but in practice interpretation of these laws and their enforcement varies a lot
  - [BA-3] Even without clear breach of rights, access to courts and fair treatment in front of national courts is not given, due to political interferences and lengthy proceedings (e.g. 10/15 years in some cases)

- [CC-1] Problem of lack of independence (corruption, disadvantaging foreign companies). Also legal systems in some countries do not provide sufficient rights/protection, retroactivity of laws (especially in tax law) is also an issue

- [CC-2]:
  - Limited possibilities to prevent problems: everyone wants as a predictable framework as possible, but it is also fair to say that you can never predict everything. Not all problems can be prevented. Their network identifies them and shares them, they keep their members informed
  - Uneven level of effectiveness of national enforcement mechanisms, notably on quality and independence: yes, as mentioned in the consultation, this is a big deal, because MS know that enforcement mechanisms are under their control. Some improvements have been seen (e.g. Baltics) but this is an issue still in other countries in Central and Eastern Europe. Independence is a constant theme.
  - High hurdles for state liability for breaches of EU law: this is something claimed to be important by representatives of some companies. These hurdles should be brought down to ease the dispute resolution. Nonetheless, they don't necessarily agree that they would substitute dispute resolution.
  - Insufficient safeguards in some procedural rules such as lack of legal standing to challenge law, remedies: by far the biggest problem - predictability - too many politically guided decisions, especially in Eastern European Countries. They put in place some rules that particularly hinder big companies. There is no stability and predictability. It is a problem with populist legislation: there is no consultation – or they provided a very limited time- the decision is fast tracked and companies cannot adapt (this happens for instance in some Member States in Central and Eastern Europe). And there is little counter pressure from EU because the legislation comes too quickly to be questioned or annulled in court. It is difficult to do much about it. Other problems exist with regards to how the property titles are given, and the fact that the interpretation varies from the person in power.

- [BA2] Missing driver is the lack of guarantee of the quality of judgement (independence and length of proceeding) with national courts lacking the expertise on EU investment law or capacity.

- [NGO-LBY] Yes, wrong-doing by MS exists, as identified in national court rulings, which sometimes also rule against the states. There is probably evidence for unjustified actions, but in particular in ISDS cases, it is not always the case that these are unjustified actions, if companies claim so. Most of the time governments are just trying to do their job.

- [NGO-ENV] Expropriation is defined under national law, but there are checks and balances under EU law, if a Member State behaves incorrectly the courts and tribunals are there: in cases of expropriation investors can go to national courts, they can refer questions to the court of Justice of the EU, or the European Court of Human Rights.
  - A bit simplistic and farfetched view that some national courts are not aware or are not interpreting the EU law in their rulings, if investors do not agree with a national court's ruling they can appeal and refer the question to the EU Court of Justice.

Consequences

- [BA-1] The attractiveness of the single market is deteriorating. Companies approached the federation saying that they would stop investing in EU markets, but move to third countries where there are still BITs (e.g. Serbia).
  - [BA-4] The unevenness in the EU leads to the Single Market not reaching its full potential.
    - As a consequence the bank loan dependency in Europe is too much of a hurdle when it comes to economic developments and efficient markets.
- [BA-2] Investors see better standing in third countries with investment treaties and decide to divert their investments into these
  - [BA-1] Another issue is that third country companies that still have BITs with EU Member States have better protection than EU companies, which gives them huge advantages in single market.
  - [CC-1] BITs termination creates a situation of discrimination between 3rd country investors who enjoy better protection through their BITs and EU investors
- [BA-2] Policy choices of nationalist governments make investors withdraw or deter investments
  - [BA-3] Poor investment protection limits investments and diverts them to other countries (e.g. more legal certainty in third countries)
  - [CC-1] Deters investments
- [BA-3] Reduced scale of investment with investors making smaller investments to mitigate risks (calculation between risk and profitability)
  - [BA-3] Cases strongly affects investment policy of a company, making companies much more cautious about investing
- [BA-3] and [BA-2] Lengthy proceedings make investments not worthwhile or a loss
- [CC-2]:
  - Investor confidence: once you improve the drivers, you help the investors.
  - Investors that experience problems and where cross-border investment incurs cost, scale down or withdraw investments
  - Yes, deterred or withdrawn investments have negative repercussions on the host state and the host will not admit that it has something to do with the policies implemented in this area
  - Investor protection is the biggest problem that the EU needs to deal with in the coming months to help the help the Single Market reach full potential. Give legal recourse and reach an enforceable decision, this is the only way to be successful.
- [NGO-LBY] Treaty shopping already exists within the EU, if intra-EU BITs are abolished, EU investors will find a new way to sue EU countries via extra-EU BITs. There is ample protection for foreign investors through a lot of tools.
- [NGO-LBY] It is questionable whether the uneven investment protection really leads to insecurity and hence fewer investments.

- Literature on investment protection and investment flows shows that the causal link between investment protection and investment flows is not conclusive. According to an OECD analysis there is no clear evidence

Current extent and likely evolution of the problems

- [BA-1] Five Austrian companies that have ongoing proceedings based on BITs (mostly energy and finance) and two that have ongoing cases based on the Energy Charter Treaty. Other companies that have been considering legal action, but due to the current circumstances (uncertainty by planned removal of BITs) decided to wait.
  - Austria is more affected by these things. For example, of EUR 200 billion investments worldwide, roughly EUR 50 billion are invested in the 12 new Member States
- [BA-3] Very focused cases with only a few per country and in specific sectors, however, these cases have huge implications as they often concern large sums of investments (e.g. EUR 500 million to 1 billion)
- [BA-3] Recent trend of denying even legitimate compensation on ground of policy sentiments (i.e. sentiment that companies should pay for environmental policy as they profited long enough from the environment)
- [CC-2] There are many more problems than those that reach the European Commission. The issue is that it is sensitive to share such cases as giving them to much visibility in this context could be counterproductive for the relationship of the investors and Member State, as well as their negotiations/discussions.

Policy measures

- [NGO-LBY] Every framework should make sure that cross-border investments are good quality investments: creating decent jobs, does not contribute to social dumping, doesn't contribute to environmental destruction and benefits community in the entire host country.
  - If there is a problem with the rule of law, it is not clear whether the right answer is investment protection.
- [NGO-LBY] Technical assistance by EU improves the judicial system for everyone, for example: improving judicial efficiency, efficiency in court proceedings, trainings for judges. Rather policies along these lines than having special instruments to just improve situation for the investors.
- [NGO-ENV] Equal treatment - Why should investors have more protection in front of courts than any other actors? This would not be in line with EU law, where everyone is the same in front of a court. This all results in a very questionable and inconsistent approach by the EC.
  - It would not be the solution to the problem to further specify the rights of investors, but rather to tackle the problem at its root and also think about the other actors impacted by weak rule of law in a given country.
- [NGO-ENV] There is no need for intervention as the current framework is enough. Instead, investments should be more conditioned on sustainable investments, they should be regulated more and obligations for investors should be included. There should be more conditions to direct investments, there should be a focus on controls on MS and on how they handle State Aid etc. Therefore, also the introduction of an Ombudsman as one of the solutions is not necessary.

Protection

- [BA-2] Suggestion to establish direct contact points in MS and with the EU (e.g. through SOLVIT or EU delegation)
  - [CC-1] Need for national support points to advise investors on their rights in Member States and on applicable EU laws
  - [CC-2] The EEN is an interesting support structure if you can ensure they are run independently from their governments (who have a say on their efficiency and effectiveness).
- [BA-3] Need for secondary legislative instrument that harmonises investment protection and substantive rights across EU (e.g. how to calculate compensation and interest rate)
  - [BA-4] There should be a clear and transparent EU framework. Basic civil law is not sufficient. Especially when a government is involved, the results can be unpredictable.
  - [CC-2] There should be a regime that reflects the idea that political change does not entitle the MS to shake up the economic basis. It would be nice to have a clear cut regime without having to recourse to the Commission to put pressure on Member States
- [BA-4] The decision to implement EU key information documents made a very positive change with regards to investments on listed products. This should be considered also for non-listed products to make them comparable
- [BA-4] The language is also an aspect that needs to be considered (information should be available at least in English on top of the national language
- [BA-4] A relief at source dividend tax system would solve most of the issues regarding double and over taxation for cross-border investments. Until now, the double dividend tax and reclaiming overpaid dividend tax is an important obstacle in cross-border investments for investors
- [BA-4] Enhance the power of ESMA in case protection problems arise.
- [CC-2] Further guidelines are also a possibility to improve clarity

Enforcement

- [BA-1] Need for enforceable solutions and not just mediation.
  - [CC-1] Need for a binding and enforceable dispute settlement mechanism (that is SME friendly, so fast and relative cheap).
- [BA-1] Establish a codified and unified definition of fair and equitable treatment, of investor rights, of good administration, because otherwise MS will always have differences
  - [BA-3] A Directive that harmonises proceedings and introduces EU standards, which allow for interim decisions and frame the length of proceedings to provide certainty to investors
- [BA-1] Alternative mechanism with the BITs being eliminated, e.g. something similar to EU Patent Court, such as a new Chamber at the ECJ. Even an European Investment Protection facilitation court system could be an option (e.g. ICS to have same standards as with third markets)

- [BA-2] Investors are afraid to revert to national courts, an EU mechanism would be better
    - [CC-1] European Commission needs to step in because companies cannot deal alone against national courts, for example ability of preliminary rulings would be helpful
- [BA-3] Two solutions for enforcement, preferred one is an EU investment court or tribunal, where the EU could independently judge on litigations reducing political interferences.

