STELLUNGNAHME

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Deutscher Industrie- und Handelskammertag

Public consultation on the prevention and amicable resolution of disputes between investors and public authorities within the single market

Who we are:
As the umbrella organisation of the 79 Chambers of Commerce and Industry (IHK) in Germany, the Association of German Chambers of Commerce and Industry (DIHK) represents 3.6 million companies of all sizes and sectors (exempted are crafts, liberal professions and agricultural businesses). They are by law members of a Chamber of Commerce and Industry. The DIHK thus represents the collective interest of German business. The DIHK also coordinates the network of the 130 chambers of commerce abroad, delegations and representative offices of German business in 90 countries worldwide (AHK). IHKs and AHKs contributed actively to this position paper and the survey attached. The DIHK is registered in the transparency register of the European Commission (No. 22400601191-42).

Summary

The presented plans of the EU Commission go in the right direction. The idea to **encourage and support EU Member States** and their national authorities in the **correct application of EU law via guidance** to guarantee investor rights is good. Some **national legal systems** are still **deficient** and EU law is not always respected. Also, **supporting attempts of amicable dispute resolution** is important. A mediation framework, national contact points and an EU agency and/or national agencies for mediation would be helpful.

However, this is **not sufficient**. Protection through mediation as well as infringement proceedings and preliminary rulings before the European Court of Justice is not enough. Effective investor protection requires a **binding dispute settlement mechanism** with **enforceable** decisions as last resort if state and investor cannot find a solution together. **Investor-State arbitration** is such a suitable dispute resolution mechanism if it is designed in a way that the **proceedings are simple, fast, transparent and not too costly** and the **arbitrators are chosen according to their knowledge** and experience. Furthermore, arbitration helps because of its **preventive effect**: the risk of arbitration proceedings could make states willing to treat investors fair, to respect EU and international law, to improve their legal systems and to dialogue within mediation proceedings. Therefore, bilateral investment agreements among EU Member State (Intra-EU BITs) are still very

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important for German companies, also in Central and Eastern Europe. Their termination without an effective replacement mechanism would leave them **without appropriate legal protection** and, furthermore, result in **discrimination of EU investors** compared to those from third countries with which there are BITs. Moreover, it would **contradict** the Commission's policy on investment protection with third countries which actively demands such additional protection.

In case the Member States decide to terminate the intra-EU BITs, the DIHK supports the **Council's request** calling on the Commission to assess the options of a binding dispute resolution mechanism (Conclusions on the mid-term review of the Capital Markets Union Action Plan of 11 July 2017). Only an **EU-wide investment protection** agreement or a similar effective and enforceable dispute settlement mechanism could replace them. Nevertheless, **sunset clauses** would have to be respected. Furthermore, the change should be used for **reforms of investor-state arbitration**, in particular to **simplify and accelerate the procedures** as well as to **reduce their high costs**. At the same time the proceedings must be efficient to protect the investors' rights. Furthermore, the options of **amicable dispute resolution** should be **expanded** beyond mediation and include **negotiations and conciliation**. **National contact points** should be **able to make proposals** to the public authority and to request the respect of EU law. Strengthening investment protection in that way could **improve the functioning of the internal market** concerning investments and the **investment climate**. Moreover, it could **strengthen the Rule of Law** via the protection of the fundamental rights of the investors.

Already before publishing its Roadmap and Inception Impact Assessment in July the Commission received **requests from business to uphold the existing Intra-EU BITs** or at least to establish a binding and enforceable EU wide dispute settlement mechanism. It had been good, therefore, to **include questions** on the need and the possible design of such a system already in the questionnaire. DIHK made proposals on that in this position paper. However, if the Commission should continue these plans, it would be helpful to search for a **dialogue with representatives of the companies concerned** in order to regain their trust and **orientate the reform towards the needs of the investors**.

Zusammenfassung

Die vorgestellten Pläne der EU-Kommission gehen in die richtige Richtung. Die Idee, die EU-Mitgliedstaaten und ihre nationalen Behörden mit einem **Leitfaden** zur **ordnungsgemäßen Anwendung des EU-Rechts zu ermutigen und dabei zu unterstützen**, um Investorenrechte zu garantieren, ist gut. Einige **nationale Rechtsordnungen** sind noch **unzulänglich** und EU-Recht wird nicht immer eingehalten. Auch die **Unterstützung von Versuchen einer gütlichen**

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Streitbeilegung ist wichtig. Ein materieller Rahmen für Mediationsverfahren, nationale Kontaktstellen und eine EU-Agentur und/oder nationale Agenturen für Mediation wären hilfreich.

Dies ist jedoch **nicht ausreichend**. Der Schutz durch Mediation und Vertragsverletzungs- und Vorabentscheidungsverfahren vor dem Europäischen Gerichtshof reicht nicht aus. Wirksamer Investorenschutz erfordert einen **verbindlichen Streitbeilegungsmechanismus** mit **durchsetzbaren** Entscheidungen als letztes Mittel, wenn Staat und Investor zusammen keine Lösung finden können. Die **Investor-Staat-Schiedsgerichtsbarkeit** ist solch ein geeigneter Streitbeilegungsmechanismus, wenn sie so gestaltet ist, dass die **Verfahren einfach, schnell, transparent und nicht zu teuer** sind und die **Schiedsrichter nach ihrem Wissen** und ihrer Erfahrung ausgewählt werden. Darüber hinaus hilft die Schiedsgerichtsbarkeit aufgrund ihrer **präventiven Wirkung**: Das Risiko eines Schiedsverfahrens kann für die Staaten ein zusätzlicher Anreiz sein, sich fair zu verhalten, das EU- und Völkerrecht zu respektieren, ihre Rechtssysteme zu verbessern und im Rahmen von Mediationsverfahrens gesprächsbereit zu sein. Die bilateralen Investitionsabkommen zwischen EU-Mitgliedstaaten (Intra-EU-BITs) sind für die deutschen Unternehmen nach wie vor sehr wichtig, insbesondere in Mittel- und Osteuropa. Ihre Beendigung ohne einen wirksamen Ersatzmechanismus würde Investoren **angemessenen Rechtsschutz** nehmen und zudem zu einer **Diskriminierung von EU-Investoren** gegenüber solchen aus Drittländern führen. Außerdem stünde dies im **Widerspruch** zu der Politik der Kommission in Bezug auf den Investitionsschutz mit Drittländern stehen, die solchen zusätzlichen Schutz aktiv einfordert.

Falls die Mitgliedstaaten sich entscheiden sollten, die Intra-EU-BITs zu beenden, unterstützt der DIHK die **Forderung des Rates**, in denen die Kommission aufgefordert wird, die Möglichkeiten eines verbindlichen Streitbeilegungsmechanismus zu untersuchen (Schlussfolgerungen zur Halbzeitbilanz des Aktionsplans zur Kapitalmarktunion vom 11. Juli 2017). Nur ein **EU-weites Investitionsschutzabkommen** oder ein ähnlicher wirksamer und durchsetzbarer Streitbeilegungsmechanismus könnte sie ersetzen. Dabei wären gleichwohl die **sunset clauses** zu achten. Außerdem sollte der Wechsel für **Reformen der Investor-Staat-Schiedsgerichtsbarkeit** genutzt werden, insbesondere um die Verfahren zu **vereinfachen und zu beschleunigen sowie ihre hohen Kosten zu verringern**. Gleichzeitig muss das Verfahren effizient sein, um die Rechte der Anleger zu schützen. Darüber hinaus sollten die Möglichkeiten der gütlichen Streitbeilegung über die Mediation hinaus erweitert und **Verhandlungen und Schlichtung** aufgenommen werden. **Nationale Kontaktstellen** sollten in der Lage sein, der **Behörde Vorschläge zu unterbreiten** und die Einhaltung des EU-Rechts einzufordern. Die Stärkung des Investitionsschutzes könnte so das **Funktionieren des Binnenmarktes** für Investitionen und das **Investitionsklima verbessern**. Darüber hinaus könnte sie die **Rechtsstaatlichkeit** durch den Schutz der Grundrechte der Investoren stärken.

