CHAMBER OF COMMERCE LUXEMBOURG
POWERING BUSINESS

Luxembourg Chamber of Commerce

Working Group on the protection of Luxembourgish investors

ANSWERS TO THE EUROPEAN COMMISSION'S PUBLIC CONSULTATION:

"AN INTRA-EU INVESTMENT PROTECTION AND FACILITATION INITIATIVE"

members of the Working Group:

- **Dr. Paschalis Paschalidis,** President of the Working Group, Senior Associate, Shearman & Sterling LLP, Paris
- **Melchior Wathelet**, Ministre d'Etat, Professor of european law
- **Christopher Vajda QC,** judge at the European Court of Justice 2012-2020
- **Prof. Dr. Hélène Ruiz Fabri,** Director, Max Planck Institute Luxembourg for Procedural Law
- **Prof. Dr. André Prüm,** Professor of law, University of Luxembourg
- **Prof. Dr. Matthew Happold,** Professor of public international law, University of Luxembourg
- **Guy Harles,** partner, Arendt & Medernach, Luxembourg
- **Jacques Graas,** partner, Allen & Overy, Luxembourg
- **Elisabeth Omes,** partner, Elvinger, Hoss & Prussen, Luxembourg
- **Maria Grosbusch,** senior associate, Arendt & Medernach, Luxembourg
- **Nicolina Bordian,** avocat à la cour, Lutgen – associés, Luxembourg
- **Paulina Pietkiewicz**, partner, Abris Capital Partners, Luxembourg
- **Henri Baguenier**, administrator, Novernergia General Partner, Luxembourg
- **Fabrice Magar,** General Counsel, Head of Corporate, Arcelor Mittal, Luxembourg
- **Andrea Zumbado,** legal counsel, Arcelor Mittal, Luxembourg
- **Jonathan Hug,** senior legal advisor, The Luxembourg Bankers' Association (ABBL)
- **Michael Sibilia,** senior legal advisor, Luxembourg Chamber of Commerce

LUXEMBOURG, SEPTEMBER 8TH, 2020.

CHAMBER OF COMMERCE LUXEMBOURG
POWERING BUSINESS

Section I - General questions

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

- Yes
- No
- ✓ ***Not applicable***

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?

- ✓ ***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) :*** *The main obstacle to intra-EU cross-border investment is the vagueness of the so-called "EU investment protection regulatory framework". Relevant rules are scattered across various instruments of EU primary law (the Treaties and the Charter) and secondary legislation (regulations and directives) depending on the sector concerned. In addition, despite the fact that the internal market is meant to be borderless, de facto barriers arise from the fact that the Member States maintain diverse legal traditions, judicial systems and legal remedies. In these circumstances, structural deficiencies in the access to, quality and speed of delivery of justice by the administrative and/or civil courts (the duration of proceedings may even exceed a decade) as well as the lack of readily available remedies to translate breaches of legal principles into compensation for the investor's economic loss caused by the breach, can discourage investors from investing in another Member State. Finally, a significant obstacle arises from the asymmetry in the level and quality of investment protection granted to the non-EU based competitors. Such competitors continue to benefit from access to arbitration tribunals able to provide awards of compensation that are enforceable both in and outside the EU.*

CHAMBER OF COMMERCE LUXEMBOURG
POWERING BUSINESS

Section II - Rules protecting investments within the European Union

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***
- ✓ ***Other (please specify which rights you were aware to have beyond the ones listed when investing cross-border):*** *The right to an effective remedy before an independent tribunal. We believe that investors are not concerned about the lack of these legal standards in EU law or even in national law. However, legal standards can only be as good as they can be enforceable. A right without an efficient remedy is vain.*
  EU law and the laws of the Member States suppose that annulment is the primary remedy in the context of judicial review and damages the ancillary one. In addition, the bar for Member State liability for breach of EU law is set extremely high requiring not simply any breach of EU law but a breach that is "sufficiently serious". Consequently, while achieving the disapplication of national measures that are contrary to EU law through court proceedings is a remedy known to EU law, compensation for breach of EU law by the Member States is rare.

  This is in stark contrast with the position of non-EU investors investing in the internal market. Such investors have the best of both worlds. They can avail themselves of the action for annulment against the contested measure under national law. However, to obtain damages they can sidestep the high threshold for State liability under national and EU law by bringing their claim for compensation before an arbitral tribunal on the basis of existing BITs. In such a case, unlike the EU investors bringing their claim for compensation on the basis of EU law, they are not required to show a "sufficiently serious" breach because under international law any breach of the BIT's investment protection standards which is attributable to the Member State suffices to establish its liability.