- [BA-3] Need for a pre-litigation and litigation instruments, possibility for mediation, but needs to be ensured that if this does not work, proper litigation and enforcement can be achieved
    - [BA-2] Supportive of EU Ombudsman policy option as an amicable solution is always preferable, however there should be a time limit to mediation to avoid misuse to delay process
    - Definition of Ombudsman would require clear mandate and clear process for mediation
- [CC-1] Reinforce existing framework such as SOLVIT and strengthen amicable dispute settlements
- [CC-2] An company loses a lot of time when going into mediation and they don't always reach a solution at the end. It would be good that at the end, if a solution is not reached, a company is able to bring their case to court with support of the EC.
    - In any case, it is important to make sure that there are proper solutions without the need to pay for big lawyers as, generally, only big companies are well equipped for litigation.
    - There could be two types of systems depending on the size of the company. For big companies (maybe also after the mediation) there could be a new chamber in the ECJ, or an agency or harmonisation office with an investment division. And for SMEs a more integral system.
- [IA-1] Every city has investment support agency which acts as mediator at local and administrative level

Company measures

- [BA-1] and [CC-2] Invoking BITs and dispute settlements is a last resort measure (as it hurts relationship with country and thereby future business), amicable solutions are preferred
    - First, companies try finding amicable solutions in dialogue
    - Some companies go to national courts, but this takes long and costs a lot
    - Companies also make use of their domestic authorities and try receiving support through embassies
- [BA-2] Large companies engage in direct negotiation with governments and have regulatory teams
- [BA-2] Chambers of Commerce support SMEs on these issues

- [BA-3] Mitigation through reduced / diversified investments, however difficult to mitigate, for example mediation works only if both parties stick to the proposal and are interested in amicable solution
- [BA-4] Investors currently resort to legal advice, or ask for help from their association. Institutional investors have more bargaining power, which individuals lack to mitigate or confront issues.

Focus Group Minutes

The focus group took place online on the 18th November. The list of participants included (number of representatives in the bracket):

- Contractor (8)
- European Commission (2)
- Legal practitioners (2)
- National government representatives (2)
- Business Association representatives (6)
- Environmental NGO (1)
- Trade union representative (1)
- Investor (1)

The Focus Group took place with the overall purpose to validate the assumptions made regarding the assessment of the impacts as well as to gather feedback from stakeholders on the identified costs and benefits of each of the policy options. Additionally, the focus group provided the opportunity to the participants to interact with the study team and provide their point of view.

The agenda points were the following:

- Welcome & Introduction
- Problem under assessment
- Feedback on the problem assessment
- Assessment of impacts
- Discussion on the impacts of policy options
- Conclusions

Introduction

After a welcome by the Project Manager, the format and rules of the 'focus group' have been explained and set. The participants from the DG FISMA have been introduced as observers. After the study team has been introduced the two main problems assessed in the study have been shortly presented by the Project Manager to provide a short overview.

Presentation of problem under assessment & comments and reactions from Participants:

Following the introduction, the problems under assessment have been explained in more detail, using the problem tree developed by the study team. Additionally, the method for assessing the main problems has been outlined. Information on the problems have

not only been gathered from a survey targeted on investors, but also from interviews, desk research and a public consultation to include all different stakeholder groups. The problem tree builds the context and foundation of the next steps of the study and the impact analysis.

Two main problems have been identified and proven by the results of the study:

1. Insufficient investment protection and lack of investor confidence in rules protecting investment
    a. 42% of the respondents to the survey expressed lack of confidence in protection
    b. 28 of the respondents to the survey confident
    c. Drivers:
        i. Difficulties on finding information on investment protection rules
        ii. Insufficient clarity in scope of investment protection rights under EU law
        iii. Uneven/inadequate investment protection rules in different Member States
    d. These drivers have been validated through questions in the survey
        i. Less than 1/3 of the respondents felt confident about current protection factors
        ii. Least confidence is felt in the conduct of public administrations
        iii. Insufficient predictability and stability of the regulatory framework is felt to be to main investor protection factor leading to adverse investment decisions
2. Difficulties in enforcing investment protection rules obtaining effective remedies for cross-border investments
    a. 42% of the respondents to the survey expressed lack of confidence in enforcement of investor rights
    b. Drivers:
        i. Concerns about effectiveness of national enforcement mechanism in cases involving investment protection
        ii. Limited possibilities to prevent problems
        iii. Ineffective safeguards in some procedural rules
    c. These drivers have been validated through questions in the survey
        i. Less than 1/3 of the respondents to the survey confident about investment enforcement factors
        ii. Least confidence in availability of mechanisms to raise concerns with public administration
        iii. Effectiveness of national enforcement mechanisms is felt to be to main investor enforcement factor leading to adverse investment decisions

Consequences and effects to which the problems contributed to

Two main effects have been triggered 1) Lack of predictability, stability, and clarity of the investment protection framework and 2) Lack of confidence in preventive, protective, and enforcement rules and systems. These led to higher costs of cross border investment, leading to a reduction of EU investments (withdrawn and deterred) or diversion outside the EU. All these factors led to reduced competitiveness, lower economic and social growth, loss of jobs and business along supply chains and cancelled infrastructure projects in host states as well as to unexploited potential of the Single Market and slower achievement of the Capital Market Union.

- Loss of revenue has been identified as the main consequence of the problems stated above, followed by the loss of jobs, technology and knowledge or finance.

After the presentation of the problems by the study team, the participants had the chance to comment on the identified problems:

Observations/reactions/comments by participants towards the logic/ coherence /completeness (including comments via the chat function):

Many of the participants had similar experiences and opinions as the results of the survey yielded as well as the overall problems have been identified. Contributions :

- Business association representative concerning the input provided to drivers: where are the inputs concerning tax issues. Tax issues are important in this relation as drivers as they put a burden on cross border investments, or infrastructure projects which are done together with state-owned companies, as well as through withholding tax issues?
    - Answer: These aspects are not considered as key drivers, but have been taken into account as part of other key drivers
        - Business association representative: a distinction between larger and smaller investors should be done here then, as the issue is larger for smaller investors who do not have experts. The cost of withholding taxes might be higher than tax itself, and therefore refrain from investment cross border, while for larger 'professional' investors the problems are clear.
            - Answer: We accounted for distinction between large and small in survey
- Legal practitioner: I would think in terms of Investment Protection we have 2 situations: 1.) taxation, which is known before investment; 2.) investment was made on basis of soft or harder commitments of a state to have some stability of the taxation regime, but the taxation regime changes after a few years, and this is the situation where a real issue of investment protection arises. Overall, I have the same feeling as the results of the study in terms of drivers for an insufficient enforcement system. Often the driver for issues is due to the way national authorities are dealing with investments
    - Answer: Indeed, the level playing field is the main issue from legal perspective
        - General standards of investment protection and single market principles should be the guiding standards to be applied in field of taxation

- Business association representative: there is a very hostile political environment in countries they want to invest in (food retail companies) where politicians publicly denounce companies, hence, there is no support for investors and investments in the political system nor media, this has a tremendous effect on the behaviour of companies as they cannot speak up to protect their investment; concerning taxation: not heard about not wanting to invest because of taxation but that the issue arises rather as investors wanted to de-invest because of taxation, food retail in particular having small margins
    - Elements of change are the issue: there are certain information at the moment of the investment, some are incomplete, some only become available once the investment was done, however some change overtime;
    - focusing on discrimination between national vs. Non-national companies as investors: It depends on the context where rules are put in place and the target group (only national companies exempted),
- Legal Practitioner: What has just been said, which we see in a number of cases in practice, demonstrates that we need enforcement mechanisms at EU level as well as where your remedies are limited at domestic level
- National government representative: I just wanted to confirm that the outcome of the survey with respect to enforcement and disputes settlement in particular is in line with the feedback that we receive from our companies.
- Business association representative: This would be out of scope for the moment, but I have several examples that show that new anti-foreign investor rules had a very negative impact on employees. In a Central European Member State you can get a 1 million euro fine if an employee misses a product on the shelves that has an expired best before date. You can imagine what an impact that has on employees, no one wants to be responsible for that.
- National government representative: Also, it is worth looking at these issues from the viewpoint of divestment. Would be interesting to see to what extent government conduct that leads to disputes also leads to FDI withdrawal or cancellation.