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Schon vor der Veröffentlichung der Roadmap und des Inception Impact Assessment im July hatte die Kommission **Forderungen der Wirtschaft** erhalten, die **bestehenden Intra-EU-Bits aufrechtzuerhalten** oder zumindest einen verbindlichen und durchsetzbaren EU-weiten Streitbeilegungsmechanismus zu etablieren. Es wäre daher gut gewesen, **Fragen** über die Notwendigkeit und die mögliche Ausgestaltung eines solchen Systems bereits in den Fragebogen **aufzunehmen**. Der DIHK hat seine Vorschläge dazu in diesem Positionspaper vorgelegt. Wenn die Kommission ihre Pläne fortsetzen will, wäre es hilfreich, wenn sie **mit Vertretern der betroffenen Unternehmen in einen Dialog** treten würde, um ihr Vertrauen zurückzugewinnen und die **Reform an den Bedürfnissen der Investoren auszurichten**.

Content

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I. General Comments

1. Mediation, national contact points and guidance would be helpful

The presented plans of the EU Commission go in the right direction. The idea to encourage and support EU Member States and their national authorities concerning the **correct application of EU** law via guidance in order to guarantee investor rights is good. Likewise, it is helpful for investors to have official guidance that confirms their rights and the procedural possibilities in case of violations. They may refer to the Commission's guidance when they face difficulties with public authorities.

Also, supporting attempts of **amicable dispute resolution** is important. Informal and voluntary negotiations and sometimes, if necessary and suitable, conciliation or mediation are already **common practice** before a company starts arbitration or court proceedings. Sometimes, the national embassies or the chambers of commerce abroad support negotiations. This is the case even if this is not formally regulated and there is no underlying contract foreseeing these options. Often Intra-EU-BITs require preliminary negotiations. However, **mediation is still less common**, particularly in Eastern Europe. Some Member States introduced mediation only recently and restricted it to civil proceedings. In Italy, mediation between states and enterprises is foreseen only for certain tax proceedings. There is still only limited experience with mediation.

Informal exchange between investors and public authorities can help to **better understand** the legal and economic circumstances of the case and the different interests. As such it can serve to avoid problems in the implementation of the investment project and the violation of investor rights from the very beginning. Furthermore, in this way, the enterprise is no longer merely the object of state action, but a **co-ordinating partner to work out solutions** that are appropriate to the individual characteristics and needs of the case and that will find increased acceptance. Even if still misunderstandings arise, early informal consultations might avoid a real dispute. They may **preserve the chances of a long-term relationship** between investor and state. This is in the interest of both sides. Therefore, the best is to start consultations already at an **early stage** before the decision is taken. But also after, for example at the stage of internal administrative review, it could still be helpful. Finding a solution at an early stage and preferably on the administrative level could **reduce litigation** before the courts and, hence, the expenditures by investors and public authorities.

As the openness of the public authorities to such amicable dispute settlement mechanisms varies among Member States and among public authorities within one Member State, it is very good to **encourage public authorities** and investors to use these instruments. It could be easier to convince a national authority or government to start such alternative ways of dispute resolution if such an option is **proposed in EU law** or in Commission guidance, even if it remains voluntarily. This would help particularly SMEs which have, regularly, less bargaining power. A **flexible**

framework for mediation and agencies on national and/or EU level that provides mediation services at **low costs** could be useful.

Likewise, the option of **national contact points** (NCP) for investors in each Member State is very good. It could ensure that investors have a place from where they can get **information** on their rights and on available procedures to settle a dispute. National authorities could get information on their duties. Furthermore, a neutral, not involved government official could have a **second look** at the case and encourage or even **request the competent authority** in finding a solution respecting the investor's rights. The NCP should be able to make proposals to the public authority concerned – even before a decision is taken. A **network** of NCPs would allow that investors involve their home country NCP: Both NCPs of the home and host state could evaluate the case and **make a proposal** how to solve it.

Both proposals for a mediation framework and a guidance are, hence, very positive.

2. Arbitration, negotiation and conciliation need to be included

However, all these proposals are **not sufficient**. A mere mediation framework is not enough, even if it is combined with a network of national contact points and/or a EU or national mediation agencies. They can achieve these aims only to a certain point but they are not enough for effective investor protection.

First, other mechanisms of amicable dispute settlement must be included: Informal **negotiations** between the investor and the state are the first step in any kind of dispute and help also beforehand in order to avoid a dispute. Furthermore, mediation cannot help in all kind of situations: A mediator may only support the parties to find a solution that suits both; they elaborate it independently. The mediator cannot make an own proposal to solve the dispute but only moderate between the parties. However, particularly SME might find it difficult to interact as equals and to negotiate a solution with a public authority. Therefore, there is a need for **conciliation**; that means that the third person does not only assist in finding a solution but also provides the parties with a **non-binding settlement proposal** that considers the legal situation and the interests of both parties. Conciliation is a well-known and proven way of dispute settlement also under EU law (see only the Regulation 524/2013/EU on online dispute resolution for consumer disputes).

Second and more importantly, **arbitration** must be included in the new mechanism. Even a combination of all amicable dispute settlement mechanisms is not sufficient for effective protection of investors: They need an **effective, binding dispute settlement** mechanism with **enforceable decisions** as a last resort. Investor-state arbitration allows that the tribunal takes a binding decision on the dispute and that arbitral awards are enforceable worldwide under the New York or the ICSID

Convention. Furthermore, often only the risk of arbitration makes states willing to dialogue seriously and to respect requirements from EU or international law despite of opposing interests. Therefore, **mediation** and also the other mechanisms for amicable dispute settlement can be **only a complement, but not a substitute for arbitration**.

3. Investment arbitration is a suitable dispute resolution mechanism

Investment Arbitration ensures that complex disputes are resolved through a suitable dispute resolution mechanism in a, in principle, **fast and effective** way and with **high-quality results**. The selection of arbitrators according to their **experience and knowledge** in the respective field is an important advantage of arbitration and a central aspect for the quality of the arbitration awards. The **enforcement** of the awards is guaranteed worldwide by the New York and the ICSID Convention.

Large companies, in general, include provisions on the settlement of disputes by means of arbitration into their contracts, also in relation to states as contracting parties. This aims at avoiding inefficient, lengthy and possibly unfair procedures before domestic courts. However, as a **last resort** Intra-EU BITs are important also for large companies, especially if the host state frustrates the execution of arbitration awards. Furthermore, the Intra-EU BITs ensure **comparable protection** also to those – often **medium sized** – **companies** which do not have sufficient negotiating powers to include arbitration clauses into their contracts with states. The Intra-EU BITs thus become a **safety net** for the worst-case scenario.

4. Intra-EU BITs help because of their preventive effect

The Intra-EU BITs are of particular importance because of their preventive effect: As the investor might use arbitration if necessary, there is an **additional incentive** on the part of the state to act fairly and legally and also to **improve the own legal system and the Rule of Law**. Moreover, the company has a better negotiating position, so that a solution can often be reached by negotiation, conciliation or mediation without need of arbitration which would not be achieved otherwise. In this way investor-state arbitration is a **door opener for a constructive dialogue** that leads to a more rational debate on the side of the domestic authorities.

5. National legal systems are still deficient

Although the legal certainty and the efficiency of the legal systems are improving in most of the EU Member States concerned, they are often still deficient. This is shown in a **survey** conducted by DIHK on the Need of Intra-EU Investment Protection in Central and Eastern Europe under

participation of the German Chambers of Commerce Abroad, Chambers of Commerce and Industry and Enterprises (see **Annex II**): a lack of **legal certainty** because of frequent, sudden and unexpected, sometimes also retroactive legal changes; legal changes that are directed against foreign companies; **administrative wrongdoings**; direct and indirect **expropriation**; **discrimination**, for example in public procurement; unreasonable civil servants and government officials that are **not willing to dialogue and to respect requirements from EU or international law**; **lengthy proceedings** and **inefficient** and badly equipped **courts**; a lack of political independence and reservations against foreign investors; **corruption** mainly in administrations but sometimes also in courts. At times competitors use these deficiencies and loopholes in order to weaken foreign investors or push them out of the market. In Hungary and Poland reforms of the legal systems are considered as a risk for the Rule of Law and the protection of human rights. This worries investors, even if other location factors and the expected business opportunities also play an important and often even more important role. The elimination of additional protection via Intra-EU BITs or an equivalent replacement mechanism could, consequently, have a **negative impact on the investment climate**.