  In this sense, cross-border intra-EU investment is not as much in need of new protection standards but of an accessible and reliable legal mechanism that permits victims of breaches of rights derived from EU law to promptly obtain annulment of the contested measure and/or, where appropriate, compensation for their financial losses without having to pursue multiple sets of proceedings. For example, we understand that in several Member States (e.g. the Netherlands) two sets of proceedings are needed before an investor is able to claim damages against the State (one to establish the breach and one to claim damages). The same problem may also arise in other Member States (e.g. Luxembourg) where judicial review and State liability fall under the jurisdiction of different courts (administrative v civil).

  We highlight that investors, and in particular SMEs, place significant importance in legal mechanisms that translate breaches of investment protection rules into compensation. "Moral victories" are generally not something SMEs can afford.

  Finally, in its current state of conferral of competences from the Member States to the EU, EU law does not apply to every aspect of Member State conduct and where it does, it does not always do so with the same degree of intensity. For example, EU Member States can take measures to the detriment of investors in the context of the Eurogroup and/or the ESM, that are not covered by EU

law or can affect investments through direct taxation measures (where EU law provides protection only against discrimination based on residence or nationality).

Question 3.1: 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):** *The content of these rights and principles may be clear at a certain abstract theoretical level but that is not the real issue for investors. The uncertainty concerning the level of investment protection provided by the existing rights and principles under EU law stems from the lack of precedent (ECJ case law) on the application of these rights and principles in the context of investor-State disputes. This problem is illustrated by the case law cited in the European Commission's communication Protection of intra-EU investment (COM(2018) 547 final). The disputes giving rise to this case law cannot be characterised as investor-State disputes, with only one exception: the cases regarding the expropriation of usufruct rights over Hungarian agricultural lands (see Joined Cases C-52/16 and C-113/16 – SEGRO and Horváth and Case C-235/17, Commission v Hungary). We will return later to these ECJ judgments in our answer to Question [16.2] below.*

  In our view, the rights conferred to investors by virtue of TFEU provisions on the fundamental freedoms, the Charter of Fundamental Rights and the general principles of EU law must be codified and given substance in a single instrument. Depending on the form of dispute settlement that is chosen (see our answer to Question [13] below), this instrument could take the form of EU secondary legislation or an international treaty between the Member States.

  In any event, even if there were no clear consensus to link EU investment rules with a specific dispute settlement mechanism, we believe that a directive that would codify and harmonize EU investment rules would be a positive step forward. This was done, for example, with respect to free movement of services through the so-called Services Directive (Directive 2006/123). The Directives laying down substantive and procedural rules to be followed by national courts in the areas of asylum, public procurement, IP claims and competition damages actions are also useful examples.

  In our view such a regulation or directive should:

  (i) codify the basic EU investment rules (equality of treatment; non-discrimination; due process rights; transparency in judicial and administrative proceedings; prohibition of denial of justice in criminal, civil or administrative proceedings; prohibition of manifest arbitrariness; prohibition of abusive treatment such as coercion, duress and harassment; the right to good administration; the principle of legitimate expectations; the prohibition of expropriation without compensation) together with any limitations in the public interest and subject to the principle of proportionality;

  (ii) require Member States to ensure that all investors have a free choice between an action to set aside the contested measure or damages (without subjecting one to the other) as well as the right to cumulate the two causes of action in the same set of proceedings before the same court;

(iii) encourage Member States to create a court or a specialized chamber within an existing court having nationwide jurisdiction to deal with investor-State disputes;

(iv) require Member States to simplify the rules of procedure before such specialized chamber and allow inter alia interventions of other interested parties, SME associations and other civil society organizations;

(v) introduce common rules and methodology or guidelines for the calculation of damages – for further details see our answer to Question [#9]; and

(vi) introduce a simplified system for the enforcement of decisions, including those awarding damages to investors;

(vii) set up a framework for the review of the implementation of this legislative act and its amendment/adjustment

(viii) provide for annual reports to be sent to the Commission.

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

- ✓ ***Yes***
- No
- Don't know/no opinion

Question 4.1: Please explain the reasons for your answer to question 4:

Article 17 of the EU Charter of Fundamental Rights prohibits unlawful (i.e. uncompensated) expropriation. Given the direct link between Charter rights and ECHR rights, investors are not concerned as much about the definition of expropriation but about the invocability of Article 17 of the Charter, which cannot be applied autonomously but only in combination with a substantive provision of EU law. In this sense, it would be useful to give the prohibition of unlawful expropriation a direct and autonomous status as a freestanding provision of EU law.