While many reactions supported the views gathered in the survey, some reactions to the outlined problems suggested different views:

- Environmental NGO representative: commenting on the correctness and coherence and the assumptions of the problem identified, as well as giving a warning of a potential bias, it would be interesting to know what kind of investors participated in the survey, as some bias is seen already in the problem assessment itself, which would imply starting from wrong assumptions and identifying the wrong solutions. Additionally, the consultation focuses so far only on group of investors and the whole picture is missing.
    - Answer: there is the possibility to see more details about the contributors to the survey, we also have been looking at various different kinds of investments and investors
        - We have not only built on the survey but also public consultation as well as interviews which focused on other stakeholder types as well
- Trade Union representative: the problem is that the analysis and assumptions are one-sided, there might be problems faced by investors; but looking at

problems, away from an investors point of view, shows that these problems are not only applicable to investors but to citizens as well; a broader perspective is missing. The problems are referring to EU law, and there needs to be a balance of EU law for stakeholders, right now there is no balance as the Court of Justice weakens workers' rights: there is already an imbalance giving an advantage to companies compared to workers; not only investors are negatively affected by changes in policies but other stakeholders as well. The problem definition is quite targeted.

Assessment of impacts & discussion of impacts

The study team introduced the process and method of assessing the impacts. What are objectives that need to be met and how can we assess whether a problem was met?

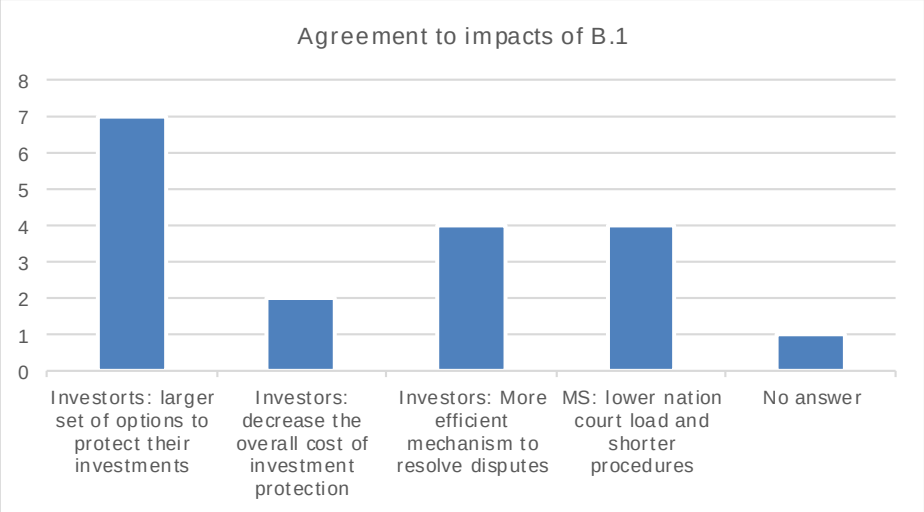
Assumption: if each of operational objective is met, we solve we solve specific objectives.

For each policy option the immediate changes have been put forward, and these changes will be assessed on their possible contribution to solve the operational objectives.

Today we focus more on the immediate impact and on the policy options to solve problem 2.

<u>Policy option B.1 extension of SOLVIT</u>

- Main changes on conflict management
  - For investors:
    - Larger set of options to protect their investments
    - Decrease the overall cost of investment protection
    - More efficient mechanism to resolve disputes
  - MS public authorities:
    - Lower national court load and shorter procedures when the issue can be effectively resolved by the SOLVIT mechanism

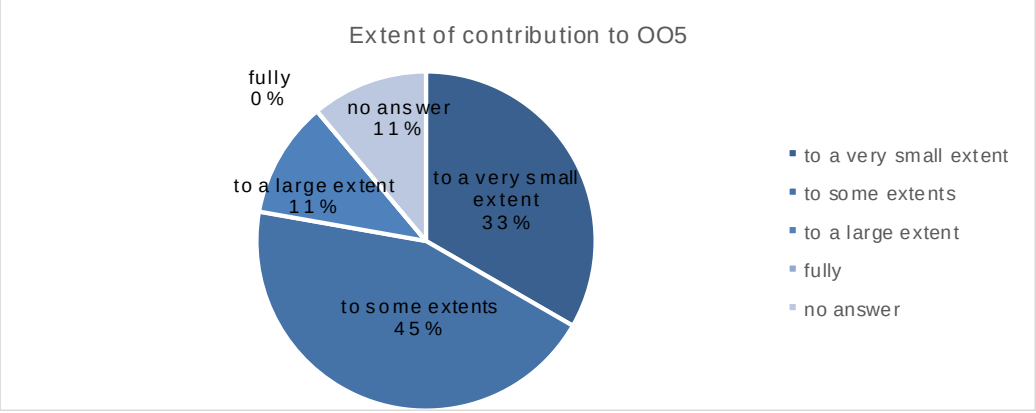


N (total number of votes) = 18

Additionally, several comments have been made concerning the SOLVIT mechanism itself. Overall, the SOLVIT mechanism was explained to be too small, and too ineffective. It could be part of package but not the sole option.

- most MS do not allocate enough resources, if this remains the case this exercise is only theoretical, therefore it is important to take other aspects into account. SOLVIT is really lacking and any benefits can only be made when it is fully functional not like it functions now; SOLVIT is missing its teeth
- nowadays SOLVIT appears of limited assistance where MS measures are affecting the investment it is a legislative act, in addition SOLVIT is unavailable where the investors seek compensation for damages or take the case to court in parallel
- important to consider that investors usually do not go to arbitration as it is very expensive and hence, they would usually rather engage in direct consultation with the governments, which resembles a political bargaining game. Therefore, something like SOLVIT would be welcome. However, SOLVIT needs to be changed, before it could be used as valuable option for investor protection. Some institutional amendments needed, e.g. impartiality, independence from executive branch. It is important to consider making SOLVIT part of a bigger package, to make it possible to escalate the disputes to higher level or body who is able to speak in a legally binding manner.
- One should consider the dynamic element of investor protection. Investors expect a robust enforcement mechanism with the hope that they will not need to use it in practice but that its mere existence will prevent breaches to the investment protection rules.
- the Commission should in some way be involved in a SOLVIT process and could facilitate their role as guardian of the treaties (infringements)
- There is potentially a difference to be made between big companies and SMEs. Big companies can reach out more easily directly to governments and negotiate directly with them, while SMEs may benefit from an institutionalised ADR

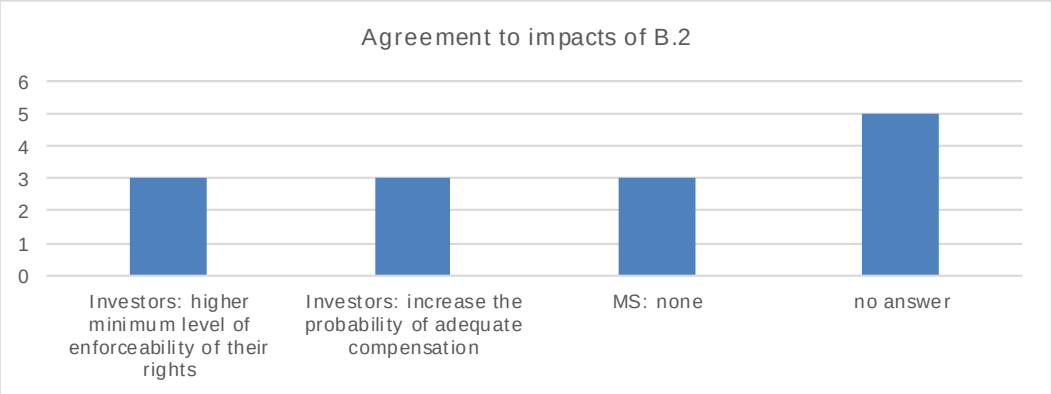
To what extent do you think this option contributes to reaching the operational objective 5: Improve possibilities to prevent problems and resolve disputes amicably (++)



N (total number of votes) = 10

Option B.2 Improving enforcement before national courts by streamlining selected procedural rules

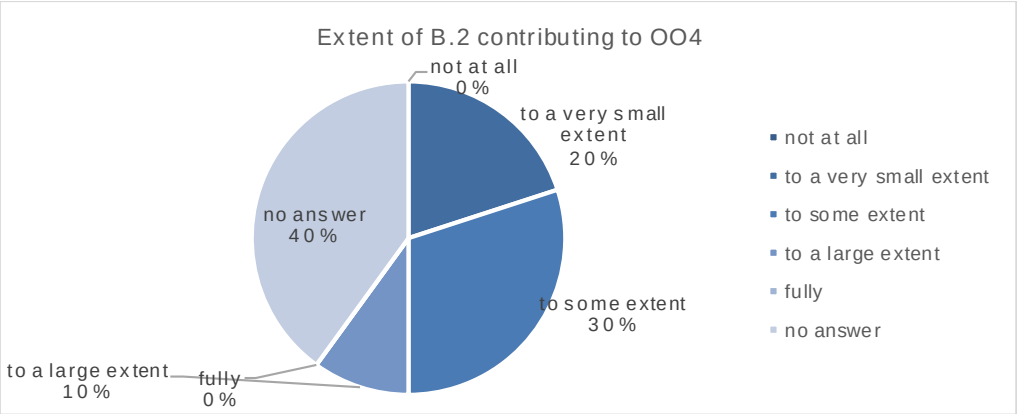
- Main changes are found in dispute resolution phase of investment process, impact on decision-making phase
  - Investors:
    - Higher minimum level of enforceability of their rights
    - Increase the probability of adequate compensation
  - MS
    - None



