



On behalf of the Public Affairs Executive (PAE) of the EUROPEAN PRIVATE EQUITY AND VENTURE CAPITAL INDUSTRY

Response to European Commission Consultation on Cross-border investment within the EU

Question 1: Have you ever invested or been involved in an investment process in another EU Member State?

Yes.

Invest Europe is the world's largest association of private capital providers. We represent Europe's private equity, venture capital and infrastructure investment firms, as well as their investors, including some of Europe's largest pension funds and insurers. Private equity firms are actively involved in the running of the businesses they have invested in, strengthening management expertise, delivering operational improvements and helping them to expand into new markets. This active approach is also employed in helping underperforming companies to survive, protecting jobs and delivering successful businesses with a strong future. Invest Europe members generally have a good knowledge of the rules applicable to cross-border investments, as many funds invest regularly on a cross border basis. While generally reduced complexity and costs are regarded as critical to enhancing cross-border investment flows, in this response we would like to put particular emphasis on the increasing concerns by some of our members regarding the loss of protections when investing across border due to the abolishment of the BIT system.

Question 2: 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?

Please choose one of the following answers:

- Investment protection framework has no impact
- Investment protection framework has a small impact
- Investment protection framework has medium impact
- Investment protection has a significant impact
- **Investment protection is a factor that can have a major impact on cross-border investments decisions and can result in cancellation of planned or withdrawal of existing investments**

Question 2.1 Which of the following you consider an obstacle to your cross-border investments?

Please choose among some of the following answers:

- Costs and burden of finding information on the legal framework regulating investments
- Costs and burden of finding market opportunities or possible business partners

- Uncertainties regarding the setting-up or exercise of activities linked to my cross-border investment (e.g. due to delays in administrative procedures or withdrawal of licences, expropriation, uncertainties about the protection of legitimate expectations)
- **Different treatment of investments coming from other Member States compared to domestic investments when disputes arise**
- **Other (please specify):**

Investor protection is key to providing the necessary legal confidence in particular where large investments are concerned. It is important that a robust impartial dispute resolution system (such as arbitration) is in place to provide the necessary legal assurance to current and future investors, especially in jurisdictions where expropriation is a considerable risk in order for EU and non-EU foreign investors to be treated equally. Non-EU competitors will continue to be covered by BITs and use impartial, expedient and independent arbitration while EU firms will need to rely on national courts with varying interpretations of the level of protection for investors. This creates unlevel playing field and detriment to the competitiveness of investing in Europe.

Question 3: When investing in another Member State, which of the following rights and principles were you aware an investor can rely on?

- **Right to a compensation if the investment is expropriated**
- **Principle of legal certainty and legitimate expectations**
- **Right to good administration**

Question 3.1 (Follow-up): For which of these rights and principles do you think their content is clear?

- Right to a compensation if the investment is expropriated
- Principle of legal certainty and legitimate expectations
- Right to good administration
- **Other (please specify which rights you were aware to have beyond the ones listed when investing cross-border):**

We believe that while these rights are well understood and critical to providing investors with the necessary level of certainty of their timely execution, the abolishment of BITs does raise important questions regarding the process through which those rights can be legally enforced in a timely manner. Since inception, the BITs have allowed many financial and strategic investors to secure compensation for expropriations, improper or illegal actions taken by some governments.

Question 4: Do you think it would be useful to further specify what Member State measure can constitute investment expropriation?

Yes. We believe that greater clarity can help to further underpin understanding and enhance the protections of investors specifically in the area of indirect expropriation.

Question 5: Do you think it would be useful to further specify the rights investors enjoy in case of investment expropriation (e.g. compensation)?

Yes. See our answer under Question 4.

Question 6: When investing cross-border, have you ever experienced problems with the adoption of a State measure which violates the principle of non-retroactivity (as defined above) or do you know about investors having experienced such problems?

Evidently, as stated in Q1, Invest Europe have not experienced problems with the adoption of a state measure, but we represent members who have such experience.

Question 7: Do you think it would be useful to further specify how to strike the right balance between the policy space that Member States need to have to protect public interests (“right to regulate”) and the minimum levels of protection that individuals need to have to plan their investments in a stable and predictable regulatory framework?

No.

Question 8: Do you think it would be useful to further specify under which circumstances legitimate expectations arise and qualify for protection?

