

Non-paper on policy options - 9th meeting of the EG on intra-EU investment environment

This paper is information purposes only and does not reflect the views of the European Commission. The positions expressed therein do not prejudice the official position of the European Commission.

Potential problem 1¹: An uneven level of investment protection in different Member States affects investor confidence

1. Increasing visibility of existing EU and national rules without changing the content of the rules

Beyond what the Single Digital Gateway already covers², 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).

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, type of protection given for legal certainty including legitimate expectations, rights stemming from the principle of good administration). The Commission services are collecting further evidence on the specific investment protection issues that represent an obstacle to cross-border investment and thus should be tackled to improve the functioning of the internal market. Moreover, the new legal instrument would be consistent and coordinated with already existing legal instruments of horizontal nature (e.g. Services Directive) and of sectorial nature (e.g. Directives in the field of financial services).

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 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. In addition to the rules on key aspects impacting cross-border investment in the above option, it could for

¹ See Inception Impact Assessment on an Investment protection and facilitation framework, p.2, available at: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12403-Investment-protection-and-facilitation-framework>

² The Single Digital Gateway Regulation provides for a single point of access to information, procedures and assistance services online (information available at https://ec.europa.eu/growth/single-market/single-digital-gateway_en). ANNEX I of the regulation provides a list of areas of information relevant for citizens and business exercising their internal market rights, including in the area of starting, running and closing a business.

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instance consolidate relevant CJEU case-law on free movement of capital (e.g. clarifying types of justified and unjustified restrictions). Also for this option, the Commission services are collecting further evidence on the need for a more comprehensive regulation of investment protection related matters to remove obstacles to cross-border investment, taking duly into account the interaction with other pieces of legislation, of both horizontal or sectorial nature.

GENERAL QUESTIONS:

- **Do you have suggestions regarding the scope and content of specific options (i.e. specific types of rules that would have to be considered for the option)?**
- **Can you estimate the types of costs (e.g. administrative) for implementing the different options in your Member State (and estimate their scale if possible)?**
- **Do you see particular feasibility issues? What could be the potential impact, added value and challenges relating to the different options in your Member State?**
- **Which authorities would be involved in the implementation of the different options at national level (e.g. other authorities than those representing the Member State in the Expert Group)?**

Potential problem 2³: Concerns about enforcement of rights and effective remedies for cross-border investors

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

This option will seek to help avoid issues or resolve them at an early stage. It could include specialised SOLVIT⁴ for investments to resolve individual investment protection cases (as it stands, SOLVIT does not have the power to solve problems stemming from Member State legislation contrary to EU law). 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.

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

³ See Inception Impact Assessment on an Investment protection and facilitation framework, p.2-3, available at: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12403-Investment-protection-and-facilitation-framework>

⁴ Information on SOLVIT is available at: https://ec.europa.eu/solvit/what-is-solvit/index_en.htm

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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.

3. Creating an Ombudsman-like EU administrative body 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.

4. Creating 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.

QUESTIONS:

General questions on all options:

- **Do you see particular feasibility issues or specific difficulties/opportunities relating to the implementation of the options?**
- **Do you have suggestions regarding the institutional/procedural set up of specific options?**

Questions specific to options 1 and 2

- **Can you estimate the types of costs for implementing the options in your Member State?**
- **Which authorities would be involved in the implementation at national level (e.g SOLVIT, investment protection agencies, Ministry of Justice)?**

Questions specific to option 3 and 4

- **Do you have any suggestions as to the necessary link and the way in which these options could interact with other national authorities in your Member States (e.g. ordinary national courts and other competent authorities that may have to be involved)?**