N (total number of votes) = 14

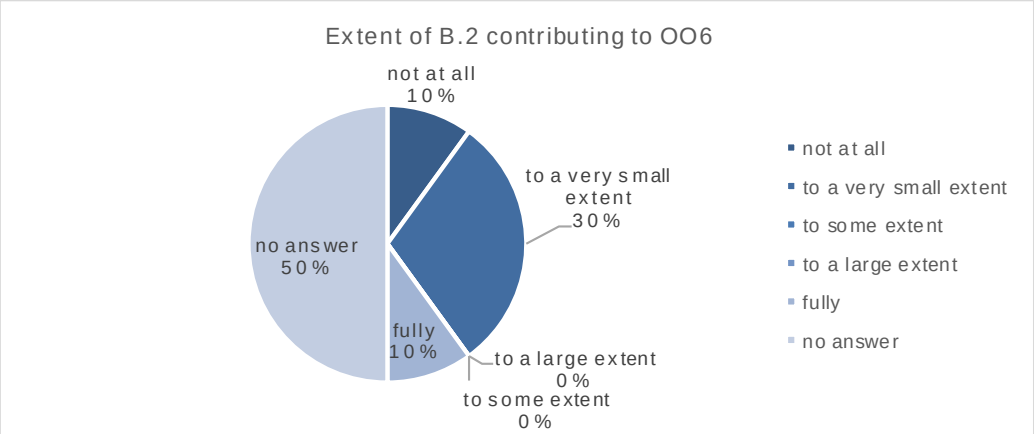
- What also could be considered as important issue, is that enforcing domestic procedural rules is not only to the benefit of investors but also to the benefit of the public as such. Hence, this option could imply some spill over effects to workers' rights
  - Further view by legal expert: MS courts takes into consideration domestic legal order and hence does not base rulings on EU law only, this yields the possibility for investors to benefit from different balance systems in legal order across the EU MS
  - Clarification on earlier input concerning the disadvantage for workers' rights in the European Court of Justice: did not mean to say that the European Court of Justice interprets EU law to disadvantage of workers vs the national courts, but the ECJ interprets 4 freedoms and checking against workers' rights, more weight would be put on 4 freedoms, therefore the issue arises not in the courts but in the balance of EU law and the way it is interpreted on the whole level

To what extent do you think this option contributes to OO4: Improve effectiveness of enforcement mechanisms for investment protection cases (++)



N (total number of votes) = 10

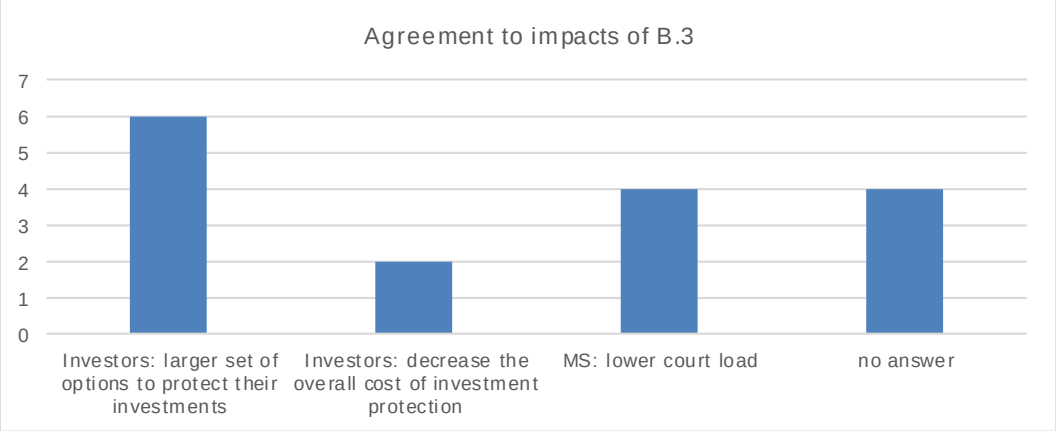
To what extent do you think this option contributes to OO6: Strengthen safeguards in procedural rules to improve enforcement in national courts



N (total number of votes) = 10

B.3 Ombudsman-like administrative body

- Main changes on conflict management phase, lower extent on dispute resolution phase and impact on decision-making phase through the risk assessment of the opportunity
  - Investors:
    - Larger set of options to protect their investments
    - Decrease the overall cost of investment protection
  - MS
    - Lower court load



N (total number of votes) = 16

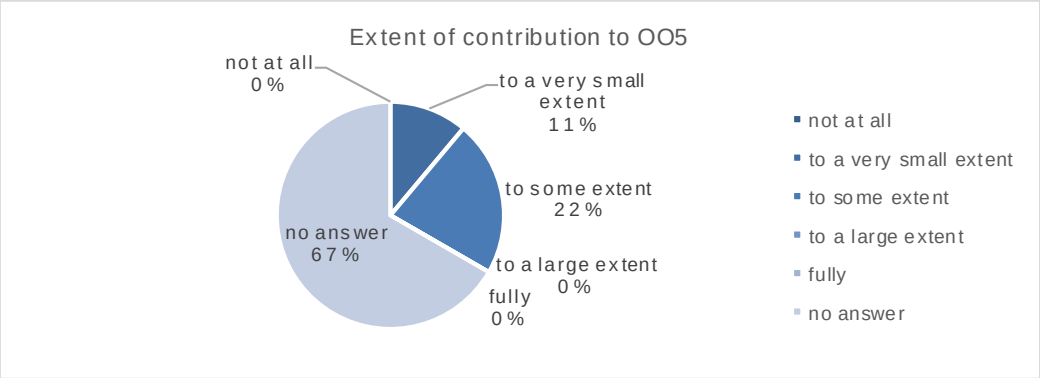
A missing impact refers to the differences between courts' rulings and ombudsman settlements or negotiations, there is always the problem of picking the legal roots that might benefit you most. An ombudsman is a good instrument if there is a large group of stakeholders, but if its 1 investor having 1 issue, administrative burden would be too high.

A more general comment has been made on why there is not always satisfaction about the enforcement possibilities at EU level, by Commission, is that MS tend to be very clever and seem to endlessly stall decisions. What comes to mind with these instruments, we know they might not be 100% effective, but they could be used as means for the MS to postpone inevitable. If things are postponed too much, companies learn how to deal with it and do not care about it, and in the end the problems are not solved. If instruments are only used by MS to prolong the procedures while it is not necessary, and therefore an Ombudsman solution is not applicable.

Additionally, similar comments as to SOLVIT have been made to this policy option:

- Same comments as for SOLVIT: lack of teeth, also needs a deterrent, more useful for SMEs than big companies, can be part of the options but not as an isolated option
- In principle, it looks attractive. Would need to be made part of a bigger package (i.e. there should be the possibility to resort to a supranational adjudicative body with compulsory jurisdiction)

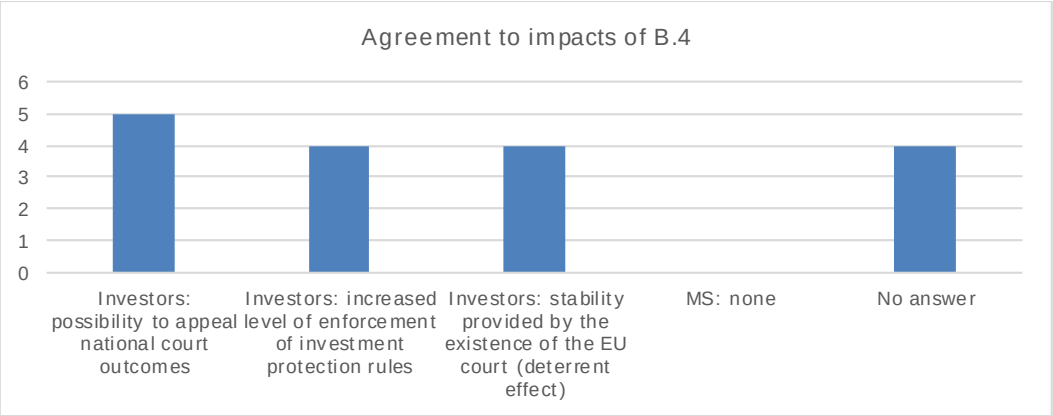
To what extent do you think this option contributes to OO5: Improve possibilities to prevent problems and resolve disputes amicably (++)



N (total number of votes) = 9

<u>Option B.4 Creating a specialised investment court at EU level</u>

- Main changes are found in all phases of the investment process, except research phase
  - Investors:
    - Possibility to appeal national court outcomes
    - Increased level of enforcement of investment protection rules
    - Stability provided by the existence of the EU court
  - MS
    - None



N (total number of votes) = 17

Comments:

What is about legal basis for such a court?