Yes. It is important to clarify that promises made to investors by the state authorities and on which they have relied to make the investment (in particular requiring heavy financing) cannot be radically altered without proper consultation with the investors and/or transitional measures and/or compensation. We would like to stress the significant impact of such radical changes to the banking system that has financed the investments.

Question 9: Which measures could enhance transparency and mitigate the potentially negative impact of Member States’ policy changes on investments?

Please choose among some of the following measures:

- **Information to investors on the projected policy measures a reasonable time in advance**
- **Involvement of investors during the preparatory phase of the policy measures to discuss the impact on investment**
- **Measures enabling investors to adapt to new policies while avoiding substantial harm to investments (e.g. transitional measures)**
- Other (please specify)

Although transparency plays generally an important role and measures to further increase transparency and dialogue between government and investors will be welcome, we note that Private Equity and Venture Capital funds invest over the long-term (an investment in a company is made on average over five and a half years) and that their exit routes, and the timings of these exits, will be constrained. As such, policy changes that impact investments made can fundamentally alter the investment rationale and thereby have a negative impact on the ability to attract future investments, and ultimately the ability of investors in our industry (such as pension funds or insurers) to rely on the funds’ returns to meet their own liabilities. All of this underlines the importance of legal certainty for long-term investments. What is therefore ultimately required is a mechanism that provides legal certainty in a timely manner, so that it provides investors with the necessary comfort that the financial assumptions made at the onset of their investments will largely remain true over the envisaged investment period.

Question 10: Do you think it would be useful to further specify what the right to good administration implies for an investor investing in another Member State?

Yes. There is no precedent in EU law dealing specifically with investor-state type of dispute. The principle is there but it has not been tested in relation to an investment dispute.

Question 11: When investing cross-border, have you ever experienced any issue with national administration in relation to the right to good administration? Do you know about investors having experienced such issues?

Yes. One of our members was forced to sell its investment in a member state by a decision of the regulatory authority which was not challengeable in courts.

Question 12: Do you think the current system of enforcement of EU investment rules in Member States works adequately?

No. As is demonstrated by the recent EU Justice Scoreboard, the quality of enforcement of EU investment rules is not homogenous throughout the member states, especially in member states facing rule of law issues.

Question 12.1 (Follow-up): If not, do you think that better enforcement by the authorities and courts of the Member State where the investment is located would help to completely address the issue?

No, it would only partially address enforcement concerns. It is unrealistic to expect all national courts of member states to resolve all enforcement concerns in a uniform manner.

Question 13: Or do you think that improving enforcement mechanisms at EU level would also be needed?

Yes. This would ensure uniform application of EU investment rules throughout the internal market.

Question 13.1 (Follow-up): If yes, what type of EU body or mechanism would be suitable to settle cross-border investment disputes?

EU investment court as a common court of the EU Member States responsible for solving individual cross-border investment disputes (to be created by Member States on the model of the Unified Patents Court)

In the past, the protections provided through BIT's has been critical to the encouragement of foreign investments, in particular CEE countries and formed an integral part of the investment structuring process undertaken by prudent investors targeting a financial commitment. Most BITs incorporated an arbitration process which provides valuable protections to investors from a home state from the commercially or financially harmful actions of a government in which an investment is made. These arbitration provisions facilitated independent dispute resolution. Following the EU abolishing all intra-EU BITs, there is an urgent need for an alternative, pan-EU investment court . Only with such a mechanism in operation will investors be confident enough to engage in cross border investment in the internal market.

Such court should accommodate the following fundamental features which have proven effective in the management and settlement of BIT disputes, namely:

- An absolute right for aggrieved investors to resort directly to the court ;

- The establishment and management of a timely process which will should seek to resolve disputes within timescales which are commercially relevant;
- The appointment of skilled, independent judges selected by independent body (other than member states' governments) having a familiarity with disputes of a commercial nature, and able to draw on the necessary range of skills and expertise appropriate to a specific case.
- An effective enforcement process to ensure that any compensation awarded is paid without delays and political interference.

Question 14: Would you have any other suggestion(s) to improve cross-border investment dispute resolution? Please explain your suggestion(s)

N/A

Question 15: Would you have suggestion(s) on ways to ensure that legitimate interests of third parties (e.g. public interest considerations on climate change, environmental or consumers' protection) are better taken into account in cross-border investment disputes? Please explain your suggestion(s)

N/A

Question 16: When investing in another Member State, which of the following remedies for breach of EU investment law by the State were you aware that an investor has?