As we have argued in our answer to Question [3.1] above, this could be achieved through an international treaty concluded between Member States or by an instrument of EU secondary legislation. In that context, inspiration can be drawn from the definition of expropriation in Article 8.12 and Annex 8-A of the EU-Canada CET Agreement and from the relevant ECHR case law on Article 1 of Protocol No 1.

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***
- No
- Don't know/no opinion

Question 5.1: Please explain the reasons for your answer to question 5

Strictly speaking, compensation is a prerequisite for a lawful expropriation. The lack of prompt payment of adequate compensation renders the expropriation unlawful. We do not believe that this requires clarification.

Our concern stems from the structure of legal remedies in several Member States where investors are often required first to bring an action for annulment against the expropriatory measure before the Member States' courts, with a claim for compensation having to be brought in subsequent separate proceedings once the breach has been established in annulment proceedings.

In certain cases, Luxembourgish investors have even been denied their right to access the courts by the public administration of the host State (e.g. Poland) which refuses or avoids issuing a decision that is challengeable in court (see our answers to Question [11.1]).

In light with our overall position that breaches of EU-law-based investor rights should be translated into compensation, we consider that it would be useful to specify that investors enjoy a right of compensation in case of expropriation and require Member States to make available a legal remedy that combines control of legality of a State measure vis-à-vis the EU-law-based investment rules with a claim for compensation (see our answers to Questions [3 and 3.1]).

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?

- ✓ ***Yes***
- No
- Don't know/no opinion

Question 6.1: Please explain the reasons for your answer to question 6

Article 4(1) of the Intra-EU BIT Termination Treaty signed by the Member States on 5 May 2020 purports to have retroactive effect by de-activating the advance consent to arbitration given by the Member States through their BITs as from the date of their accession to the EU.

While we understand that this is in line with ECJ case law, given that the Achmea ruling has declaratory effect, Article 4(1) interferes not only with arbitral proceedings in progress on 6 March 2018 but also with some arbitrations concluded prior to that date. This is because the Termination Treaty's definition of a concluded arbitration excludes those concluded arbitrations where the award had not been executed or challenged or with respect to which enforcement proceedings were pending on 6 March 2018.

We consider that this an inappropriate attempt to "rewrite history", especially with respect to arbitrations where the Member State party to the dispute did not promptly object to the jurisdiction of the arbitral tribunal but instead consented to the tribunal's jurisdiction and participated in the proceedings.

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?

- ✓ ***Yes***
- No
- Don't know/no opinion

Question 7.1: Please explain the reasons for your answer to question 7

Although the Member States' "right to regulate" is not explicitly acknowledged in the EU Treaties or in EU secondary legislation, it undoubtedly exists in EU law. The EU Treaties and CJEU case law allow Member States, under certain conditions, to derogate from freedoms granted under the Treaty provisions on the grounds of public policy, public order, public health and public security. In accordance with CJEU case law, Member States can also introduce restrictions on the rights that cross-border investors enjoy pursuant to the fundamental freedoms, provided that such restrictions are non-discriminatory, are justified by the public interest, are proportionate and respect the rights enshrined in the Charter of Fundamental Rights.

In our view, this system is clear and works well. We do not see the added value of introduce a new term such as the "right to regulate", especially if this consultation were to lead to the codification of EU investment rules through an instrument of EU secondary legislation (see our answer to Question [3.1]).

However, if there were consensus to create a new dispute settlement mechanism (see our answer to Question [13]) by an international treaty concluded by the Member States in order to resolve investor-State disputes on the basis of a specific set of investment protection rules, we consider that it would be useful to explicitly acknowledge the Member States' right to regulate; not at least to dispel the myth that the purpose of investment protection is to allow investors to challenge legitimate and democratically adopted policies. Such attempts by investors in the past have failed in court as they have failed in arbitration. We refer, for example, to challenges to tobacco packaging legislation aimed at the protection of public health such as Case C-491/01, British American Tobacco before the CJEU and the Philip Morris v Uruguay arbitration before ICSID.

If a "right to regulate" were to be legislated, we believe that there should be limitations to this right and safeguards against its abuse. In particular, it should not be used as a pretext to expropriate investments or nationalize sectors of the economy or revoke permits granted to foreign investors in order to favour domestic competitors. There should be rules regarding the obligation of the Member States to inform investors of forthcoming drastic changes to the legislative framework on the basis of which investments were made and to provide transitional measures. Compensation should be available in cases where Member States have made lawful and specific commitments on which the investor relied in making the investment.