Legal Expert: some options by commission put on the table

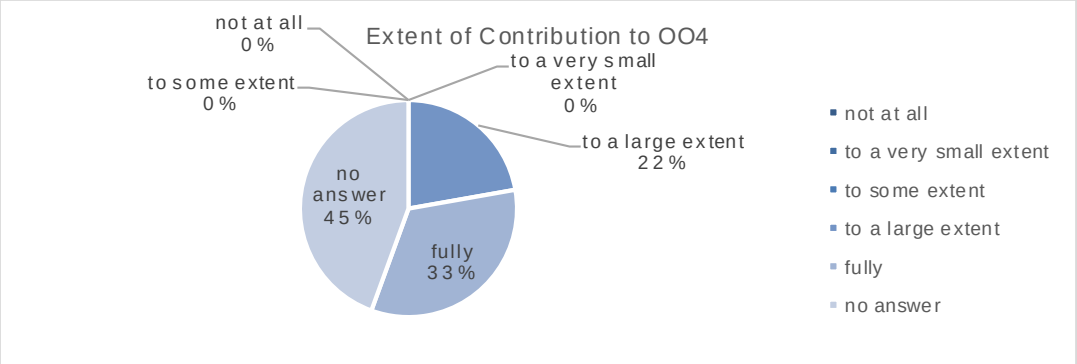
- What would be the legal basis for such an EU court?
  - The basis is not yet defined and open for discussion, different options exist, put forward by the European Commission; would not conclude however, that any court on EU level is completely out of question
  - Clarification by EC: this option is not envisaged as an appellate instance for national courts, but as an alternative court where investment cases would be brought directly
  - Also, not completely clear what type of laws would be within the scope of such a court, what issues will be tried to be solved, and how could EU law actively be enforced through this body? If you would be a single investor you would be exposed with such a court, the effectiveness of the court is questionable

- A discussion emerged on the topic of the supranational adjudicative body: indicating that an EU court system already exists and the ECJ is in place already.
  - but investors do not have direct legal standing before the ECJ against measures taken by Member States (they need to complain to the EU Commission or to request domestic courts to refer the case for a preliminary ruling)
    - Exactly, just like workers and anybody else: From a trade union perspective it cannot be justified to have a chamber in the ECJ especially for investor claims. This is regardless of whether this would be covered by EU law. We need a balanced approach. It is a one-sided approach to install a chamber especially just for investors; As trade union we strongly oppose an Arbitration Court (on the basis of international law or on any other legal basis)

- Strong support for the option of the court was given by the national Banking Association in a Southern Member State strongly support the solution of the constitution of an "EU Arbitration Court", as a specialized chamber at the European Court of Justice, because we consider a potentially a good approach as long as no Treaty changes are required. We would like to get more information on this idea. We are not aware of all the details. Namely, we need a full explanation concerning the point Specialised Tribunal (to be established by a regulation on the basis of

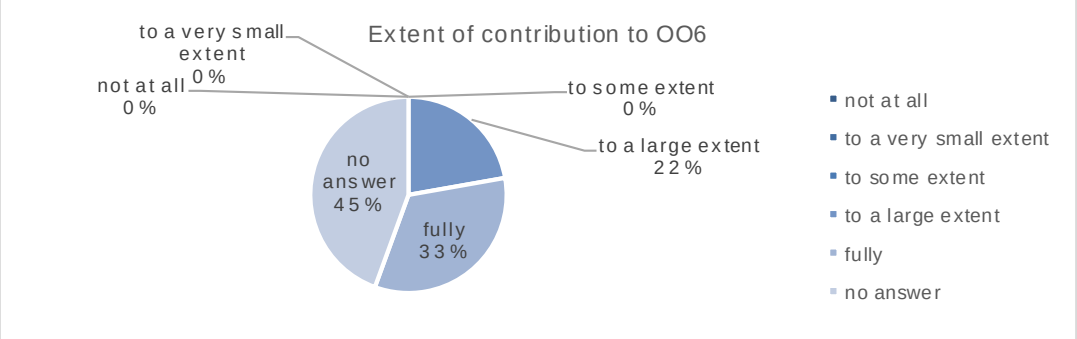
Article 257 TFEU) (page 3) in the supporting document Possible EU business targets for a legislative framework for intra-EU investment protection to be developed as a substitute to Individual BTIs

To what extent do you think this option contributes to OO4: Improve effectiveness of enforcement mechanisms for investment protection cases (++)



N (total number of votes) = 9

To what extent do you think this option contributes to OO6: Strengthen safeguards in procedural rules to improve enforcement in national courts



N (total number of votes) = 9

Additional comments:

- A possible fifth option would be to look at existing single market features and how to extend/amend them, extend notification
- Additionally, improving the powers of the European Commission in infringement proceedings should be one of the options considered in the study.
- It's important to differentiate the issues and SOLVIT would be a good opportunity, but if the issue is a real infringement, then the Commission needs to act, as this is its job, if it is something else, then SOLVIT could be possible; for the national courts, the problem is that in some MS the issues can only be contested in front of the constitutional courts, not everybody can file a complaint here.

ANNEX V: MAIN AREAS SCREENED FOR IMPACTS

Screening checklist from the Better Regulation Toolbox	
Economic impacts	**Key questions**
Operating costs and conduct of business	• Will it impose additional adjustment, compliance or transaction costs on businesses? • Does it impact on the investment cycle? • Will it entail stricter regulation of the conduct of a particular business? • Will it lead to new or the closing down of businesses? • Are some products or businesses treated differently from others in a comparable situation? • How are individual Member States affected?
Administrative burdens on businesses	• Does it affect the nature of information obligations placed on businesses (for example, the type of data required, reporting frequency, the complexity of submission process)?
Trade and investment flows	• How will investment flows be affected and the trade in services? • Will the option affect regulatory convergence with third countries? • Have international standards and common regulatory approaches been considered?
Competitiveness (sectoral) of business	• What impact does the policy option have on a sectors' market share and comparative advantages in an international context (e.g. imports, exports, investment flows, trade barriers, regulatory convergence, etc.)?
Position of SMEs	• What is the impact of identified additional costs and burdens on the operation and competitiveness of SMEs and micro SMEs in particular?
Functioning of the internal market and competition	• What impact (positive or negative) does the option have on the free movement of goods, services, capital and workers? • Will it lead to a reduction in consumer choice, higher prices due to less competition, the creation of barriers for new suppliers and service providers, the facilitation of anti-competitive behaviour or emergence of monopolies, market segmentation, etc.? Or would it lead to the opposite?
Innovation and research	• Does it facilitate the introduction and dissemination of new production methods, technologies and products? • Does it affect the protection and enforcement of intellectual property rights (patents, trademarks, copyright, other know-how rights)?
Public authorities	• Does it bring additional governmental administrative burden? • Does the option require the creation of new or restructuring of existing public authorities?
Consumers and households	• Does the option affect the prices, quality, availability or choice of consumer goods and services?
Macroeconomic environment	• Does it have overall consequences for economic growth and employment? • How does the option contribute to improving the conditions for investment and the proper functioning of markets?

Screening checklist from the Better Regulation Toolbox	
Social impacts	**Key questions**
Employment	• To what extent are new jobs created or lost? • Are direct jobs created or lost in specific sectors, professions, regions or countries? • To what extent does the option influence opportunities and incentives of workers/specific groups to work?
Governance, participation and good administration	• Does the option affect the involvement of stakeholders in issues of governance? • Are all actors and stakeholders treated on an equal footing, with due respect for their diversity? Does the option impact on cultural and linguistic diversity? • Does the implementation of the proposed measures affect public institutions and administrations, for example in regard to their responsibilities? • Does the option make the public better informed about a particular issue?
Environmental impacts	**Key questions**
Climate	• Does the option affect the emission of greenhouse gases (e.g. carbon dioxide, methane, nitrous oxide, etc.) into the atmosphere?
Waste production, generation and recycling	• Does the option affect waste production (solid, urban, agricultural, industrial, mining, radioactive or toxic waste) or how waste is treated, disposed of or recycled?
Transport and the use of energy	• Will it increase or decrease the demand for transport (passenger or freight), or influence its modal split? • Does it increase or decrease vehicle emissions? • Will the option increase/decrease energy and fuel needs/consumption?
Fundamental rights	**Key questions**
Property rights and the right to conduct a business	• Are property rights affected (land, movable property, tangible/intangible assets)? Is acquisition, sale or use of property rights restricted? • If yes, what are the justifications and compensation mechanisms? • Does the option affect the freedom to conduct a business or impose additional requirements increasing the transaction costs for the economic operators concerned?
Good administration, Effective remedy/ Justice	• Will the administrative procedures in place become more burdensome? • Will they guarantee the right to be heard, the right of access to the file with due regards to professional and business secrecy as well as the obligation of the administration to give reasons for its decisions? • Is the individual's access to justice affected? • In case that the policy option affects rights and freedoms guaranteed by EU law, does it foresee the right to an effective remedy before a court or tribunal?

