

INCEPTION IMPACT ASSESSMENT

TITLE OF THE INITIATIVE	Investment protection and facilitation framework
LEAD DG (RESPONSIBLE UNIT)	Directorate-General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA). Responsible Unit: FISMA.B4 (Free movement of capital and application of EU law)
LIKELY TYPE OF INITIATIVE	The initiative will entail legislative and non-legislative proposals
INDICATIVE PLANNING	Q1 2021
ADDITIONAL INFORMATION	-
The Inception Impact Assessment is provided for information purposes only. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content. All elements of the initiative described by the Inception impact assessment, including its timing, are subject to change.	

A. Context, Problem definition and Subsidiarity Check

Context

Following the *Achmea* judgment of the Court of Justice in March 2018, all Member States committed to terminate their intra-EU Bilateral Investment Treaties (intra-EU BITs) by means of a plurilateral agreement or bilaterally in their Declarations of 15 and 16 January 2019. On 5 May 2020, 23 Member States¹ signed an agreement for the termination of intra-EU bilateral investment treaties. Intra-EU BITs included rules protecting investors when investing in another country (e.g. compensation in case of expropriation and dispute settlement before international arbitral tribunals). In the context of discussions relating to that termination, a number of Member States and EU investors expressed concerns as to whether EU law protects cross-border investments as effectively as BITs. In the Communication on the *Protection of intra-EU investment* of 19 July 2018², the Commission aimed to increase investors' confidence by recalling the most relevant substantive and procedural EU rules with reference to the Court's case law; especially that EU law offers a complete system of judicial remedies. It thus helps ensure that investors' rights are known and respected in all Member States. However, the Communication did not alleviate the concerns of stakeholders as reflected by feedback from two subsequent workshops on intra-EU investment.³ The Commission is committed to preserving and improving both a predictable, stable and clear regulatory environment and the effective enforcement of investors' rights. It remains thus open to make the protection of investors in the EU more effective, strong and adequate. Member States have also committed to intensify discussions with the aim of improving investment protection in the EU⁴. In line with Executive Vice President Dombrovskis's mandate⁵ and as announced in the Commission Work Programme 2020⁶ and in the Communication A

¹ Signatories of the termination agreement are Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.

² Communication from the Commission: Protection of intra-EU investment, COM(2018) 547 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0547&rid=8>

³ Stakeholder workshops on intra-EU investment of 17 December 2018 and 3 December 2019

⁴ 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

⁵ Mission letter to Valdis Dombrovskis, Executive Vice-President-designate for An Economy that Works for People, dated 10 September 2019 available at https://ec.europa.eu/commission/sites/beta-political/files/mission-letter-valdis-dombrovskis-2019_en.pdf

⁶ Commission Work Programme 2020: A Union that strives for more, COM(2020)37 final, available at https://eur-lex.europa.eu/resource.html?uri=cellar%3A7ae642ea-4340-11ea-b81b-01aa75ed71a1.0002.02/DOC_1&format=PDF

New Industrial Strategy for Europe of 10 March 2020⁷, the Commission is thus assessing the intra-EU investment protection rules and exploring ways to make cross-border investments easier in the context of the Capital Markets Union. This has become even more important following the COVID-19 outbreak (see Commission Communication on a *Coordinated economic response to the COVID-19 Outbreak*⁸). According to the spring economic forecast of the European Commission, the major shock and expected recession the COVID-19 outbreak has caused the EU economy will also severely affect investment plans and capital flows. The extremely detrimental impact of this crisis on the economy will require, amongst others, effective policies to help re-build and improve investor confidence.

Problems the initiative aims to tackle

The initiative aims to address the following problems:

Uneven level of investment protection in different Member States that affects investor confidence.

Investment rights and remedies are laid down by both EU and Member States rules as interpreted by national judges and the Court of Justice (ECJ). EU rules in this field are set out in different sources and are of diverse nature. Some of them, which safeguard rights and freedoms and thus protect investments, are spread out across different pieces of EU secondary law (sector based - e.g. financial services, transport,- or more horizontal - e.g. the Services Directive). As EU secondary law does not regulate all matters, some aspects of investments are covered only by general rules in the EU treaties, the Charter of Fundamental Rights (e.g. right to property, free movement of capital), and general principles of EU law (such as legal certainty and legitimate expectations). The broad formulation of such general rules allows Member States to *specify their details in rather different ways* through national rules. It may be difficult for investors operating cross-border to rely on investment protection rules that are in all regards adequate and sufficiently clear in all MS.