We consider that the "right to regulate" as recognized in Article 8.9 of the EU-Canada CET Agreement and noted with approval by the CJEU in Opinion 1/17 (paras 154-156) reflects a workable and acceptable compromise between all competing interests and can serve as a useful source of inspiration for the codification of the relevant EU-law-based standards of investment protection.

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

- ✓ ***Yes***
- No
- Don't know/no opinion

Question 8.1: Please explain the reasons for your answer to question 8

We refer to our response to Questions 7 and 7.1.

We take note of the fact that the definition of the notion of "legitimate expectations" has been a controversial matter. Several intra-EU investment arbitrations have concerned a Member State's reneging on a promise that was subsequently considered to constitute State aid incompatible with the internal market and implemented illegally, i.e. the without the Commission's approval, (see, for example, the Electrabel v Hungary and EDF v Hungary arbitrations regarding the premature termination of long-term power purchase agreements by Hungary).

We also take note of instances where Member States enacted incentives to encourage investment in a specific sector (e.g. renewable energy) and subsequently, after having induced the foreign investors to invest, modified the said incentives drastically in favour of domestic (private or State-owned) undertakings. When the investors relied on the principle of legitimate expectations the Member States sought to invoke an alleged incompatibility of investors' legitimate expectations with EU State aid rules, even without any Commission decision concerning the original incentive scheme that motivated the investors' decision to make the investment.

We recognize that the principle of legitimate expectations should not be a vehicle for circumventing EU State aid law. However, investments in certain sectors that are important for the future of the EU (such as renewable energy) require regulatory stability. Even if the operation of such investments is not costly, they require significant capital investment to build the infrastructure. If this capital is to be raised through debt (in particular bank loans), the Member States' failure to honour their commitments can have a significant impact not only on direct investors but also on the banking system.

We thus believe that, although Member States should be able to adjust their commitments, modifications that affect the economic performance of the investment beyond a reasonable degree should give rise to an obligation to pay compensation. The more abrupt, sudden and radical the change, the stronger the case for compensation should be.

In this respect, we consider that Articles 8.9.3-4 and 8.10 of the EU-Canada CET Agreement and noted with approval by the CJEU in Opinion 1/17 (para 158) reflects a workable and acceptable compromise between all competing interests and can serve as a useful source of inspiration for the codification of the relevant EU-law-based standards of investment protection.

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

- 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) :*** *Involving investors during the preparatory phase of policy changes and allowing them the space to adapt to change through transitional measures are measures of good governance. Experience however shows that very often such prior consultations are not undertaken and investors are not given the space and time to allow them to adapt their operations and the financing of their investments.*

  The obligation to compensate is ultimately the only efficient means to guarantee investment stability. In this respect, we note with regret that the Commission's questionnaire does not address the question of the appropriate level of compensation and calculation methodology.

  We believe that in the event that there was an initiative to consolidate and codify EU investment rules, more clarity and certainty should be provided on how compensation should be calculated (see our answer to Question [3.1]).

  We do not consider that any specific head of damages (loss incurred, lost profits etc) should automatically be excluded. However, the calculation of damages should be subject to clear methodology guidelines that increase predictability of outcomes, not only for the benefit of investors but also of States whose budgets have to bear the financial consequences of any establish breached of investment protection rules. In this respect, Guideline IV of the World Bank Guidelines on the Treatment of Foreign Direct Investment could serve as a useful source of inspiration. Where feasible, the adjustment of these guidelines as regards particular sectors of the economy could also be envisaged, especially with respect to sectors that are particularly volatile, in order to avoid compensation in amounts that are exorbitant or go beyond what is strictly necessary.

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***
- No
- Don't know/no opinion

Question 10.1: Please explain the reasons for your answer to question 10

As we have indicated in our answer to Question [3.1] above, one of most important challenges to intra-EU investment protection is the absence of case law and precedent with respect to investor-State disputes.

The right to good administration enshrined in Article 41 of the EU Charter of Fundamental Rights provides a good example of this problem. First, being a Charter right, it cannot apply autonomously but only in combination with a substantive rule of EU law. Second, a significant part of the relevant case law relates to EU staff cases. Third, even the judgment referred to by the Commission in the consultation documents (Case C-230/18, PI – closure of a massage salon on the suspicion that sexual services were being provided

therein) is not akin to a mainstream investor-State dispute. The protective scope of this right in the context of intra-EU investor-State disputes thus remains unclear.