ANNEX VI: CHANGE PROJECTIONS IN FDI AND GDP IMPACTS

We start from FDI data obtained from the balance of payment dataset from Eurostat. We aggregate the total flow of FDI to each MS, retaining only FDI originated from another EU MS.

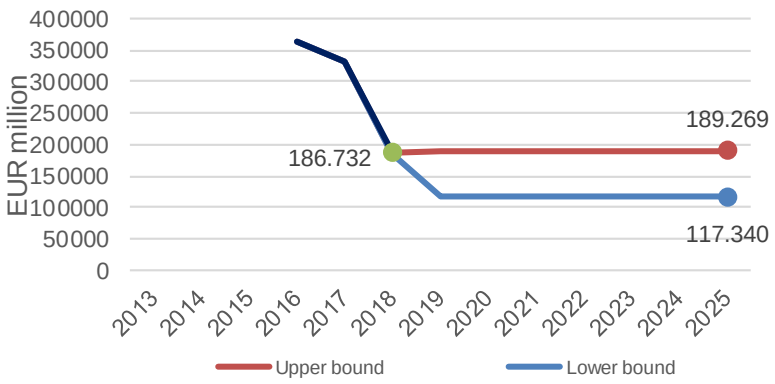
We project for each MS a one-year ahead baseline with either the compounded annual growth rate ($CAGR_i$) between 2013 and 2018 or a trend (t_i). Then we re-aggregate to produce an EU wide stock of FDI in EU MS, coming from EU MS investors, i.e. EU cross border investments

$$FDI_{EU}^{trend\ baseline} = \sum_{i=1}^{27} FDI_i * (1 + t_i) \quad \text{or} \quad FDI_{EU}^{CAGR\ baseline} = \sum_{i=1}^{27} FDI_i * (1 + CAGR_i)$$

To obtain the in:

$$FDI^{EU\ Option\ x} = \sum_{i=1}^{27} FDI_i^{baseline} (1 + W_i\ )$$

The weighting schemes for each country i, W_i , are obtained from the investment property rights gap calculated as the MS *i* index score subtracted from the highest index score (gap in index points), multiplied by the FDI flow value associated to each index points (results from Economu (2019).



Trend: Simple extension of the existing trend. The trend baseline is a lower bound value (blue).

CAGR: Application of the Compounded Annual Growth Rate (2013-2018) to the latest available data point. The CAGR baseline is an upper limit value (red).

Four-year rolling averages of annual MS level EU FDI flows.

The set of tables below give the detailed calculations for the baselines, the FDI gains and the GDP gains.

Table 16: Weighting scheme for unlocked FDI assumptions

	Property Rights Index in 2020	Gap (points)	Impact (% lost FDI flow)
Austria	87.3	5	8%
Belgium	84.5	7.8	12%
Bulgaria	64.2	28.1	45%
Croatia	69.9	22.4	36%
Cyprus	77.4	14.9	24%
Czech Republic	76.8	15.5	25%
Denmark	86.3	6	10%
Estonia	83.2	9.1	15%
Finland	92.3	0	0%
France	85.9	6.4	10%
Germany	80.5	11.8	19%
Greece	57.0	35.3	56%
Hungary	64.8	27.5	44%
Ireland	86.6	5.7	9%
Italy	75.4	16.9	27%
Latvia	72.3	20	32%
Lithuania	77.9	14.4	23%
Luxembourg	86.4	5.9	9%
Malta	70.5	21.8	35%
Netherlands	90.0	2.3	4%
Poland	63.1	29.2	47%
Portugal	75.4	16.9	27%
Romania	72.5	19.8	32%
Slovakia	73.1	19.2	31%
Slovenia	76.5	15.8	25%
Spain	74.9	17.4	28%
Sweden	88.8	3.5	6%

Table 17: Modelling of the potential impact on FDI and resulting GDP growth (EUR million)

IMPACT ON FDI FLOWS							
			Problem	Policy Options Potential Impact			
EU 27	2018	2019	GAP (100%)	5%	10%	25%	50%
Baseline CAGR	186 732	189 269	222 060	190 909	192 548	197 467	205 665
Baseline Trend	186 732	117 340	137 877	118 367	119 394	122 475	127 609
Additional FDI (CAGR)			32 791	1 640	3 279	8 198	16 395
Additional FDI (Trend)			20 537	1 027	2 054	5 134	10 269
IMPACT ON GDP - Method 1							
EU27	2018	2019	Problem	Policy Options Potential Impact			
GDP EUR million	13 517 906	13 963 561	GAP (100%)	5%	10%	25%	50%
GDP EUR/cap	30 230	31160					
FDI/GDP CAGR	1.38%	1.36%	1.59%	1.37%	1.38%	1.41%	1.47%
FDI/GDP Trend	1.38%	0.84%	0.99%	0.85%	0.86%	0.88%	0.91%
Population	447	448	448	448	448	448	448
CAGR baseline	Difference FDI/GDP (ppc)		0.23%	0.01%	0.02%	0.06%	0.12%
Trend Baseline			0.15%	0.01%	0.01%	0.04%	0.07%
CAGR baseline	Difference GDP/cap (ppc)		0.023%	0.001%	0.002%	0.006%	0.012%
Trend Baseline			0.015%	0.001%	0.001%	0.004%	0.007%
CAGR baseline	Difference in GDP/cap (EUR million)		7.32	0.37	0.73	1.83	3.66
Trend Baseline			4.58	0.23	0.46	1.15	2.29
CAGR baseline	Difference in GDP (EUR million)		3 279	164	328	820	1 640
Trend Baseline			2 054	103	205	513	1 027
IMPACT ON GDP - Method 2							
			Problem	Policy Options Potential Impact			
EU 27			GAP (100%)	5%	10%	25%	50%
CAGR baseline	FDI %change due to policy		17.325%	0.866%	1.732%	4.257%	8.662%
Trend Baseline			17.502%	0.875%	1.750%	4.300%	8.751%
CAGR baseline	GDP % impact (0.054% elasticity)		0.9355%	0.0468%	0.0936%	0.2299%	0.4678%
Trend Baseline			0.9451%	0.0473%	0.0945%	0.2322%	0.4726%
CAGR baseline			2.5468%	0.1273%	0.2547%	0.6258%	1.2734%

Trend Baseline	GDP % impact (0.147% elasticity)	2.5728%	0.1286%	0.2573%	0.6321%	1.2864%
CAGR baseline	GDP impact (0.054% elasticity) - EUR million	1,771	89	177	435	885
Trend Baseline		1,109	55	111	272	555
CAGR baseline	GDP impact (0.147% elasticity) - EUR million	4 820	241	482	1 185	2 410
Trend Baseline		3 019	151	302	742	1 509

Source: own elaboration based on Eurostat, Economu (2019), Baiashvili and Gattini (2020), and Pegkas (2015).

For the first approach to assess the economic impact, we rely on the results of Baiashvili and Gattini (2020)[202]. The authors found that "*on average, the impact on growth of a 1 percentage point increase of FDI to GDP ratio ranges between 20 percent (or 0.2 percentage points of real GDP growth per capita) and 1 percent (or 0.01 percentage points of real GDP growth per capita) depending on the method and income group*." Within that 1 to 20% range, we conservatively pick the 10% point.

For the second approach, we use the results of Pegkas (2015)[203] who found that "*using the Fully Modified OLS (FMOLS) and Dynamic OLS (DOLS) methods the elasticity of GDP with respect to FDI is 0.054% and 0.147%, respectively. [..] This means that a one percent increase in FDI stock will foster economic growth for the panel of eighteen countries of Eurozone by about 0.054% percent.*"

Both approaches are slightly different, but lead to GDP gains/losses results of a similar order of magnitude. The first approach yields results that stand more or less in the middle of the range of estimates of the second approach, given by 2 levels of GDP elasticity (blue rows).

[202] Baiashvili, T. and Gattini, L., 2020. Impact of FDI on economic growth: The role of country income levels and institutional strength (No. 2020/02). EIB Working Papers. https://www.eib.org/attachments/efs/economics_working_paper_2020_02_en.pdf

[203] Pegkas, P., 2015. The impact of FDI on economic growth in Eurozone countries. The Journal of Economic Asymmetries, 12(2), pp.124-132.