6. Infringement proceedings and preliminary rulings are not enough

EU infringement procedures and preliminary rulings as an "alternative" do not provide enough protection. **Infringement proceedings** do not protect the investors in the specific cases. Usually, they can help **only for the future**. Moreover, the Commission decides **politically**: even where EU law has been violated there will not necessarily be an infringement proceeding. Moreover, the proceedings often go on for **years**. Investors cannot wait so long; they risk going bankrupt in the meantime. Furthermore, in infringement proceedings the European Court of Justice can decide only on the infringement of EU law but it **cannot award compensation** for damages. However, companies need enforceable rights, compensation and effective dispute settlement.

Likewise, **preliminary rulings** are not effective enough, particularly for the **lengthy proceedings** and the **lack of political independence** of courts in certain countries. A legal obligation to refer a case to the ECJ exists only for national courts of last instance. Lower courts often do not refer a case to the ECJ even if the interpretation of EU law might be doubtful. And even if a case is referred to the ECJ it takes often two to three years until the Court delivers its preliminary ruling. Therefore, it takes many **years** until the company may get compensation this way. Investment arbitration is faster even if it takes also often too much time.

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7. End of investment arbitration would result in discrimination and contradiction

If the Intra-EU BITs would be abolished without effective replacement, as proposed by the Commission, the alleged discrimination of EU investors from Member States without Intra-EU BITs would be combated with **another discrimination**: between European investors and those **from third countries**. The EU just agreed on investment protection with Canada and is negotiating for example with China. The United States still have many investment agreements with EU Member States. These investors from third countries would have more rights than EU investors.

Also from the Commission's point of view, **investment protection is important**, even in countries with developed legal systems; otherwise it would not conclude agreements on investment protection with countries such as Singapore (No. 9 of the World Justice Project-Rule of Law Index, WJP-RoLI) or Canada (No. 12) or negotiate that with Japan (No. 15). The approach of the Commission to abolish Intra-EU BITs and, at the same time, to conclude investment protection agreements with third countries is **contradictory**. Even more as most of the EU countries concerned are by far not as high ranked as those third countries, for example Croatia (No. 39), Greece (No. 41), Hungary (No. 49) and Bulgaria (No. 53).

The complete abolition of investment protection within the EU is, therefore, not justified. A better approach to combat the alleged “discrimination” within the EU could be a new **EU-wide** investment protection agreement or a similar binding dispute settlement mechanism under EU law for **all EU investors**.

8. Effective investor protection strengthens the internal market and the Rule of Law

Strengthening investment protection through mediation, conciliation or arbitration proceedings could improve the **functioning of the internal market** concerning investments and the **investment climate**. Furthermore, it strengthens the **Rule of Law** and creates an **incentive for good law-making** and the development of a functioning legal system in the contracting parties that protects human rights: Investment protection means protection of the **fundamental rights** of the investors, particularly their freedom to conduct a business in Art. 16 of the Charter of Fundamental Rights of the EU, the right to property in Art. 17 and the right to an effective remedy and to a fair trial in Art. 47.

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II. Proposals for the design of a mechanism for amicable dispute resolution

1. Mediation

The mediation framework should describe the **basic features** of mediation proceedings to give more clarity to investors and public authorities concerning the options for amicable dispute settlement via mediation. At the same time, it must provide as much **flexibility** as possible so that the parties can adapt the proceedings to their specific needs. Furthermore, it must **fit to national procedural and constitutional law** as well as the legal culture.

The **scope of application** should be **wide** in order to help in as many kind of disputes and difficult situations as possible, for example, for individual administrative decisions, acts or contracts but also beyond: Also when **changes of legislation** lead to expropriation, discrimination or a violation of legitimate expectations it should be possible for the investor – at an early stage and also later – to address the public authority, the government or the NCP and to ask for **consultations**. There should be a clear description on the types of disputes that can be covered by mediation, but this list should **not be exhaustive**. The aim is to describe examples so that investors and states may get a clearer idea which kind of disputes could be suitable for mediation. The description shall not restrict the possibilities for investors and states to search for amicable dispute settlement.

All stages of proceedings should be encompassed. It should be available before a decision is taken by the public authorities as well as after, for example at the stage of the internal review of the decision or once litigation has started before the judgement has been delivered. Beyond the Commission's proposals, for example, when the decision has been already taken but no internal or judicial review mechanism is available, mediation should be possible. There should be **no definite list** of stages of proceedings but at most examples in the recitals or a non-exhaustive list.

Also, the "**conditions**" under which investors and public authorities may engage in a mediation process should not restrict the scope of application. They should be understood as guidance to help to to make the dispute settlement as smooth as possible but **not** as **excluding** disputes from amicable dispute settlement.

Clear rules stating **conditions** under which public authorities shall be able to **commit to a settlement agreement** and to award compensation might be helpful to guide public authorities, particularly if they do not have any experience in mediation. However, it needs to be considered that the domestic substantive and procedural rules for public authorities concerning the conclusion of contracts with private parties vary widely among the EU Member States. It might be difficult to find a common sense on that. Furthermore, a EU Regulation on amicable dispute resolution cannot encompass all possible areas of law and their mandatory rules for 28 Member States. Therefore, it might be wise to restrict the conditions to the requirement that the contract must **respect EU law and domestic law**. The provisions may certainly **not create stricter conditions** than foreseen in

EU law. Rules on how to preserve the public interest must be based on the applicable law: The balance of investor rights and public interests may not deviate from the one in the EU treaties or secondary law.

Clear rules on the **confidentiality** of the mediation procedure are of utmost importance. Only confidential proceedings allow the investor and the public authorities to discuss all relevant aspects and all possible solutions. Insofar, arbitration proceedings and amicable dispute resolution mechanisms must be clearly distinguished. Whereas investment arbitration must be designed as transparent as possible as a prerequisite for its acceptance, meetings of investor and state within mediation proceedings must be **closed to the public**. The initiation and the **results** of the mediation proceedings shall be made public only if there is a legitimate **public interest and if it is stipulated** under national or European law. Even then, the **confidentiality of business secrets** must be ensured. The results should be published only in form of a summary. Original documents from the proceedings should, in principle, not be published. Only under exceptional circumstances or where both parties agree procedural documents should be published. Then confidential sections must be blackened.

Clear rules on the mediation **procedure** and on the **duration** of the mediation process would be also helpful, even if there must be **enough flexibility** for the parties. By mutual consent it must be possible to deviate from the prescribed proceeding. Both parties must have the possibility to terminate the mediation at any moment also without the consent of the other party. Rules on the **relationship with court proceedings** can be useful, for example that starting mediation suspends the limitation period to start litigation.

The **mediator** must be **chosen freely** by the parties. However, **qualification requirements** as well as **high ethical standards** are important to ensure the neutrality of the mediator and high-quality results. The mediator must be able not only to mediate between the parties but also to control that the result of the mediation will be formulated in way that it is **legal enforceable**. A **list or register of mediators** can be helpful to find a suitable mediator with experience in certain sectors and the necessary language skills. But the list may **not be exhaustive** as long as the mediator chosen fulfils the criteria concerning the qualification and neutrality.

The **involvement of third parties** in the mediation process could also be regulated. However, in a mediation process it is necessary to ensure that **both parties agree** on the proceeding including involving third parties and that they are **flexible** concerning the way this happens. Certainly, third parties may not have a right to take part in mediation proceedings.