We believe that in giving shape to this right, inspiration could be drawn from the procedural aspects of the fair and equitable treatment standard as defined and accepted by the EU and its Member States in Article 8.10.2 of the EU-Canada CET Agreement.

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?

- No
- Don't know/no opinion
- Yes, I was not involved in an administrative procedure that affected my investment.
- Yes, I was not granted access to information on procedures affecting my investments.
- Yes, the public authority adopted a measure negatively affecting my investment without explaining the reasons for such measure.
- ✓ ***Yes, for other reasons.***

Question 11.1: Please specify the circumstances in which you experienced such an issue with national administration in relation to the right to good administration or in which you know investors experienced such an issue

Two of the Luxembourgish investors consulted in this process reported the following examples of national administrations' failure to act in accordance with the right to good administration.

One of the Luxembourgish investors consulted in this process reported that their investment (shares) in a Polish bank was expropriated through a decision of the Polish banking authority ordering the Luxembourgish investor to sell its stake in the bank. According to the investor, the order in question was immediately enforceable but could not be challenged in court until the Polish banking authority had issued a decision on the investor's request for reconsideration of the order. The Polish banking authority failed to take a decision on the investor's request for reconsideration and thus the expropriation took place without the investor being able to challenge the order in court. These facts gave rise to an arbitration under the BLEU-Poland BIT and to an award of compensation in favour of the Luxembourgish investor. The award is now the subject of a challenge by Poland before the Swedish Supreme Court on the basis of the CJEU ruling in Achmea and of a preliminary reference to the CJEU.

One of the other Luxembourgish investors consulted, is a private equity fund incorporated in Luxembourg in 2007 which developed renewable energy projects in various European countries (Portugal, Spain, France, Italy, Poland and Bulgaria). In Spain, the investor installed seven PV plants. Some years after the connection of plants to the grid, the Spanish government changed the regulatory framework through several decrees with dramatic retrospective effects on the applicable tariffs without prior consultations with the investors. Consequently, the Luxembourgish investor instituted an arbitration against Spain under the ECT (Energy Charter Treaty) requesting a compensation in respect of the retrospective amendments made by Spain to the regulatory rules for photovoltaic projects.

The arbitration was conducted at the Stockholm Chamber of Commerce (SCC). The award condemned Spain to pay to the investor EUR 53.3 million as compensation plus interest and costs.

Spain has appealed against the award to the Svea Court of Appeal in Stockholm. Such appeal is still pending.

In addition to the appeal, Spain made requests for a referral to the CJEU on the basis that the matter should have been solved under EU law. The investor opposed such requests.

The Svea Court of Appeal issued on 27th May 2020 a decision by which it denied Spain's request for a referral to the CJEU and only allowed the European Commission to intervene in the challenge proceedings by way of a written submission.

Section III – Improving enforcement of investment rules within the EU

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

- Yes
- ✓ ***No***
- Not always
- Don't know/no opinion

Question 12.1: Please explain the reasons for your answer to question 12 and possibly indicate which MS you are referring to

The judicial systems of many Member States are under pressure for a variety of reasons, ranging from having to deal with an increasing caseload with scarce resources to structural deficiencies in safeguarding judicial independence and impartiality. The EU Justice Scoreboard illustrates the challenges in enforcing EU investment rules through the existing national court systems.

As we have indicated in our previous answers, in our view EU investment rules suffer from an enforceability problem even in the Member States' where judicial systems are fare better than other on the EU Justice Scoreboard. This is because annulment or disapplication of the national measure contrary to EU law remains the primary remedy, with damages the ancillary one.

In practice, investors are often frustrated by the failure of national courts to provide prompt annulment or disapplication of a national measure that breaches EU law. Judicial review proceedings take several years, which period may be extended by another eighteen months on average if there is a preliminary reference to the CJEU. Obtaining annulment or disapplication of the contested measure several years later without any compensation is neither a satisfactory nor an efficient outcome from an economic perspective, and is not conducive to encouraging cross-border investment.

More broadly, we believe that a step forward in the codification and enforcement of EU law likes the ones outlined in our answers to Questions [3, 3.1 and 13] would benefit not only investors but also every EU citizen whose EU-law-based rights are breached.

Question 12.2 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?

- Yes, it would address all enforcement concerns
- ✓ ***No, it would only partially address enforcement concerns***
- Don't know/no opinion

Question 12.3: Please explain the reasons for your answer to question 12.2

Better enforcement of EU investment rules by the authorities and the courts of the Member States is unquestionably a desirable objective (c.f. our answer to Question 3.1). However, this is a long-term goal whereas intra-EU investment protection requires immediate solutions in view of the forthcoming termination of the intra-EU BITs.