ANNEX VII: COST MODELLING FOR OPTION A1, B1, B2, B3 AND B4

Approach for estimating costs of option A.1. Further clarification of existing EU rules through non-legislative measures"

The costs estimated for option A.1 "Further clarification of existing EU rules through non-legislative measures" consist of the following components: 1.) Member States' costs for identifying and populating the 27 Member State Rules pages, 2.) Member States' costs for identifying and populating the 27 Member States Opportunities, 3.) Member States' costs for maintaining the Rules pages, 4.) Member States' costs for maintaining the Opportunities pages as well as costs for the EU institutions on 5.) the creation of the Rules pages and 6.) the creation of the Opportunities pages.

The cost components have been estimated under the following assumptions:

1. Member State costs on identifying and populating the 27 Member State Rules pages have been estimated by using the cost per FTE per Member State in 2017 (Eurostat, 2020) and assuming the work of 1FTE for 1 months.
2. Member State costs on maintaining the Rules pages have been estimated by using the cost per FTE per Member State in 2017 (Eurostat, 2020) and assuming the work of 0.1 FTE for 1 month. These costs are recurring costs, the cost estimates are per year.
3. European institutions' costs for summarising the EU communication has been based on the basic salary of EU Commission officials in grade 9 step 1, the salary being equal to 7845.39 per month[204] and assuming 1 week of work for 1 FTE.
4. The European institutions will face an increased amount of projects to be processed through this option, as the project threshold will be lowered from EUR 1 mio to EUR 500 000. These costs will be recurring costs and are estimated to amount to EUR 40 000.

	Costs
MS costs identification & population of Rules page	82 988
MS costs maintaining rules pages	8 295
Total cost Member States	91 288
Creation of MS Rules pages	7 845
Increase in the number of projects processed	40 000
Total costs EU institutions	47 845
Total costs of option	139 133

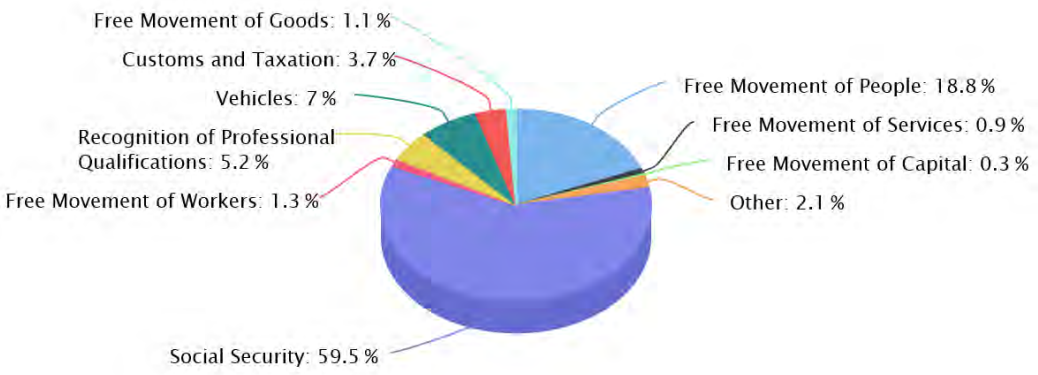
[204] https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-781-F1-EN-ANNEX-1-PART-1.PDF

Approach for estimating costs of option B.1. Strengthening prevention mechanisms and investment facilitation

The overall approach for estimating the costs of policy option B.1 "Strengthening prevention mechanisms and investment facilitation" is based on the extension of the current SOLVIT mechanism and consists of 5 components: 1.) the Member States contribution to the SOLVIT extension, 2.) cost of training in the Member States, 3.) cost of promotion in the Member States as well the components regarding the costs faced by EU institutions 4.) coordination support costs and 5.) promotion costs.

In order to calculate the costs for the Member States, their average contribution to the current SOLVIT mechanism has been constructed by calculating the averages of the Member States' contribution to cases submitted and cases received under SOLVIT in 2019[205]. This average has been used per Member State to estimate the contribution to the SOLVIT extension under this policy option per Member State. The current cost of SOLVIT has been estimated by using cost per FTE in the EU Member States and the average of 1.9 FTE per MS as assumed in the 2015 SWD.[206] For this element 3 scenarios have been estimated:

1. A higher bound scenario, estimating that the SOLVIT extension will equal 3 % of the current SOLVIT expenses of the Member States (in total EUR 56 766),
2. A medium scenario, estimating that the SOLVIT extension will equal 1,5 % of the current SOLVIT expenses of the Member States (in total EUR 28 383),
3. A lower bound scenario, estimating that the SOLVIT extension will equal 1% of the current SOLVIT expenses of the Member States (in total EUR 18 922)



These costs are complemented by the above mentioned cost components 2-5 for every scenario, under the following assumptions:

[205] https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/solvit/index_en.htm
[206] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017SC0210

1. Member State costs on training have been estimated by using the cost per FTE per Member State in 2017 (Eurostat, 2020), and assuming 2 months of work of 2 FTE per Member State
2. Member State costs on promotion have been estimated by using the cost per FTE per Member State in 2017 (Eurostat, 2020), and assuming 1 month of work of 1 FTE per Member State
3. European Institutions' costs on coordination support has been based on the basic salary of EU Commission officials in grade 9 step 1, the salary being equal to 7845,39 per month[207] and assuming 1 month of work for 2 FTE
4. European Institutions' costs on promotion of the policy option has been based on the basic salary of EU Commission officials in grade 9 step 1, the salary being equal to EUR 7845.39 per month[208] and assuming 1 month of work for 2 FTE

Additionally, for every scenario a fee structure could be included, implying possible costs for investors too.

	3% Contribution to SOLVIT extension (Scenario 1)	1.5% Contribution to extension (Scenario 2)	1% Contribution to extension (Scenario 3)
EU institutions Coordination costs	15 690	15 690	15 690
EU institutions Promotion costs	15 690	15 690	15 690
Total cost European institutions	31 380	31 380	31 380
Contribution to Solvit	56 766	28 383	18 922
Cost of training	331 966,66	331 966	331 966
Cost of promotion	82 958,47	82 958	82 958
Total costs MS	471 691	443 308	433 847
Total costs of option (+ possible fees from investors)	503 072	474 869	465 228

Approach for estimating the costs of option B.2. Improving enforcement in front of national courts

The overall approach for estimating the costs of B.2. Improving enforcement in front of national courts consists mainly of costs for training the staff for new procedural rules. Hence, it is assumed that only one-off costs for Member States will arise, while no costs (neither one-off nor recurring costs) will arise for EU institutions, furthermore, no recurring costs will arise for Member States.

The above-mentioned component is based on the following assumption:

[207] https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-781-F1-EN-ANNEX-1-PART-1.PDF
[208] https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-781-F1-EN-ANNEX-1-PART-1.PDF

1. Costs arising from the training of the staff for new procedural rules have been estimated by using the cost per FTE per Member State in 2017 (Eurostat, 2020), and assuming 1 month of work of 1 FTE per Member State

	Costs
MS costs training for new procedural rules	82 992
Total costs of option	82 992

Approach for estimating the costs of option B.3. Creating European investment board

The overall approach for estimating the costs of B.3. Creating European investment board consists of 7 components: 1.) Support Costs for Member States for Set-up to ensure access to the mechanism from a national level, 2.) costs for Member States for translating the guidelines and lists into the national language, to facilitate access, 3.) costs for Member States to promote the mechanism and inform investors about there benefits, 4.) costs for EU institutions to create the platform and guidelines, 5.) costs for the EU institutions to support in translation of the lists and guidelines into the 24 official EU languages, 6.) costs for the EU institutions to promote the body and inform investors about their benefits and 7.) the annual costs of the mechanism (allowances, rents, salaries and other staff related expenditure ensuring operating of the body).

These components are based on the following assumptions:

1. Support costs for Member States for supporting the European institution in the set-up of the body have been estimated by using the cost per FTE per Member State in 2017 (Eurostat, 2020), and assuming 2 months of work of 1 FTE per Member State
2. Costs for Member States for translation of lists and guidelines have been estimated by using the cost per FTE per Member State in 2017 (Eurostat, 2020), and assuming 1 month of work of 1 FTE per Member State.
3. Costs for Member States for setting up the body in the Member States have been estimated using the cost per FTE per Member State in 2017 (Eurostat, 2020), and assuming 1 month of work of 1 FTE per Member State
4. Costs for Member States for promotion of the body have been estimated by using the cost per FTE per Member State in 2017 (Eurostat, 2020), and assuming 1 month of work of 1 FTE per Member State.
5. European Institutions' costs on creating the platform and guidelines has been based on the basic salary of EU Commission officials in grade 9 step 1, the salary being equal to EUR 7845.39 per month[209] and assuming 2 months of work for 2 FTE.
6. European Institutions' costs for support on the translation of lists and guidelines has been based on the basic salary of EU Commission officials in grade 9 step 1, the salary being equal to EUR 7845.39 per month[210] and assuming 1 month of work for 1 FTE per official language of the EU.