Concerning the **enforcement** of mediated settlement agreements, it is important to stipulate that Member States and investors should follow the settlement. The Member State should treat the agreement as **binding** and enforce it within its territories. This applies in cases where a

compensation for losses has been agreed as well as when an action of the authority is required. As both parties agreed to the mediation settlement, the implementation should not be a problem, in general. **Domestic law on the enforcement procedure** has to be applied **without any form of discrimination** and without creating **excessive formalities**.

Judicial review of mediated settlements should be possible only under **very restrictive** circumstances. Member States and investors should, in principle, follow the settlement. Lengthy proceedings with multiple instances should be avoided.

A **specific agency** at national or EU level that **provides mediation services** could be helpful. An agency at national level would have the advantage that it is "closer" to the parties concerned and the circumstances of the case. The staff as well as the mediators on the list would have certainly experience concerning the specific Member State. On the other hand, one agency for the whole EU would have the advantage that investors with investments in several Member States have always the same agency to be addressed. It could ensure that the standards are high in the whole EU. The best option could be to have a **network** of national agencies under the supervision of an EU agency. Whether at EU level or at national level, it would be helpful, particularly for SME, if the agency could also **administer mediation services at low costs** and **give advice** on procedural aspects and substantive rights.

2. Network of contact points

The national contact points (NCP) for investors in each Member State should provide all kind of **information** on the rights and duties of investors and on available procedures to prevent or settle a dispute. They should also provide national authorities with information on their duties. They should make the information available on the internet but also provide for help via telephone, email and in direct contact.

Furthermore, on request of the investor or the public authority they should have a second look at the case and evaluate the situation. They should be able to encourage or – where necessary – to **request the competent authority** to find a solution respecting the investor rights. To this aim, the NCP should be able to **make proposals** to the public authority concerned – even before a decision is taken.

All NCPs should be united in one **network** in order to exchange best practices and support each other to prevent or solve disputes with investors. Both public authorities and investors should be allowed to **involve the NCP of the investor's home country**: The NCPs of the home and host state could evaluate the case and make a proposal how to solve it. This could ensure that all

perspectives and opinions are involved and it could strengthen and harmonise the investor protection EU-wide.

The NCP must be completely **independent** from political influence of the government and public authorities and have a strong position in the national government. If it cannot have the character of an independent agency it might be attached for example to the department for foreign trade promotion in the ministry for economics as long as complete independence is ensured. The government officials must be **experts on EU and investment law** and ensure neutrality.

3. Proposals for the design of a negotiation and a conciliation mechanism

The here proposed mechanisms for negotiations and conciliation could be designed **similarly to the mechanism for mediation** and be attached to it in a way that **one single** mechanism includes all three possibilities of amicable dispute resolution. The framework should describe the **basic features** of negotiation and conciliation proceedings to give more clarity to investors and public authorities concerning the options and proceedings. At the same time, it must provide as much **flexibility** as possible so that the parties can adapt the proceedings to their specific needs.

The **scope of application** should be **wide** in order to help in as many kinds of disputes and difficult situations as possible. All stages of proceedings should be encompassed. A list of the types of covered disputes should not be exhaustive. Conditions for settlement agreements may not be stricter than the applicable law. Just as the mediation framework, it would need clear and strict rules on the **confidentiality** of the procedure. Both parties must have the possibility to terminate the negotiations or conciliation at any moment also without the consent of the other party.

It is very important to stipulate that Member States and investors must, in principle, follow the settlement agreement. The rules on **enforcement and judicial review** as well as on the relationship with court proceedings could be like the above-mentioned ones for mediation. The planned mediation **agency** at national or EU level could provide not only mediation services but also support in negotiations and conciliation proceedings.

4. Proposals for the design of an EU-wide arbitration mechanism

A binding and enforceable dispute settlement mechanism is of utmost importance for effective investor protection. If the existing Intra-EU BITs shall be terminated, there must be a **new EU-wide investment protection** agreement or a similar mechanism under EU law for all EU investors which is similar effective. The Council conclusions as well as the joint concept paper of Germany and four other Member States are insofar highly appreciated for the discussion.

The German Intra-EU BITs including investor-state dispute settlement (ISDS) have, in general, proved its worth to protect investors: Investors are protected even if domestic legal protection is deficient. **Competent and experienced arbitrators** decide the disputes in a procedure which is **adapted to the needs of the parties**; the awards are **enforceable** worldwide.

However, ISDS has some defects and needs to be **reformed**, particularly concerning the **effectiveness and transparency** of the proceedings. Often, proceedings are too long and costly. Particularly SMEs have difficulties to use ISDS. During the last years, this need for reform has been discussed in detail. The EU, many States and international organisations have been engaged to improve, for example, the transparency and the impartiality of judges via codes of ethics. The EU Commission even proposed to reform the system as a whole and to replace ISDS with a new investment court system (ICS), which means a permanent court with full-time judges and randomly composed tribunals. But not all changes will necessarily improve the system. Moreover, there is still **need for further improvement**. The most important aspects shall be shortly mentioned here.

Most important from the perspective of SMEs is a **simplification and acceleration** of the procedures as well as a **reduction of the high costs**. A significant part of those companies who doubt the usefulness of ISDS or ICS argue that it is too costly. Therefore, it is necessary to establish a **schedule of fees for party representatives and arbitrators**, particularly for SME and small claims. Furthermore, restrictions to the **document production** and stricter **deadlines** for decisions would be useful. **Flexible geographical hearing locations**, the option to agree on a **single judge** and the use of **videoconferences** for the oral hearings could make proceedings less costly. The combination with a system of **amicable dispute resolution** including negotiations, conciliation and mediation could reduce the number of cases reaching arbitration. Moreover, in order to eliminate or reduce the financial and organisational hurdles, there should be **programs for SMEs** at national and European level. National investment guarantees might be associated with **legal expenses insurance**. The network of national contact points, the agencies or an own **EU Advisory Centre on Investment Law** could give **legal advice** at reduced prices.

Relating to the **selection of arbitrators**, the possibility to **choose judges** according to their **experience in specific sectors or areas of law** would be a real advantage for States and investors. This ensures that the judges have the necessary skills and experience to evaluate complex facts as well as economic and legal questions. Closed lists of arbitrators could be counterproductive. Furthermore, the right to choose an arbitrator is a key aspect of arbitration. Also a complete ban of the possibility to work as an arbitrator and counsel would lead to a considerable reduction of potential arbitral candidates, thus endangering the system as a whole. However, the selection of arbitrators, especially the presiding arbitrator, must be made **more transparent and open**. The professional qualifications of each arbitrator should be the decisive selection criteria.

Furthermore, it would be useful to cap their fees, particularly in cases concerning SMEs or small claims, to reduce the costs.

An **admissibility review** that allows rejecting abusive or obviously unfounded claims in an **early stage** of proceedings can help to reduce administrative burden and pressure on the State where claims have no basis. This admission procedure should be as straightforward, quick and inexpensive as possible, not entail considerable procedural effort and be based on clear criteria. In general, the **burden of presentation and proof** of an infringement should be imposed on the claimant.

Of utmost importance is a **simple and effective enforcement** of the decisions. This is guaranteed for ISDS by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and the New York Arbitration Convention for awards of arbitral tribunals (New York Convention). It must be assured that **decisions of a dispute settlement mechanism under EU law can also be enforced in this way**. If an Appeal Tribunal is introduced the **defences** to refuse the enforcement must remain as **limited** as legally possible.

Concerning the question of an **appeal mechanism**, it is imperative to ensure that **not every** decision will be appealed as this could cause a long-term delay of each proceeding. Therefore, an appeal must be restricted to **legal errors only**. The focus of the appeal tribunal must be to revoke arbitrary or abusive decisions or manifest errors of law. In addition, an effective **admission procedure** (in analogy to the certioari procedure before the U.S. Supreme Court) must ensure that only those cases are handled by it which are actually problematic. **Strict deadlines** are necessary. Among the **adjudicators all kind of legal traditions** must be represented.