We believe that this area of EU law is ripe for further harmonization and requires uniformity of application that will encourage investment and create employment across the EU. As explained in our answer to Question [13] below, this can be achieved better and more easily via a European judicial mechanism that ensures the effective and uniform enforcement of these rules throughout the EU, this being necessary to give investors the comfort they need to make cross-border investments, while at the same time satisfying the legitimate concerns of the Member States and civil society.

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

- ✓ ***Yes***
- No
- Don't know/no opinion

Please explain the reasons for your answer to question 13 and possibly indicate which aspects could be improved

In its public consultation document, the Commission explicitly identifies two possible alternatives: "an EU ombudsman-like body (out of court mechanism where individual investors could file complaints against measures of the Member State where the investment is located)", and "an 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 our opinion, any improvement to the EU investment rules system must address dispute settlement (i.e. a judicial mechanism capable of producing legally binding solutions) to be effective. This is even more the case for SMEs that are most of the time not in a position to negotiate contracts containing commercial

arbitration clauses or penalty clauses with Member State authorities. Thus, it is our view that an ombudsman-like body cannot adequately address the concerns of the investors, as it could not issue binding and enforceable decisions. Setting up an easily accessible European judicial mechanism would ensure the benefits of the full effectiveness of EU investment rules to all investors regardless of their size and wealth, as well as satisfy the case law issue raised above.

This judicial mechanism could take three possible forms.

The first option would be to include it in the existing judicial architecture of the EU as a specialized chamber of the General Court of the European Union. This would require a treaty amendment to enlarge the jurisdiction of the General Court (and the Court of Justice, when seized on appeal) to hear direct claims brought by natural and legal persons against the Member States on the basis of EU law. Given the General Court's recent enlargement to include two judges per Member State, an increase of its jurisdiction would ensure a constant workflow. It would also be a positive measure of EU integration that would benefit investors and other citizens alike.

The second option is a variation of the first one. An EU investment court could be set up as a specialized court in accordance with Article 257 TFEU.

Both these options however would represent a significant departure from the philosophy of the existing EU judicial system whereby investors have to challenge contested national measures before the courts of a Member State, seeking where necessary, to obtain a reference for a preliminary reference to the Court of Justice.

The third option would require the setting up, through a measure of enhanced cooperation, of a judicial mechanism common to all Member States, bound by the primacy of EU law and empowered to refer questions for preliminary ruling to the Court of Justice.

In this respect, we consider the Unified Patent Court should not be an example to follow, especially regarding its functioning, not at least due to its far too complex structure.

In our view, in order to be efficient, any EU investment court should be composed of only one instance and have no regional divisions.

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

/

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?

As we have explained in our answer to Question 13, the creation of an EU judicial mechanism for the resolution of intra-EU investment disputes is the most suitable solution to ensure the full effectiveness of EU investment rules. This could also be achieved through an instrument of EU secondary legislation that would harmonize EU investment rules (see our answer to Question 3.1]).

These alternatives provide the best ways to take account of the legitimate interests of third parties (NGOs, SME associations, sectorial associations and others). We believe that the EU institutions and Member States should have the ability to intervene in all proceedings pending before the EU investment court. NGOs and other organizations that can demonstrate a legitimate interest in the dispute should also be able to intervene by filing amicus curiae briefs. Allowing NGOs, SME associations and other citizen organizations to intervene would increase the legitimacy of any dispute settlement mechanism that this consultation process may privilege in the eyes of all stakeholders, ensuring that justice is not only done but also seen to be done.

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)***
- ✓ ***Other (please specify)***

Please explain the reasons for your answer to question 16:

Properly speaking, some of these "remedies" are not effective remedies or remedies at all. Interpretation of national law in a manner consistent with EU law is not a remedy. Restitution of claimed goods is unlikely to be an appropriate remedy, especially given the passage of time.

Timely annulment or disapplication of measures contrary to EU law with the possibility of interim relief and/or damages are the only suitable remedies for intra-EU investment protection. As we have explained in our answers above, the real issue that investors face is the unavailability of damage compensation as a primary remedy for breach of EU investment rules.

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***
- No
- Don't know/no opinion

Please explain the reasons for your answer to question 16.1:

We refer to the expropriation case that gave rise to the CJEU judgments in Joined Cases C-52/16 and C-113/16 – SEGRO and Horváth and Case C-235/17, Commission v Hungary.