[209] https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-781-F1-EN-ANNEX-1-PART-1.PDF
[210] https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-781-F1-EN-ANNEX-1-PART-1.PDF

7. European Institutions' costs on promotion of the policy option has been based on basic salary of EU Commission officials in grade 9 step 1, the salary being equal to EUR 7845.39 per month[211] and assuming 1 month of work for 1 FTE

8. The annual costs to ensure the functioning and operating of the body, such as allowances, salaries, and other staff related expenditure, as well as rents, equipment and other operating expenditure has been based on the costs incurred by ICSID. Due to the similarity of the intention of the two bodies, the setup of ICSID could be used as a basis for estimation, although on a smaller scale. Therefore, three scenarios, applying different shares of the ICSID costs have been estimated:

    a. A higher bound scenario: The annual costs of European investment board in the EU will approximately equal 50% of the costs of ICSID

    b. A medium scenario: The annual costs of European investment board in the EU will approximately equal 25% of the costs of ICSID

    c. A lower bound scenario: The annual costs of European investment board in the EU will approximately equal 10% of the costs of ICSID

Additionally, for ICSID the expenses related to arbitration/conciliation proceedings are paid out of advance from parties to the proceedings. Therefore, the costs related to the proceedings in front of the EU administrative body, are assumed to be paid neither by the EU institutions nor by Member States, but by the investors. This implies a possible fee structure for investors.[212]

Cost Items	Scenario 1, annual costs of European investment board equal 50% of ICSID	Scenario 2 annual costs of European investment board equal 25% of ICSID	Scenario 3, annual costs of European investment board equal 10% of ICSID
Support costs for Member States (Set-up)	165 917	165 917	165 917
Support costs for Member States (Translation)	82 992	82 992	82 992
Promotion costs for Member States	82 992	82 992	82 992
Costs for setting up the body in the MS	82 992	82 992	82 992
Total costs Member States	414 892	414 892	414 892
One-off costs creating platform & guidelines	31 380	31 380	31 380
One-off cost translation of lists and guidelines	188 289	188 289	188 289
One-off cost promotion	7 845	7 845	7 845
Total costs EU institutions	227 514	227 514	227 514
annual staff costs	5 388 657	2 694 328	1 077 731
Total (+ possible fees for investors)	6 million	3.3 million	1.7 million

[211] https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-781-F1-EN-ANNEX-1-PART-1.PDF
[212] https://icsid.worldbank.org/sites/default/files/publications/annual-report/en/ICSID_AR20_CRA_Web.pdf

Approach for estimating the costs of option B4 – Creating a European Investment Court

The precise cost of this Court is hard to predict with a high level of accuracy because this data will ultimately depend on a number of factors, such as its concrete design, methods of functioning, its size, arrangements relating to possible user fees and on the concrete outcome of future negotiations. The cost estimates for the European Investment Court Scenario (Option B.4) are based on a comparative analysis with budgetary data of other international courts and tribunals. For the assessment the fees and expenses of six international courts and tribunals have been analysed:

- The international Court of Justice
- The international Criminal Court
- The Appellate Body of the WTO
- The Court of Justice of the European Union
- The International Tribunal of the Law of the Sea
- The European Court of Human Rights

The overall costs per year of these courts have been assessed in terms of a) remuneration of adjudicators per year and b) the expenses for staff/secretariat per year. The expenses have been assessed in their totals as well as relative to the amount of adjudicators/members of staff employed in the court.

As all courts above use a fixed remuneration instead of a fee-based, this option will be used for the cost estimates of the European investment court as well. Additionally, this has the advantage that the costs of the court, do not depend on the number of cases brought to the court, as stated in the Commission Working document.

Four different cost estimates have been designed for the European investment court, based on different assumptions.

1. Based on the same assumptions as the Commission Staff Working Document Impact Assessment *"Multilateral reform of investment dispute resolution Accompanying the document Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes"*:
    - 14 adjudicator will be employed in the court (9 for the first instance; 5 for Appeal Tribunal)
    - 3 members of staff are expected to support the work per adjudicator (in total 42 members of staff will be employed): 1 legal assistant, 1 secretary, 1 case manager and translator
    - For remuneration and expenses the average costs for both components a) remuneration of adjudicators per year and b) the expenses for staff/secretariat per year of the 6 courts assessed are used.
2. Given the fact that remuneration of adjudicators as well as expenses for staff/secretariat for the Appellate Body of the WTO differ substantially from the range of the other 5 courts, the WTO AB was excluded for this cost estimate:
    - 14 adjudicator will be employed in the court (9 for the first instance; 5 for Appeal Tribunal)

- 3 members of staff are expected to support the work per adjudicator (in total 42 members of staff will be employed): 1 legal assistant, 1 secretary, 1 case manager and translator
- For remuneration and expenses, the average costs for both components a) remuneration of adjudicators per year and b) the expenses for staff/secretariat per year of the following 5 courts (ICJ, ICC, CJEU, ITLOS, ECHR) are used.

3. This option differs in the amount of staff, the assumption is based on average numbers of adjudicators and members of staff of the six courts assessed
    - 33 adjudicators (Average number of adjudicators of the 6 courts assessed)
    - 609 members of staff (Average number of members of staff of the 6 courts assessed)
    - For remuneration and expenses the average costs for both components a) remuneration of adjudicators per year and b) the expenses for staff/secretariat per year of the 6 courts assessed are used.
4. This option differs in the amount of staff employed, the assumption uses the proposed number of adjudicators by the Commission document, but uses the average number of members of staff per adjudicator of the six courts assessed:
    - 14 adjudicator will be employed in the court (9 for the first instance; 5 for Appeal Tribunal)
    - 13.5 members of staff will be employed per adjudicator (189) (average of number of member of staff employed per adjudicator of the six courts assessed)
    - For remuneration and expenses the average costs for both components a) remuneration of adjudicators per year and b) the expenses for staff/secretariat per year of the 6 courts assessed are used.

All cost estimates include the total one-off costs faced by Member States as well as the European institutions for training, set-up and promotion of the court. These cost estimates are based on the following assumptions:

- One-off promotion costs in MS are based on costs per FTE in each Member State in 2017 (Eurostat, 2020). Additionally, the costs are assumed to equal 1 FTE working 2 months. For the total costs of the court, the sum of all 27 MS is used.
- One-off set-up costs for EU institutions are based on the basic salary of EU Commission officials in grade 9 step 1, the salary being equal to EUR 7845.39 per month[213] Set-up costs for the European institutions are estimated to be equal to 6 months of work for 4 FTE.
- One-off training costs for EU institutions are based on the basic salary of EU Commission officials in grade 9 step 1, the salary being equal to

[213] https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-781-F1-EN-ANNEX-1-PART-1.PDF

EUR 7845.39 per month[214]. Training costs for EU institutions are estimated to equal 3 months' work of 3 FTE.

- One-off promotion costs for EU institutions are based on the basic salary of EU Commission officials in grade 9 step 1, the salary being equal to EUR 7845.39 per month[215]. Promotion costs for EU institutions are estimated to equal 1 months' work of 1 FTE.

Additionally, a fee structure for investors could be included in this policy option: Basing the fees to be paid by investors on a case basis, would reduce costs for Member States and the EU institutions and distribute costs (partly) to investors and their counterparts if a case is brought to court.

	Assumption as in Commission Staff Working Document[216]	Assumption as in Commission Staff Working Document[217]	Assumption based on averages of adjudicators and staff of other courts[218]	Assumption based on amount of judges of Commission Working document[219]
One-off promotion costs in MS	165 983	165 983	165 983	165 983
Total costs Member States	165 983	165 983	165 983	165 983
One-off set up cost EU institutions	188 289	188 289	188 289	188 289
One-off training costs EU institutions	70 609	70 609	70 609	70 609
One-off promotion costs EU institutions	7 845	7 845	7 845	7 845
Total Costs EU institutions	266 743	266 743	266 743	266 743
Costs for judges	4 218 860	4 768 380,	10 245 803	4 218 860
Costs for staff members	5 835 284	5 532 441	84 611 618	26 258 778
Total costs: (+possible fees from investors)	10 million	10 million	95 million	31 million

[214] https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-781-F1-EN-ANNEX-1-PART-1.PDF
[215] https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-781-F1-EN-ANNEX-1-PART-1.PDF

[216] Assumption as in Commission Staff Working Document (14 adjudicators, 3 members of staff per adjudicators), using average remuneration
[217] Assumption as in Commission Staff Working Document (14 judges, 3 members of staff per adjudicators), using average remuneration (without WTO AB) as this falls significantly out of the range of the other courts (way below the others for adjudicants costs, way above the costs for staff costs
[218] Assumption based on averages of adjudicators and staff of other courts (33 judges; 609 members of staff)
[219] Assumption based on amount of judges of Commission Working document (14 adjudictors) and average number of staff per adjudicator of other courts (13)

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