

Roadmap

Title of the initiative: **Commission Communication on EU investment policy**

Type of initiative (cwp/catalogue/comitology): CWP

Lead dg / contact person / details: DG Trade Unit B.1

Expected date of adoption of the initiative (month/year): May 2010

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version no.: 1

Initial IA screening & planning of further work

A. Context and problem definition

(i) What is the political context of the initiative? (ii) How does this initiative relate to past and possible future initiatives, and to other EU policies?

(i) The Treaty on the Functioning of the European Union ("the TFEU") establishes the European Union's exclusive competence on foreign direct investment, as part of the common commercial policy. Further to the conferral of exclusive competence for the protection of foreign direct investment to the Union, the debate on the exercise of that exclusive competence by the Union is now to commence. In his hearing before the European Parliament, Commissioner-designate for trade Karel De Gucht indicated that he would seek to engage with the Parliament and the Council on the contours of the future EU investment policy on the basis of a Communication of the Commission.

(ii) To maintain full legal certainty for investors despite the transfer of competences to the EU, the Commission has to adopt a proposal for a Council and Parliament Regulation (adoption foreseen in May 2010) that would establish transitional arrangements for the continued existence of all investment agreements currently in force between Member States and third countries. Whereas that Regulation deals only with the transition phase, the present initiative for a Commission Communication is focused on the different questions that could arise from the future exercise by the EU of its competence on foreign direct investment. However, the Communication will need to be operationalised through legal instruments, such as negotiating directives and international agreements.

What are the main problems identified?

The EU has been conferred exclusive competence on foreign direct investment, whereas it had only partial competence on investment before the entry into force of the Lisbon Treaty. This competence provides for an opportunity to define an EU investment policy that will add an important dimension to the external competitiveness strategy of the Union. Member States are no longer able to negotiate international agreements on foreign direct investment with third countries (unless they are empowered to do so). Thus, a key question relates to how the Union will act in an area that has been until now reserved to Member States.

Who is affected?

The main (direct) beneficiaries of EU investment policy are EU and foreign investors that benefit from international investment agreements. Indirectly, this therefore also affects consumers and citizens.

(i) Is EU action justified on grounds of subsidiarity?

Foreign direct investment has become an area of exclusive EU competence in the Treaty on the Functioning of the European Union (Article 207(1) and Article 3(1)), and therefore justification on grounds of subsidiarity is not necessary.

(ii) Why can the objectives of the proposed action not be achieved sufficiently by Member States (necessity test)? (iii) As a result of this, can objectives be better achieved by action by the Community (test of EU added value)?

Foreign direct investment is an area of exclusive EU competence; hence, the objectives cannot be achieved by Member States.

B. Objectives of EU initiative

What are the main policy objectives?

The main objective is to set out the principal strategic orientations of EU investment policy, including a broad toolbox that can form the basis for the presentation and discussion of new negotiating directives for future investment negotiations with third countries. Key questions in this regard include the scope of future investment negotiations (sectoral scope and types of investment addressed), geographical priorities, standards of treatment to be defined and the possibility of providing for enforcement mechanisms like investor-state arbitration.

Do the objectives imply developing EU policy in new areas or in areas of strategic importance?

Yes. The objectives imply developing a new policy in an area that has not yet been dealt with by the Union, i.e. the area of investment protection. This action is to be situated as part of the work on the external competitiveness strategy of the EU.

C. Options

(i) What are the policy options? (ii) What legislative or 'soft law' instruments could be considered? (iii) Would any legislative initiatives go beyond routine up date of existing legislation?

The main policy option is to table a Communication outlining future initiatives (of a legislative and non-legislative nature). Given that the present initiative is about setting an agenda for future action (i.e. negotiations with third countries) and defining a toolbox for such negotiations, as such it does not require legislative initiatives.

Before the entry into force of the Lisbon Treaty, Member States have concluded more than 1.000 bilateral agreements with third countries providing rules for the protection of investment, and the Communication will analyse how the various issues addressed individually by Member States (e.g. definition of investment, standards of protection, transfers, enforcement mechanisms) could be tackled at EU level. Another option would have been not to have a Communication and to propose negotiating directives outside any conceptual framework discussed among the institutions, but such an approach was not considered appropriate for the exercise of a new competence by the EU.

Does the action proposed in the options cut across several policy areas or impact on action taken/planned by other Commission departments?

The proposal is linked to the free movement of capital (Title IV, Chapter 4 of the TFEU), notably as it will address other forms of investment than foreign direct investment which is covered by Article 207 TFEU. This should not present an impact on Commission work upholding the free movement of capital. The proposal would also have a relationship to other policy areas of the Commission, notably policies that affect or condition foreign investors and investments in the EU.

Explain how the options respect the proportionality principle?

The Communication approach is based on the added value test, another formulation of the proportionality principle : the choice of third countries, and the toolbox design, will reflect the fact that the exercise of the new competence would add value to what has been done so far by Member States individually.

D. Initial assessment of impacts

What are the significant impacts likely to result from each policy option (cf. list of impacts in the Impact Assessment Guidelines pp. 32-37), even if these impacts would materialise only after subsequent Commission initiatives?

The initiative will in and of itself not have any impact, other than fostering debate and consultation. Any impact would result from subsequent EU actions, i.e. the negotiation of investment agreements, including notably investment protection provisions, with specific third countries. In this respect, any impact would depend on the specific provisions pursued and obtained in negotiations and the impact will vary depending on the country with whom the EU chooses to negotiate. The anticipated impact would be the increase of international investment flows, both from and to the European Union.

Could the options have impacts on the EU Budget (above 5 Mio €), and/or should the IA also serve as the *ex ante* evaluation, required by the Financial Regulation?
No financial impact is expected from the Communication.

Could the options have significant impacts on (i) simplification (ii) administrative burden or on (iii) relations with third countries?
EU policy, once operationalised through international agreements, could have an impact on simplification in so far it would replace the complex network of agreements that Member States have concluded. The communication would also have an impact on third countries, given that it will precisely set an agenda for negotiations with third countries. Increased investment protection for EU investors in third country markets should support the EU to be good for jobs and growth in those countries too.

E. Planning of further impact assessment work

When will the impact assessment work start?
The respective impact assessments will be performed once the Communication is being operationalised through legal instruments. As the Communication is merely designed to provide a conceptual framework for further action, no IA is needed

(i) What information and data are already available? (ii) Will this impact assessment build on already existing impact assessment work or evaluations carried out? (iii) What further information needs to be gathered? (iv) How will this be done (e.g. internally or by an external contractor) and by when? (v) What type and level of analysis will be carried out (cf. principle of proportionate analysis)?

Which stakeholders & experts have been/will be consulted, how and at what stage?
It is expected that the Communication to the European Parliament and the Council will also be discussed by stakeholders and experts, in particular via the civil society dialogue of DG Trade.