This can also lead to inconsistencies in applying EU law rules, despite the guidance provided by the ECJ's case law. Whereas in certain regards some flexibility in implementation is inevitably left to each Member State, the margin of manoeuvre left by the general formulation of many rules, where that margin is broad, may be problematic when investing cross-border. Because of the partly "variable geometry" of protection rules and safeguards, investors remain in some regards uncertain about the level of protection they can expect for their investments in different EU Member States. In particular, they are concerned about differences in compensation for restrictions of their property and economic rights or in the safeguards available to ensure the predictability and stability of the regulatory framework. They are uncertain about the exact protection of their legitimate expectations, as well as whether administrative conduct always complies with the good administration principle in all regards (e.g. right to be heard). Feedback suggests that the uneven protection levels across Member States generate uncertainty and negatively affect investors' confidence. Higher risks of losses due to investment protection problems can increase costs and influence investment decisions as investors may not be willing to invest cross-border, in countries where they do not consider the level of protection sufficient.

Concerns about enforcement of rights and effective remedies. Cross-border investors in the EU, who face problems with States where they invest (host State), can be confronted with difficulties in enforcing their rights and obtaining a remedy. This problem has several aspects which are likely to be caused by some shortcomings related to the functioning of the enforcement system. First, there are limited possibilities to prevent or resolve problems at an early stage and amicably; as a result, in some cases investors are likely to 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. Furthermore, in relation to courts, investors raise issues about the quality of judicial proceedings or in terms of appropriate consideration of

⁷ Communication from the Commission: New Industrial Strategy for Europe, COM(2020) 102 final, available at: https://ec.europa.eu/info/sites/info/files/communication-eu-industrial-strategy-march-2020_en.pdf

⁸ Communication from the Commission: Coordinated economic response to the COVID-19 Outbreak, COM(2020) 112 final, available at: https://ec.europa.eu/info/sites/info/files/communication-coordinated-economic-response-covid19-march-2020_en.pdf

their rights. Some investors consider that judges, in some instances, lack specialisation in and knowledge of intra-EU investment rules. Together with the cross-border nature of the disputes, these are all elements that, in the investors' view, can negatively influence the outcome of their cases in courts. Additionally, some investors report strong concerns about the independence and impartiality of courts in a small number of Member States. Cross-border investors are also concerned about the practical effectiveness of some procedural rules (e.g. due to lack of legal standing to bring court action against certain types of national measures), which in their experience, could also result in longer procedures. To the extent that these concerns are well-founded, such rules may complicate or impede access to remedies. In view of the above, investors call for a supranational body to ensure more uniform and predictable application of EU rules.

The possible consequences of the problems are that cross-border investors who do not consider the level of investment protection in the EU to be sufficient or who might not obtain an effective remedy for violations of their rights lose confidence, incur additional costs, scale down or withdraw existing investments. This can, in turn, discourage future investments as experiences and concerns are shared in the investment community. The problems can also lead to redirection of EU investments through certain third countries, where investors may consider the protection under modern international investment protection rules more effective. Some types of investment, such as long-term infrastructure projects, are more likely to be affected by investment protection problems which emerge after the investment is made, as they cannot be easily withdrawn or redirected. All these problems could have far-reaching consequences including loss of jobs, loss for businesses along supply chains and cancellation of infrastructure projects of broader social and economic benefit. A negative perception and concerns about investment protection in the EU may contribute to lower cross-border and overall investment in the EU. This is particularly problematic at a time when the EU needs to boost investment to offset the negative consequences of the COVID-19 outbreak and to meet strategic priorities set out by the Commission (European Green Deal, Digital Single Market and an Economy that works for the people).

Basis for EU intervention (legal basis and subsidiarity check)

Diverging levels of investment protection in the different Member States may have a negative impact on the free movement of capital and investment flows in the internal market. This problem has a clear cross-border dimension, because it concerns investments made in one EU Member State by investors from another Member State. Concerns about the effectiveness of EU investment protection can influence investment decisions and deter cross-border investment. Member States cannot solve the problems on their own, as far as these problems are linked to differences in the implementation and enforcement across the different Member States. Measures taken at EU level can ensure more consistent protection across Member States, thereby improving the functioning of the internal market through an enhanced level playing field and an improved free movement of capital and the freedom of establishment.

