

Insurance Europe key messages on intra-EU investment protection and facilitation

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Insurance Europe welcomes the opportunity to comment on the European Commission's public consultation on an intra-EU investment protection and facilitation initiative.

The insurance industry is Europe's largest institutional investor, investing over €10 200bn in the economy. A significant amount of this is invested in long-term assets such as infrastructure, and often on a cross-border basis. The EC consultation and the assessment of the current system of investment protection and facilitation within the EU are therefore highly relevant for the industry. Insurance Europe would therefore like to provide its high-level views on key areas of the consultation.

A stable and favourable investment environment with clear rules, effective remedies and measures facilitating access to investment opportunities is crucial to encourage investments within the EU.

This is also in line with EU objectives in flagship initiatives, such as the Capital Markets Union (CMU) project. The COVID-19 outbreak has magnified the socioeconomic challenges that Europe is facing, including achieving economic growth and recovery. In addition, it has highlighted the need for and importance of private investments. As political risk, legal certainty and safeguards for investors are significant factors affecting investors' decision-making, it is key to ensure adequate investor protection within the EU as this is crucial for enhancing cross-border investments.

EU law provides for investor protection, including fundamental freedoms, such as the free movement of capital, and general principles, eg non-discrimination, proportionality, legal certainty and the protection of legitimate expectations. At the same time, as investor rules are laid down both in EU and national law, **different legal sources and level of protection in different member states can lead to a degree of uncertainty and affect investors' confidence. In this respect, improving access to information for investors, as well as addressing uncertainties in relation to existing protections and specific rights and procedures, can help facilitate cross-border investments in the EU.** Specifically, concerns exist about:

- differences in compensation for restrictions of investors' property and economic rights;
- differences in the safeguards available to ensure the predictability and stability of the framework; and,
- lack of clarity in relation to the protection of legitimate expectations and compliance with the good administration principle.

There should be no sudden and retroactive changes of local investment frameworks. Legal certainty and adequate grandfathering rules are key for cross-border (long-term) investors.

In recent years, (re)insurers have witnessed unfortunate violations of investor rights in relation to long-term investments in infrastructure or renewable energy. Examples include retroactive reductions in feed-in tariffs and retroactive taxation of photovoltaic plants in Spain, the Czech Republic and Italy in 2014, as well as the 90% reduction in the usage fees for the Gassled pipeline network in Norway in 2016.

As a consequence, some (re)insurers have decided to refrain from further investing in markets in which they have incurred losses on their investments due to retroactive changes to legislation without grandfathering rights.

Insurance Europe believes it is key that investors are able to rely on the fact that relevant investment conditions will continue to exist after making their investment decision. In the event of (retroactive) changes to the legal framework, adequate grandfathering rules must ensure legal certainty.

Cross-border investors in the EU facing problems with member states in which they invest can be confronted with difficulties in enforcing their rights and obtaining a remedy.

Specifically, due to the changes brought about by the judgement of the European Court of Justice (ECJ) in the *Achmea* case of 6 March 2018 (C-284/16) deeming intra-EU bilateral investment treaties (BITs) incompatible with EU law and leading to the repeal of the investor-state arbitration clauses, there are limited possibilities to prevent or resolve problems at an early stage and amicably. In some cases, investors are likely to have no other option than to bring the matter before a national court, which in turn may lead to dispute escalation. This can lead to increased costs, can damage relationships with public authorities and can lead to the eventual withdrawal of investments. Furthermore, judges do not always have the specialisation in and knowledge of intra-EU investment rules. **While better enforcement of investment rules by member states can help improve the issues faced by investors, consideration of further actions at EU level may be needed to address existing challenges.** This is not to question the jurisdiction of EU member states. Rather, it is a matter of simple and effective legal protection for foreign investors in the event of violations of investor rights.

In addition, EU investors should not be disadvantaged vis-à-vis investors from third countries when it comes to legal protection. Third-country investors can currently still rely on extra-EU bilateral investment treaties concluded between an EU member state and the third country in which the investor is established. It is vital to ensure a level-playing field between EU and non-EU investors and the effectiveness of procedural guarantees granted to investors.

Building on existing investment promotion and facilitation measures and services can help attract and encourage cross-border investment.

Digitalisation can serve as a tool to increase cross-border investments, potentially enhancing the transparency and comparability of investment opportunities, not just from a risk/return perspective, but also from perspectives such as sustainability considerations. In this respect, ensuring that information is provided in a digital-friendly manner and encouraging the use of electronic tools by national administrations can help facilitate investors.

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