5. Non-retroactivity of a reform of protection of intra-EU investments

Also after implementing a new system of protection of intra-EU investments it would have to be ensured that the current standard of protection is maintained for existing investments even after a termination of the Intra-EU BITs, based on the so-called **sunset clauses** in order to protect legitimate expectations. In this respect, the proposals could only be a **complement, not a substitute**. This does not serve to postpone reforms: The more efficient the new system is, the more attractive it would be for investors to use it, even if they could also resort to the old system.

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III. Proposals for the Guidance Document

A guidance document should clarify all rules and principles protecting intra-EU investors and address all the problems which they are still facing in Member States.

The **existing rules and principles** that can help investors that are facing the problems include, on the one hand, primary law such as the **fundamental rights** (the right to property, the freedom to conduct business as well as the right to an effective remedy and to a **fair trial**), the relevant **fundamental freedoms** (free movement of capital and freedom of establishment) and certain **general principles** of EU law (for example the principle of **non-discrimination**, the principle of **legal certainty**, the protection of **legitimate expectations** and the principle of **non-retroactivity**). On the other hand, **secondary law** should be explained where problems persist. This includes, for example, **public procurement** law and **sector specific regulation** that opens certain sectors to competition. Where the legal field is very complex and wide, a guidance paper could include **references** to other guidance instruments, for example in State Aid Law. Explained should be the substantive rights and the exceptions.

Furthermore, the guidance must **address all the problems which investors are still facing** in EU Member States. As mentioned above, the legal systems are often still deficient: lack of **legal certainty** because of frequent, sudden and unexpected, sometimes also retroactive legal changes; **administrative wrongdoings**; undiscerning civil servants and government officials that are **not willing to dialogue** and to consider requirements from EU or international law; **lengthy proceedings** and **inefficient** and badly equipped **courts**; a lack of transparency and **discrimination** in public procurement; sometimes even direct or indirect **expropriation**; a lack of political independence and reservations against foreign investors; **corruption** mainly in administrations but sometimes also in courts. These difficulties arise in **accessing the market** but also **after establishment**; therefore, both aspects should be addressed in the guidance.

The guidance must make clear under which conditions these problems constitute a violation of the mentioned rights and principles and – positively – in which **way Member States need to act** in order to respect investor's rights. Furthermore, it needs to state the **procedural** possibilities before national and EU courts as well as other **binding and non-binding dispute settlement** mechanisms that investors may use in case of violations of their rights.

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IV. Conclusion

The DIHK has supported the discussion on a reform of investment protection during the last years, for example with contributions to the TTIP consultation and the consultation on a Multilateral Investment Court, the survey on investment barriers and the survey on the need of Intra-EU BITs in Central and Eastern European countries (see Annex II) as well as – after academic counsel – with the Harnack-Haus Reflections. The DIHK would like to **contribute** with its experience and knowledge to the further development and elaboration of binding and non-binding mechanisms to protect (intra-EU) investments and is at any time at the disposal of the Commission.

Annex:

I. DIHK Response to the online questionnaire

II. DIHK Survey on the Need of Intra-EU Investment Protection in Central and Eastern Europe – Country Reports under participation of the German Chambers of Commerce Abroad, Chambers of Commerce and Industry and Enterprises

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Berlin, 1. November 2017

Annex I: DIHK Response to the Online Questionnaire

https://ec.europa.eu/info/consultations/finance-2017-investment-protection-mediation_en

2.1 Need for an EU framework on amicable dispute prevention and resolution

Question 1. Do you have any personal experience with using amicable dispute resolution methods such as mediation to prevent or resolve the following disputes with public authorities?

	Yes	No	Don't know/no opinion/not relevant
Disputes with public authorities based on a contract and concerning an investment	x		
Disputes with public authorities based on an international treaty and concerning an investment	x		
Other disputes with public authorities concerning an investment	x		

Question 1.1. Please briefly describe the dispute(s) with public authorities based on a contract and concerning an investment, mentioned in question 1 above (700 characters maximum):

As a business association, we do not have such disputes with public authorities. However, our member companies have sometimes such disputes, e.g. one company that had a mining concession for exploration and, on this account, according to domestic law also the right to obtain a concession for extraction. However, the national authorities did not grant the concession for extraction. The authorities and the national courts did not act according to the law and seemed to be corrupted by a local oligarch. The government of the Member State was only ready to negotiations because of the risk of an arbitration proceeding and because of the support from the German government.

Question 1.2. Please briefly describe the dispute(s) with public authorities based on an international treaty and concerning an investment, mentioned in question 1 above (700 characters maximum):

As a business association, we do not have such disputes with public authorities. However, our member companies have sometimes such disputes, e.g. companies working on solar energy: The reduction of subsidies also for existing installations caused massive losses and made investments unprofitable. Their interests have not been heard during the legislative process and they were forced to sue the Member State before national courts and/or arbitration tribunals under the Energy

Charter. This involves high risks and costs. As legal protection against legislation is restricted, legal remedies under domestic law alone do not guarantee complete protection against a violation of investor rights.

Question 1.3. Please briefly describe the other dispute(s) with public authorities concerning an investment, mentioned in question 1 above (700 characters maximum):

E.g., difficulties with market access, unfair treatment, discrimination in the application of competition law or in the acquisition of land, exclusion from public procurement procedures for specious reasons, legal changes that are directed against foreign companies, e.g. foreign banks or retailers, direct and indirect expropriation. Companies face a lack of legal certainty because of frequent, sometimes retroactive legal changes. In case of administrative wrongdoings officials are not willing to dialogue. Lengthy proceedings, inefficient and badly equipped courts, a lack of political independence and corruption make it difficult to enforce the rights before domestic courts (Survey Annex II).

Question 2. Do you believe that mediation is/can be effective to prevent disputes with public authorities? From 0 (not effective) to 5 (very effective): *3*

Question 2.1. Please explain why you selected this answer to question 2 (300 characters maximum):

Mediation can improve the mutual understanding and help to avoid problems in the implementation of the investment project and the violation of investor rights. But it does not always help; there is a need of early consultation, conciliation and arbitration, also to make states willing to dialogue.

Question 3. Do you believe that mediation is/can be effective to solve disputes with public authorities? From 0 (not effective) to 5 (very effective): *3*

Question 3.1. Please explain why you selected this answer to question 3 (300 characters maximum):

Mediation is common practice to solve disputes, even if it is not regulated. But it is not sufficient for effective investor protection which needs negotiations, conciliation and, most importantly, a binding mechanism with enforceable decisions as last resort, also to make states willing to dialogue.

Question 4. If you have any further comment on the use of mediation in preventing/resolving disputes between investors and public authorities, please include it here (700 characters maximum):

The Commission's plans go in the right direction. Different forms of amicable dispute settlement before arbitration are already common practice, even if this is not formally regulated. Encouraging investors and public authorities to use these instruments is good. A mediation framework and mediation agencies on national and EU level could be useful, particularly if the investors can refer to a Commission guidance that proposes to use them and that confirms their substantive rights. However, mediation is not sufficient. They need negotiations, conciliation and, most importantly, arbitration to obtain a binding, enforceable decision. Mediation can be only a complement, but not a substitute.

Question 5. Do you think that the options for mediation between public authorities and investors available in your Member State are:

NOTE: This question does not relate to cases in which there is a prior contract between an investor and a public authority that foresees an amicable dispute resolution method for disputes that arise under this contract or when the dispute can be qualified as a commercial dispute.

	Fully sufficient	A good basis but could be further improved	Not sufficient	Don't know / no opinion / not relevant
As regards scope of disputes covered		x		
As regards clarity of conditions for the recourse to mediation			x	
As regards clarity of the mediation procedure to be followed			x	
As regards the freedom of choice by the parties of the mediator		x		
As regards the possibility to receive compensation for losses according to a mediated settlement agreement		x		
As regards the time needed to conclude the procedure and receive compensation		x		
As regards transparency to third parties/public	x			

Question 6. On average, if you have experience investing and have been faced with a dispute in another Member State, do you think that the options for mediation between public authorities and investors available in other Member States are:

NOTE: The question does not relate to cases when there is a prior contract between an investor and a public authority that foresees an amicable dispute resolution method for disputes that arise under this contract or when the dispute can be qualified as a commercial dispute.