B. Objectives and Policy options

The objectives of this initiative are: 1) Ensuring a more consistent protection of investments across the EU and 2) Enhancing means to prevent issues and providing more effective remedies in case of investment protection problems arising in any Member State, in order to increase investors' confidence that their investments are effectively protected in every EU Member State. These objectives should contribute to the general aim of boosting cross-border investment, improving access to investments for citizens and businesses regardless of their location in the EU and contributing to economic cohesion among Member States.

Under a base-line scenario the **current legal framework**, presented in the [Communication on Protection of intra-EU investment of 19 July 2018](#), already includes a wide-range of rules protecting investments and mechanisms to enforce them in proceedings before national administrations and courts, as well as a complete system of judicial remedies under EU law. As recalled by the Court of Justice in the *Achmea* judgement, EU law is based on the fundamental premise that each Member State shares with all the other Member States a set of common values on which the EU is founded, as stated in Article 2 TEU. Rule of law, including judicial independence, is part of these fundamental values. That premise implies and justifies the existence of mutual trust between the Member States that these values will be

recognised, and therefore that the law of the EU that implements them will be respected.

The Commission uses a range of tools to ensure the effective enforcement of EU rules, also on investment protection. They include infringement procedures against non-complying Member States. As infringement procedures cannot solve all problems and provide remedies in individual cases, investors may have to seek remedies for their specific case in national courts. The annual EU Justice Scoreboard looks at a range of indicators to assess the independence, quality and efficiency of national justice systems and also feeds the European Semester. The Commission continues to use all the instruments at its disposal, including infringement proceedings, to uphold judicial independence. As announced in the Political Guidelines of President von der Leyen, the Commission is also setting up a comprehensive European rule of law mechanism covering all Member States, with objective annual reporting by the Commission. Without prejudice to other options below, under the base-line scenario the rule of law policy can be beneficial to dispel some of investors' enforcement concerns.

In addition, further options could be envisaged to strengthen investors' confidence, as existing tools at EU level may not be specific enough to address all issues related to intra-EU investment.

A **range of regulatory and non-regulatory policy options** will therefore be assessed against the objectives. The options for the problem identified above could be considered in combination.

1) Options to address divergences in the level of protection could include specifying and improving some EU rules to address possible issues and ensure more consistent implementation of investment protection at national level in the following areas: the scope of the fundamental freedoms including the free movement of capital (which covers the full investment lifecycle but might not be perceived as such); the compensation awarded for expropriation; the safeguards for legal certainty and legitimate expectations; the rights stemming from the principle of good administration; the remedies for wrongdoings by public authorities. The options can be supported by measures facilitating cross-border investments and awareness of relevant rules and opportunities. The means to address possible issues in these areas could be addressed by a recommendation, a directive or a regulation.

2) Options to address concerns about the enforcement of rights and effective remedies in case of compliance with EU law could include: improving enforcement before national courts by improving selected procedural rules in relation to specific matters for which an internal market issue has been detected; creating an Ombudsman-like EU administrative body where investors could bring cross-border investor-to-State complaints; creating a specialised investment court (modelled on the Unified Patent Court) that would deal with individual cases. Any initiative would need to take into account the protection granted to other actors, including consumers, and avoid undue discrimination. In addition, problem prevention mechanisms could be further developed to avoid and resolve issues at an early stage (investment facilitation measures, such as a specialised SOLVIT for investments, investment contact points). Depending on the preferred option, a recommendation, directive, regulation or an international treaty similar to the one underpinning the Unified Patent Court could serve as an instrument.

The EU has also put in place a number of initiatives to promote and facilitate investment in the Single Market such as the Your Europe portal⁹, SOLVIT¹⁰, the Single Digital Gateway¹¹, and the advisory and match-making services of InvestEU¹². These tools provide information on EU law, facilitate the completion of key administrative procedures online and support investments in different policy areas. There could be benefits in building on existing promotion and facilitation measures to reinforce the focus on cross-border investments.