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

- Yes
- ✓ ***No***

- Don't know/no opinion

In investment protection, a high level of reliance is placed on the knowledge that, once successfully invoked, a remedy granted will produce effect, and thus redress to the damage suffered by the claimant. This was sadly not the case in the examples referred in our answer to Question 16.1.

These cases, concerning the expropriation by Hungary of rights of usufruct over agricultural lands, highlight the shortcomings of the existing system of remedies under EU law. German and Austrian investors who challenged the expropriation through the Hungarian courts obtained a reference to the CJEU, which upheld their claims and declared the Hungarian measures contrary to EU law. The Commission also brought its own successful direct action against Hungary for the same issue.

On the other hand, a UK investor (Magyar Farming Company) affected by the same Hungarian measures initiated an ICSID arbitration against Hungary on the basis of the UK-Hungary BIT.

The CJEU's decision in Segro and Horváth was obtained in significantly less time (and likely at less expense) than the arbitral award secured by the UK investor.

However, the German and Austrian investors got no more than a declaration of incompatibility, more than four years after the expropriation of their property rights. By contrast, the UK investor obtained an award of damages of EUR 7 million plus interest, enforceable through a preferential system of enforcement rules in every State party to the ICSID Convention, both inside and outside the EU.

It is unclear whether the rights of usufruct have been restored to the German and Austrian investors as a result of the CJEU judgment and whether they have been duly compensated for the deprivation of their property.

In our view, this case – which occupies a prominent place in the Commission's communication on the Protection of intra-EU investment (COM(2018) 547 final) – provides a striking illustration of the inadequacy of the existing system of remedies under EU law, even where the claim under EU law has been successful in court.

Section IV – General questions on the overall EU investment protection system

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

- 1 - Poor
- ✓ ***2 - Rather poor***
- 3 - Neutral
- 4 - Good
- 5 - Very good
- Don't know / no opinion / not relevant

Question 17.1: Please explain the reasons for your answer to question 17

Whatever the appropriate rating to be given to the investment protection framework under EU law in abstract terms, in relative terms it is poorer than its comparator, the investment protection framework under international investment law, in two key aspects.

First, it does not provide a readily available remedy that translates breaches of investment protection rules into compensation for the investor's economic loss caused by the breach.

Second, it does not provide a readily available and non-Statal, judicial mechanism for the adjudication of investment claims.

These are precisely the two significant advantages that the EU and its Member States grant to the non-EU based competitors of EU investors. However, in an increasingly integrated global economy, EU investors' competitors in the internal market are not only investors from other Member States but also, increasingly, investors from third States. This creates an asymmetry of protection to the detriment of EU investors who are consequently incentivized to invest in third States under the protection of bilateral investment treaties rather than in the EU, or to invest in the EU though a chain of non-EU based companies.

Since the Eastern Sugar v Czech Republic arbitration, the Commission and the Member States have been gone at great lengths to argue that EU law provides comparable protection to bilateral investment treaties. We hope that the EU institutions and the Member States will deliver on this promise.

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***
- No
- Don't know/no opinion

Question 18.1: If there is/are such specific aspect(s) that investment protection rules and mechanisms should take into account, please specify and/or explain which ones

SMEs are often acknowledged to be the backbone of the European economy. However, they have limited resources and ability to challenge prejudicial measures adopted by Member States contrary to EU law.

We believe any EU judicial mechanism for the settlement of intra-EU investor-States disputes should be compatible with the right of access to an independent tribunal enshrined in Article 47 of the Charter of Fundamental Rights. Such mechanism should thus include a legal and administrative aid component for the benefit of SMEs in line with the CJEU's prescriptions regarding the CETA tribunals in Opinion 1/17 (paras 205-222).

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?

- ✓ ***Yes***
- No
- Don't know/no opinion

Question 19.1: Please explain the reasons for your answer to question 19

EU law does not apply to every aspect of State action and where it does, it applies with varying degrees of intensity. In his Opinion in Case C-284/16, Achmea, AG Wathelet gave examples of areas covered by bilateral investment treaties but not by EU law, or where the protective scope of EU law is limited (Eurozone stability, criminal matters,etc.).

We would like to give the example of a problematic situation reported by a Luxembourgish investor that engaged in mining activities in Poland. To that end, the investor undertook, with the permission of the Polish authorities, several exploration activities which were successful. Sometime after the beginning of exploration activities, however, the Polish government introduced a mineral extraction tax at such a high rate that it became uneconomical to pursue the investment in Poland further (i.e. start extraction activities) despite the significant amounts already spent in exploration.