Please specify the Member State(s) where you faced a dispute:

□ Austria	□ Belgium	□ Bulgaria	□ Croatia
□ Cyprus	□ Czech Republic	□ Denmark	□ Estonia
□ Finland	□ France	□ Germany	□ Greece
□ Hungary	□ Ireland	□ Italy	□ Latvia
□ Lithuania	□ Luxembourg	□ Malta	□ Netherlands
□ Poland	□ Portugal	□ Romania	□ Slovak Republic
□ Slovenia	□ Spain	□ Sweden	□ United Kingdom

	Fully sufficient	A good basis but could be further improved	Not sufficient	Don't know / no opinion / not relevant	It depends on the Member State
As regards scope of disputes covered					x
As regards clarity of conditions for the recourse to mediation					x
As regards clarity of the mediation procedure to be followed					x
As regards the freedom of choice by the parties of the mediator					x
As regards the possibility to receive compensation for losses according to a mediated settlement agreement					x
As regards the time needed to conclude the procedure and receive compensation					x
As regards transparency to third parties/public					x

Question 7. If you replied "It depends on the Member State" to the previous question, please specify in which Member States options for mediation are sufficient and in which they are not, and why:

Question 7.1. Please specify the Member State(s) in which Member States options for mediation are sufficient:

□ Austria	□ Belgium	□ Bulgaria	□ Croatia
□ Cyprus	□ Czech Republic	□ Denmark	□ Estonia
□ Finland	□ France	□ Germany	□ Greece
□ Hungary	□ Ireland	□ Italy	□ Latvia
□ Lithuania	□ Luxembourg	□ Malta	□ Netherlands
□ Poland	□ Portugal	□ Romania	□ Slovak Republic
□ Slovenia	□ Spain	□ Sweden	□ United Kingdom

Question 7.2. Please specify the Member State(s) in which Member States options for mediation are not sufficient:

□ Austria	□ Belgium	□ Bulgaria	□ Croatia
□ Cyprus	□ Czech Republic	□ Denmark	□ Estonia
□ Finland	□ France	□ Germany	□ Greece
□ Hungary	□ Ireland	□ Italy	□ Latvia
□ Lithuania	□ Luxembourg	□ Malta	□ Netherlands
□ Poland	□ Portugal	□ Romania	□ Slovak Republic
□ Slovenia	□ Spain	□ Sweden	□ United Kingdom

Question 7.3. Please explain your answers to question 7.1 and 7.2 (1000 characters maximum):

DIHK does not know a Member State with a regulated framework for mediation between states and investors. However, this does not mean that informal negotiations and mediation are impossible. On the contrary, it is common practice to start with negotiations and sometimes conciliation or mediation, before a company starts arbitration or court proceedings, even if an underlying contract does not foresee these options. This is the case in Germany and other EU Member States. Often Intra-EU-BITs require preliminary negotiations. It helps to better understand the circumstances of the case and to preserve a long-term relationship between investor and state. This is in the interest both sides. Nevertheless, it is right that the openness of the public authorities to such dispute settlement mechanisms varies. In Eastern Europe mediation is less common. It could be easier to convince a national authority or government to use them if such an option is foreseen in EU law or a Commission guidance.

Question 8. Do you believe that minimum rules for a framework on prevention and amicable resolution of disputes between investors and public authorities should be designed at EU or at national level?

x EU level □ National level □ Don't know / no opinion / not relevant

Question 8.1. Please explain why you selected this answer to question 8 (500 characters maximum):

The framework serves to promote Intra-EU investments. Therefore, the particular needs of foreign investors have to be considered. They have more difficulties to understand the local circumstances and to find an amicable agreement with local authorities in case of a dispute. Hence an EU framework would be more helpful. It would also enhance the investors' confidence if the system abroad is similar to the one of his home country. However, the EU framework must fit to domestic laws.

2.2 Options for a framework on prevention and amicable resolution of disputes between investors and public authorities

Question 9. Should an EU network of investment contact points within national administrations be established?

x Yes □ No □ Don't know / no opinion / not relevant

Question 9.1. Please explain how you would see the role of such contact points and of the EU network of these contact points (1000 characters maximum):

National contact points (NCP) for investors could ensure that investors have a place where they can get information on their rights and on available procedures to settle a dispute. National authorities could obtain information on their duties. Furthermore, a neutral, not involved government official could have a second look at the case and encourage or even request the competent authority in finding a solution respecting the investor rights. The NCP should be able to make own proposals to the public authority concerned – even before a decision is taken. To achieve this, the NCP must be completely independent from other public authorities. It needs experts on EU and investment law and a strong position in the national government. A network of NCPs would allow that investors involve their home country NCP: Both NCPs of the home and host state could evaluate the case and make a proposal how to solve it. This could strengthen the investor protection EU-wide.

Question 10. Which of the characteristics below would be the most important for consideration in the design of an EU mediation framework? From 0 (not important) to 5 (very important)

	0	1	2	3	4	5	Don't know / No opinion / not relevant
Ability of the parties to freely choose a mediator amongst qualified/registered mediators						x	
Ability to choose a mediator from other Member States to help the parties communicate					x		
Ability to choose a mediator experienced in the sector concerned by the dispute						x	
Ensuring mediators are properly qualified						x	
High ethics/independence standards of the mediator						x	
Existence of a specific agency providing mediation services at the national level					x		
Existence of a specific agency providing mediation services at the EU level						x	

Existence of a specific agency at national level that can administer mediation services					x		
Existence of a specific agency at EU level that can administer mediation services					x		

Question 11. Which of the characteristics below would be the most important for consideration in the design of rules for mediation? From 0 (not important) to 5 (very important)

	0	1	2	3	4	5	Don't know / No opinion / not relevant
Clear rules on the types of disputes that can be covered by mediation					x		
Clear rules stating conditions under which investors and public authorities are able to engage in a mediation process					x		
Clear rules stating conditions under which public authorities are able to commit to a settlement agreement, including when compensation is agreed upon				x			
Clear rules on confidentiality of the mediation procedure						x	
Clear rules on how to preserve the public interest				x			
Clear rules on how long the mediation process should last						x	
Rules on minimum public transparency requirements about initiation of a mediation procedure and its results			x				
Involvement of concerned third parties in the mediation process				x			
Rules on enforcement of mediated settlement agreements				x			
Rules on relationship with court proceedings (such as impacts of starting a mediation on time limits to start litigation)						x	
Judicial review of mediated settlements			x				

Question 12. Can you identify other desirable characteristics/options that you believe should be considered in the design of a possible EU mediation framework/rules for mediation (700 characters maximum)?

The framework needs also provisions on other forms of amicable dispute resolution such as negotiations between the investor and the state and conciliation, that means that the third person does not only assist in finding a solution but also provides the parties with a non-binding settlement proposal. Most importantly, it also needs an effective, binding dispute settlement mechanism as demanded by the Council on 11 July 2017. Therefore, the Commission's proposal should go ahead and include arbitration. The existing Intra-EU BITs could be an example if certain reforms are made e.g. concerning the transparency and efficiency of the proceedings.

Question 13. For which types of disputes between investors and public authorities should mediation be available as a method of resolution/prevention of disputes (1000 characters maximum)?

The new alternative dispute settlement mechanism – including negotiations, mediation, conciliation and arbitration – should not be restricted to certain kind of disputes but it should be available for all disputes: on individual administrative decisions, acts or contracts but also beyond. Also when changes of the legislation lead to expropriation, discrimination or a violation of legitimate expectations it should be possible for the investor – at an early stage, but also later – to address the public authority, the government or the NCP or to ask for consultations.