C. Preliminary Assessment of Expected Impacts

Likely economic impacts

The initiative is expected to improve EU investors' confidence when investing cross-border. This would

⁹ <https://europa.eu/youreurope/index.htm>

¹⁰ https://ec.europa.eu/solvit/index_en.htm

¹¹ https://ec.europa.eu/growth/single-market/single-digital-gateway_en

¹² https://europa.eu/investeu/home_en

<p>lead to an increase in cross-border investments. The expected benefits include a contribution to economic growth through increased access to funding for companies and projects in Member States receiving investments, more opportunities for investment in profitable projects and expansion for EU businesses.</p> <p>This initiative should contribute to the achievement of the Capital Markets Union’s objective of increasing cross-border investment by better protecting and facilitating investment within the EU.</p> <p>The initiative is particularly relevant for small and medium-sized enterprises (SMEs), as the impact of problems may be greater on them. This will be even more apparent as a consequence of the COVID-19 outbreak. For instance, it is more burdensome for SMEs to enforce their rights in administrative or judicial procedures. While larger investors could sustain high costs related to changes in public policies or disputes and continue their business, smaller investors are more likely to exit from the market or go bankrupt.</p>
<p>Likely social impacts</p> <p>The initiative is expected to have an indirect positive impact on employment. Increased investment will bring fresh funding to new and existing projects or businesses, which in turn could generate jobs. Less withdrawn investments would also diminish the loss of jobs and businesses along supply chains. The initiative is expected to have an indirect impact on social inclusion as investments could play a role in helping to build new infrastructures, connecting remote communities and providing them with the facilities they need. It also aims at ensuring equal economic opportunities regardless of citizen location in the EU.</p>
<p>Likely environmental impacts</p> <p>The initiative is expected to have indirect positive impacts on the environment. Massive investments are needed to meet the European Green Deal commitments.</p>
<p>Likely impacts on fundamental rights</p> <p>The initiative is expected to impact positively on the protection of fundamental rights under the EU Charter of Fundamental Rights, notably the freedom to conduct a business (Article 16), the right to property (Article 17), the right to an effective remedy (Article 47).</p>
<p>Likely impacts on simplification and/or administrative burden</p> <p>Improving EU framework on investment protection will bring simplification benefits, as citizens and companies will be able to rely on clearer and more consistent rules across the EU. Citizens and companies will find it easier to identify and enforce rights related to investments and reduce the burden of researching national legal frameworks. The initiative could create additional costs depending on the option on enforcement, for instance for options such as an EU administrative body or specialised forum. Dispute prevention mechanisms would create additional costs, notably due to new procedures for citizens, companies and public administration, but this could be offset by savings due to fewer court cases.</p>
<p>D. Evidence Base, Data collection and Better Regulation Instruments</p>
<p>Impact assessment</p> <p>An impact assessment is being prepared to support this initiative and inform the Commission's decision.</p>
<p>Evidence base and data collection</p> <p>The impact assessment will use data collected over the past few years from investors, including through stakeholders workshops organised in 2018 and 2019. Additional data on existing national legal frameworks on investment protection will be obtained from questionnaires addressed to EU Member States. Further evidence will be gathered from investors and other stakeholders based on surveys and other stakeholder workshops. Finally, statistics from European bodies and international organisations, such as the European Investment Bank and OECD, will be taken into account, as well as academic literature.</p>
<p>Consultation of citizens and stakeholders</p> <p>The objective of the consultation is to collect data and gather additional stakeholders’ views on the current situation of intra-EU investment protection and facilitation framework. The consultation also</p>

aims at collecting opinions and evidence on the extent of the problems and feedback on possible policy options and their likely impacts.

The main stakeholders identified are: i) Cross-border investors in the EU, including investors in long-term assets and SMEs; ii) National public authorities; iii) Trade/businesses associations; iv) Civil society representatives and v) The general public.

Planned consultation activities consist of: Open online public consultation (12 weeks, Q2 2020); Stakeholder workshops on intra-EU investment (Q2 & Q4 2020); Expert group meetings with Member States representatives; Targeted questionnaires to national public authorities (Q2 2020); Survey (Q2& Q3 2020). The Commission will set up a website dedicated to the public consultation where all relevant information concerning the consultation will be published in due time.

Will an Implementation plan be established?

The need for an implementation plan will be assessed in light of the outcome of the impact assessment and the decision about which policy option to retain.