In fact, given the tax's significantly high rate only the incumbent Polish mining company (which was partly State-owned) had sufficient mining activity and a position in the market to bear the burden of the mining extraction tax and even that company had to obtain a significant loan from a Polish State-owned bank in order to remain solvent.

The effect of foreclosure of the Polish mining industry to intra-EU investment is obvious but the question is to what extend an EU-law based legal principle would allow the investor in question to recover the amounts spent in exploration (now without any meaningful purpose)? We submit that, at present, there is no positive answer.

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.)?

- Yes
- No
- ✓ ***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***
- No
- Don't know/no opinion

Question 21.1: Please explain the reasons for your answer to question 21

As we have indicated in several of our answers above, we consider that an instrument of EU legislation consolidating and codifying EU investment protection rules would be an appropriate manner to deal with the fragmentation of these rules across EU primary and secondary law.

Section V – Facilitating and promoting cross-border investments

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)?

- Yes, it is easy, as all relevant information is available online and easily accessible
- 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.
- ✓ ***No, it is not easy, as no relevant information is available. Expensive legal opinions need to be obtained from local law firms on a case by case basis.***
- Other (please specify)

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?

- Yes, it is easy anywhere in the EU, based on the available information and tools
- To some extent, only for some EU countries (where we have business activities and our own business network)
- ✓ ***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***
    - Other
- No, it is not easy, and investment promotion measures cannot help.

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

- No. All necessary measures and standards are in place or will soon be implemented (e.g. the Single Digital Gateway, which covers information and procedures on starting, running and closing a business).
- To some extent. Whilst all necessary measures and standards are in place (or will soon be implemented, e.g. the Single Digital Gateway), their effective application in practice differs per Member State.
- ✓ ***Yes. Even though many measures are already in place or will soon be implemented, there is need for additional facilitation measures for cross-border investments. Please specify from the drop-down menu (multiple choice possible):***
    - ***Further consolidating the relevant information specific to cross-border investments in one place (e.g. when implementing the Digital Single gateway)***
    - ***Identifying an investment contact point per member State to provide information on rules and measures protecting and facilitating cross-border investments)***
    - ***Speeding-up administrative procedures***
- Other (please specify)

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?

- Yes, there is a mechanism to provide structured feedback to authorities and there are follow-up possibilities, accessible to all stakeholders
- 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
- Partially: There is a mechanism for dialogue and to provide structured feedback to authorities and there are follow-up possibilities, but they are not accessible to all stakeholders (depending on size of investment, sector, etc.).
- ✓ ***No and there is need for changes in this field.***
- Other (please specify).

Question 25.1 Please specify how providing feedback on problems of general relevance to the investment environment for follow-up by the competent authorities at EU or national level could be made easier:

- ✓ ***Regular workshops on intra-EU investment environment involving stakeholders and public authorities at EU level***
- ✓ ***Providing possibilities for a regular dialogue between stakeholders and competent authorities on the national investment environment in Member States***
- ✓ ***Establishing a feedback channel (e.g. electronic) for stakeholders to report specific concerns related to the intra-EU investment environment at EU level***

- ✓ ***Establishing a feedback channel (e.g. electronic) for stakeholders to report specific concerns on the national investment environment to competent authorities in Member States***
- ✓ ***Establishing a mechanism for follow-up to reported general concerns by stakeholders at EU level***
- ✓ ***Establishing a mechanism for follow-up to reported concerns by stakeholders at national level (e.g. by administrative authorities)***

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?

- Yes, I have used SOLVIT and it helped solve my problem
- Yes, I used another mechanism and it helped solve my problem
- Yes, I tried, but SOLVIT or other existing problem-solving mechanisms did not solve my problem
- No, because I was not aware of SOLVIT or other relevant problem-solving mechanisms
- No, I did not even try, because I think that SOLVIT and other problem-solving mechanisms are not suitable to solve my problem
- ✓ ***Other***

Question 26.1: Please specify why you think SOLVIT and other problem-solving mechanisms are not suitable to solve your problem

SOLVIT is a useful tool primarily designed to help businesses and citizens fight against administrative red tape.

As such, it has no track record of resolving investor-State disputes, which are of a different nature and scale. In addition, it has no power to deal with expropriation claims and cannot be compared to the BIT protection and international arbitration at the disposal of investors of third States investing in the internal market.

As a mechanism that relies essentially on national administrations, including those that have created the problem complained about, SOLVIT is thus manifestly inadequate to deal with investment disputes.

This is not to say that SOLVIT is not a tool worth having but it is not suitable for investment protection.