Question 14. At what stage of proceedings should mediation procedures be available?

	Yes	No	Don't know/no opinion/not relevant
Before a decision/act is taken by the public authorities	x		
At the stage of the internal review of the decision/act in case of appeal in front of the competent public authorities	x		
Before undertaking litigation in court concerning the litigious decision/act taken by the public authorities	x		
Once litigation has started and before the judgement	x		
Once the litigious decision/act by the public authorities has been withdrawn (e.g. following a new decision/act or a court decision). In this case the objective of the mediation would to define the amount of compensation for losses, if any.	x		
Other	x		

Question 14.1. Please specify at what other stage of proceedings should mediation procedure be available (500 characters maximum)?

The scope of application should be wide. All stages of proceedings should be encompassed. There should be no definite list but a wide scope and at most examples in the recitals or a non-exhaustive list. The situations mentioned above, for example, do not include the case when the decision has been already taken but no internal or judicial review mechanism is available. Still, the investor should have the option to address a contact point or to initiate negotiations, mediation or arbitration.

2.3 Potential impacts

Question 15. Do you consider that access to an EU network of investment contact points to prevent disputes with public authorities could From 0 (not important) to 5 (very important):

	0	1	2	3	4	5	Don't know / No opinion / not relevant
Allow for better understanding of complex legal and economic circumstances of the case before the decision/act is taken or at the stage of internal administrative review.					x		
Improve the investment climate					x		
Be particularly beneficial for SMEs					x		
Reduce the likelihood of litigation in front of the courts					x		
Reduce expenditures by public authorities as fewer disputes might reach the litigation phase					x		
Help preserve a long-term relationship between investors and Member States					x		
Other reasons						x	

Question 15.1. Please specify what other reasons (500 characters maximum):

The network could ensure that investors get information on their rights and on available procedures to prevent or settle a dispute. National authorities could get information on their duties – even before a decision is taken. Both NCPs of the home and the host state could exchange their views on the dispute and make a proposal how to solve it, perhaps with support from an EU agency. In this way the application of EU investment law and the rule of law could improve EU wide.

Question 16. Do you consider that access to an EU mediation framework to solve/prevent disputes between investors and public authorities could. From 0 (not important) to 5 (very important)

	0	1	2	3	4	5	Don't know / No opinion / not relevant
Reduce costs for investors linked to resolution of disputes				x			
Reduce costs for public authorities linked to resolution of disputes				x			
Allow for more flexibility when dealing with a dispute				x			
Allow for better understanding of complex legal and economic circumstances of the case					x		
Improve investment climate					x		
Be particularly important for SMEs					x		
Reduce the likelihood of litigation in front of the courts					x		
Ensure a consistent approach towards mediation between investors and public authorities across the EU					x		
Reduce expenditures by public authorities as fewer disputes might reach litigation phase				x			
Help preserve a long-term relationship between investors and Member States					x		
Other reasons						x	

Question 16.1. Please specify what other reasons (500 characters maximum):

Mediation can achieve these goals only to a certain point. It is not sufficient for effective protection of investors. They need also other forms of amicable dispute resolution such as negotiations between the investor and the state, conciliation and, mainly, an effective, binding dispute settlement mechanism as last resort. Therefore, the Commission's proposal should go ahead and include these mechanisms in order to achieve these goals.

Question 17. Under which option do you think the benefits mentioned above would be achieved in the most efficient manner? From 0 (no impact) to 5 (strong impact)

	0	1	2	3	4	5	Don't know / No opinion / not relevant
EU mediation framework enabling mediation between investors and the relevant national authorities				x			
Agencies at national level which could administer the mediation services or act as mediators				x			
EU-wide mediation agency which could administer the mediation services or act as a mediators					x		

Question 18. For an action undertaken following one of the options above, no impacts on fundamental rights have been identified. Do you consider that there could be an impact on fundamental rights?

x Yes □ No □ Don't know / no opinion / not relevant

Question 19. If you do consider that there could be an impact on fundamental rights, please specify which one, identifying it in relation to each specific option (700 characters maximum):

Investment protection through mediation and arbitration proceedings strengthens the protection of the fundamental rights of the investors, particularly their freedom to conduct a business in Art. 16 of the Charter of Fundamental Rights of the EU, the right to property in Art. 17 as well as the right to an effective remedy and to a fair trial in Art. 47. As legal protection of these rights is still deficient in some EU Member States (s. Annex II) it is necessary to uphold the existing Intra-EU BITs or – if they shall be terminated – to establish an equally efficient system including not only mediation but also arbitration. In contrast, third parties' rights are, in principle, not at risk.

Question 20. For an action undertaken following one of the options above, no clear environmental impacts have been identified. Do you consider that there could be any environmental impacts?

□ Yes x No □ Don't know / no opinion / not relevant

Question 21. If you do consider that there could be an impact on environmental impacts, please specify which one, identifying it in relation to each specific option (700 characters maximum): –

Question 22. For an action undertaken following one of the options above, no social impacts have been identified. Do you consider that there could be any social impacts?

□ Yes x No □ Don't know / no opinion / not relevant

Question 23. If you do consider that there could be an impact on social impacts, please specify which one, identifying it in relation to each specific option (700 characters maximum): –

2.4. Clarification of existing rights of cross-border EU investors in EU law

Question 24. What are the most important problems facing intra-EU investors that should be addressed in a guidance document? (e.g. difficulties in accessing the market, treatment after establishment, discrimination, expropriation, administrative wrongdoings, sudden and unexpected changes in the legal environment) (1000 characters maximum)

Although the efficiency of the legal systems is improving in most of the Member States concerned, they are often still deficient (s. Annex II): a lack of legal certainty because of frequent, sometimes retroactive legal changes; administrative wrongdoings; undiscerning civil servants and government officials that are not willing to dialogue and to consider requirements from EU or international law; lengthy proceedings and inefficient and badly equipped courts; a lack of transparency and discrimination in public procurement; sometimes even direct or indirect expropriation; a lack of political independence and reservations against foreign investors; corruption mainly in administrations but sometimes also in courts. At times competitors and local oligarchs use these deficiencies and loopholes to weaken foreign investors and push them out of the market. These difficulties arise in accessing the market but also after establishment; therefore, both aspects should be addressed in the guidance.

Question 25. Which rules and principles protecting intra-EU investors create the highest degree of complexity and therefore require clarification as a priority? Does the complexity concern rules on free movement of capital and freedom of establishment, fundamental rights of investors (the right to property and the freedom to conduct business), or the general principles of Union law (the principle of nondiscrimination, the principle of legal certainty, the protection of legitimate expectations)? (1000 characters maximum)

In a guidance document, the Commission should clarify all existing rules and principles that can help investors that are facing the problems mentioned in Question No. 24. This concerns, on the one hand, primary law such as the mentioned fundamental rights (also the right to an effective remedy and to a fair trial), the cited fundamental freedoms and the relevant general principles of EU law (also the principle of non-retroactivity). On the other hand, secondary law should be explained where problems persist. This includes, e.g., public procurement law and sector specific regulation that opens certain sectors to competition. Where the legal field is very complex and wide, a guidance could include references to other guidance instruments, for example in State Aid Law. Explained should be the substantive rights including exceptions but also the procedural possibilities before national and EU courts as well as other binding and non-binding dispute settlement mechanisms.

3. Additional information

Should you wish to provide additional information (e.g. a position paper, report) or raise specific points not covered by the questionnaire, you can upload your additional document(s).