- Provisional measures (interim relief)
- Annulment of national measures
- 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
- Restitution (e.g. of the claimed good)

All of the above. As stated in answer to Q3, a number of our members are fairly advanced and sophisticated investors. The issue is in our perspective not so much awareness of remedies but efficient and timely enforcement of such remedies.

Question 16.1 (Follow up): Have you ever experienced/Do you know about a situation where you/the investor claimed one of those remedies?

Yes, we are aware of situations in which our members claimed one or several of the above remedies. The process was heavily reliant on BITs.

Question 16.2 (Follow up): If yes, do you consider that the remedies available were appropriate?

Yes. Damage was valued and compensation was awarded.

Question 17: What is your overall assessment of the investment protection framework provided by EU law when investing in another Member State?

Rather poor. While it is true that many of the right principles and rules are enshrined in EU legislation, these protections are reduced in the absence of an efficient enforcement mechanism.

Question 18: Is there any specific aspect related to investments made or received by Small and Medium-sized enterprises (SMEs) that investment protection rules and mechanisms should take into account?

Yes. The creation of an EU investment court (see Question 13) should take into account the fact that the SMEs have by definition limited financial resources. Specific measures to ensure accessibility of such court should be taken (e.g. legal aid and/or right to intervene in cases brought by other investors).

Question 19: Is there any aspect related to cross-border investments, not covered by the questions in sections two and three, that you think should be better protected by EU law?

Don't know/no opinion

Question 20: Do you think aspects of the current EU investment protection framework may need to be adapted to evolutions brought by digitalisation and new technologies (e.g. new ways of buying and selling assets, assets offered in a new form or new types of assets to be invested in, etc.)?

Don't know/no opinion

Question 21: Do you think it would make it easier for investors to exercise their rights when they invest cross-border within the EU if more aspects of investment protection would be regulated for all Member States by EU legislation?

Yes.

Question 22: Do you think it is easy to obtain information on the rules, procedures and data relevant for cross-border investment in the EU (e.g. rights before public administration when applying for an authorisation to start an investment or if actions of public authorities negatively affect an existing investment, economic data)?

“To some extent, as all relevant information is not available or easily accessible online, is scattered across different sources or related only to some Member States”.

Question 23: How easy is it to identify potential projects, partners and financing sources once you are interested in cross-border investment in the EU and what measures could help?

“It is not easy, but investment promotion measures could help”

- Advice from investment promotion agencies on local partners
- Help from business representatives (e.g. via Enterprise Europe Network)
- Match-making tools online to identify prospective projects and partners in the EU
- Events where we can meet prospective partners or finance providers from the EU

Question 24: Do you think it would be useful to have specific measures focusing on cross-border investment facilitation?

N/A

Question 25: Do you think it is easy to provide feedback on problems of general relevance to the investment environment for follow-up by the competent authorities at EU or national level?

“To some extent: There is no established mechanism for dialogue, feedback and follow-up by the government, but it is possible to provide feedback on an informal basis”

Question 26: Have you used SOLVIT or other mechanisms which help prevent or resolve individual problems with cross-border investments in an amicable way with public authorities?

“No, I did not even try, because I think that SOLVIT and other problem solving mechanisms are not suitable to solve my problem”.



Contact

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About the PAE

The Public Affairs Executive (PAE) consists of representatives from the venture capital, mid-market and large buyout parts of the private equity industry, as well as institutional investors and representatives of national private equity associations (NVCAs). The PAE represents the views of this industry in EU-level public affairs and aims to improve the understanding of its activities and its importance for the European economy.

About Invest Europe

Invest Europe is the association representing Europe's private equity, venture capital and infrastructure sectors, as well as their investors.

Our members take a long-term approach to investing in privately held companies, from start-ups to established firms. They inject not only capital but dynamism, innovation and expertise. This commitment helps deliver strong and sustainable growth, resulting in healthy returns for Europe's leading pension funds and insurers, to the benefit of the millions of European citizens who depend on them.

Invest Europe aims to make a constructive contribution to policy affecting private capital investment in Europe. We provide information to the public on our members' role in the economy. Our research provides the most authoritative source of data on trends and developments in our industry.

Invest Europe is the guardian of the industry's professional standards, demanding accountability, good governance and transparency from our members.

Invest Europe is a non-profit organisation with 25 employees in Brussels, Belgium.

For more information please visit www.investeurope.eu.