DIHK Position Paper including the Response to the Online Questionnaire and

DIHK Survey on the Need of Intra-EU Investment Protection in Central and Eastern Europe – Country Reports under participation of the German Chambers of Commerce Abroad, Chambers of Commerce and Industry and Enterprises

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Berlin, 1. November 2017

Annex II: DIHK Survey on the Need of Intra-EU Investment Protection in Central and Eastern Europe – Country Reports under participation of the German Chambers of Commerce Abroad, Chambers of Commerce and Industry and Enterprises

Summary

Enterprises wishing to make cross-border investments in the EU Single Market must overcome **numerous obstacles**: On the one hand, there are **bureaucratic** and cost-intensive impediments that are comparable to bureaucracy in Germany. On the other hand, there are **discriminations** compared with domestic companies, **unfair treatment** and **deficiencies in national legal protection**, as shown in this survey carried out in 2017 among the German Chambers of Commerce Abroad (AHKs), Chambers of Commerce and Industry (IHKs) and Enterprises for those Central and Eastern European EU Member States, with which Germany currently has a bilateral investment protection agreements (intra-EU BITs).

The conclusion is that the freedom of establishment and the free movement of capital in the EU internal market are far from being fully realised. Although the application of EU law, legal certainty and the efficiency of legal systems have improved in most Member States concerned, they are often still inadequate: a **lack of legal certainty** due to frequent, sometimes retroactive legislative changes; **violations of EU or national law** by the administration; unreasonable civil servants and government officials not willing to dialogue and to apply international and EU law; **lengthy administrative and judicial proceedings** during which investors are hardly informed; **inefficient and badly equipped courts**; **discrimination** and a lack of transparency in public procurement; a lack of political independence and **reservations** against foreign investors; **corruption** especially in administrations, but sometimes also in courts. All this worries investors even if other location factors and the expected business opportunities also play an important and often more important role.

The **intra-EU BITs**, especially in Central and Eastern Europe, are, therefore, **still important** for German enterprises. With the investor-state arbitration tribunals, they do not only provide a **suitable dispute settlement mechanism** to solve complex disputes quickly, effectively and with high quality results. They are particularly important because of their **preventive effect**: since the investor could initiate arbitration, if necessary, there is an additional incentive on the part of the state to act fairly and lawfully and also to improve its own legal system and the rule of law. In addition, the enterprise has a better negotiating position, so that a **solution can often already be reached through negotiations** without the need of arbitration proceedings, which otherwise would not be achieved. Investor-state arbitration is, thus, a door opener for **constructive dialogue** and leads to a more rational debate on the part of state authorities. Often, enterprises are supported by national embassies and chambers of commerce abroad, whereas the **EU Commission helps only to a limited extent** for political reasons.

The **termination** of the intra-EU BITs could put investors in great trouble and lead to a **negative impact on the investment climate**. The only alternative could be an **EU-wide** investment

protection agreement or a similar **dispute settlement mechanism**. However, this would have to be **binding and** similarly **effective**. The decisions must be enforceable. A European arbitration mechanism could be advantageous compared to the existing investor-state arbitration if it was **faster and less expensive** than before, particularly for SMEs.

Country Reports

Bulgaria

- The Intra-EU BITs are considered very important for protecting existing investments and attracting new ones. Their preventive effect is of great importance. They provide additional legal protection and help particularly as a last resort in the negotiations, when ministries and authorities act in a grossly illegal manner.
- The national legal system of Bulgaria currently does not provide adequate replacement; it is not efficient. The judiciary in Bulgaria is uncertain and unstable. Judges are not sufficiently qualified and not independent. There are unequal and contradictory case law and corruption.
- In particular, when local enterprises are well connected with the local authorities and courts, policies are sometimes deliberately taken against foreign undertakings and the local business is preferred, often for specious reasons, for example awarding concessions or concerning competition law issues. In many cases, the national courts do not help, because the judges there are also bribed.
- For political reasons, the EU Commission is very reluctant to commit itself to support individual companies in case of infringements – unlike the German Embassy, the German Foreign Office and the Federal Ministry of Economics, which accompany the proceedings as observers and in some cases also support the enterprises in negotiations with the government.
- In addition, frequent legislative changes lead to legal uncertainty, even if they are rarely retroactive. Improving the rule of law is seen as a prerequisite for more investment.
- From the business' point of view, decisive steps are needed to implement a judicial reform, to improve the quality of administrative services, to improve transparency in public procurement and to combat corruption. An association of chambers with the participation of the German AHK demanded in an open letter an effective implementation of the judicial reform and, particularly, highly qualified and independent judges.
- This assessment is also confirmed by the EU Commission's report on Bulgaria's progress in the framework of the Cooperation and Verification Mechanism (COM (2017) 43 v. 25.1.2017). It notes that, despite some progress in the implementation of the judicial reform, major challenges remain and that particularly the implementation of the national anti-corruption strategy is still at an early stage.
- The abolition of intra-EU BITs will certainly leave a negative impact on the investment climate.

Key figures:

- AHK Economic Outlook 2017[1]: Enterprises are still dissatisfied with the ineffective public administration (53 % dissatisfied or very dissatisfied), the lack of legal certainty (60 %), ineffective combating of corruption and crime (90 %), the lack of transparency in public procurement (75 %) and the unpredictability of the economic policy (58 %). All these are obstacles which are highlighted once again by the enterprises and which put Bulgaria on one of the last places in Central and Eastern Europe. Nevertheless, 90 % of the undertakings interviewed would invest again in Bulgaria. 47% of the enterprises plan for more capital expenditure in 2017.
- World Justice Project Rule of Law Index 2016[2]: Rank 53, with particularly low scores in the area of corruption; there is not a single sector where Bulgaria is in the top third
- Corruption Perceptions Index CPI 2016[3]: Rank 75 with consistent bad score over the last few years
- Global Competitiveness Index 2016-2017[4]: Rank 97 in the sector institutions
- UNCTAD Investment Dispute Settlement[5]: 8 cases, 7 of them from EU countries

Croatia

- For companies, an effective legal system, effective courts and procedures as well as the fight against corruption are fundamentally important issues. They are in demand, even if other location factors such as taxes, levies and professionals are more important for the investment decision and even if bureaucratic obstacles disturb more in daily business.
- Satisfaction with legal certainty and the effectiveness of judicial proceedings has increased. Judicial proceedings get faster and better. However, the topic is still in the lower third of the satisfaction scale.
- Public administration is ranked lowest among all location factors. The reasons are complex administrative structures with a lack of coordination between the different administrative levels and sometimes lengthy licensing procedures. Business calls for an administrative reform, a simplification of regulations and an acceleration of licensing procedures.

[1] The AHK Economic Outlooks are held in parallel in 15 CEE countries each February. A majority of the participating companies belong to the category of SMEs with less than 250 employees. More information can be found on the websites of the AHKs, which can be found at www.ahk.de.
[2] World Justice Project, https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf, part. p. 21, 26.
[3] Transparency International, http://files.transparency.org/content/download/2089/13368/file/2016_CPIReport_EN.pdf, part. p. 4.
[4] World Economic Forum, http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf, part. p. 46, 47.
[5] UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry (last time checked on 1.9.2017).

- A major problem is the frequent introduction of new laws or changes to existing regulatory measures; this often causes uncertainty, e.g. in case of taxation and spatial planning, even if the rules are in general not applicable retrospectively. The unpredictability of economic policy is criticised; enterprises want more regulatory stability and reliability.
- Intransparent tenders sometimes create problems for undertakings; sometimes they have the impression that they have already been formulated for a specific – local – provider. There is already an initiative for more transparency, together with other chambers.
- There is no experience of concrete discrimination. In general, laws apply equally. However, distortions of competition are reported to the benefit of state-owned enterprises, which would hinder foreign investment. Furthermore, Croatia is accused that the regulations on stock exchange regulation would not be enforced to the detriment of German companies.
- Corruption is a factor that slows down business development. However, there are also reports, e.g. from contractors, which never had to pay anything. Also inside courts corruption is rare.

Key figures:

- AHK Economic Outlook 2017: In addition to the high tax burden and the tax system and authorities the public administration, corruption and the unpredictability of economic policy continue to be considered as a brake on business development. At the same time, 80 % of the undertakings interviewed would invest in Croatia again. Around 47 % of the enterprises said that their capital expenditures are rising.
- World Justice Project Rule of Law Index 2016: Rank 39
- Corruption Perceptions Index CPI 2016: Rank 55
- Global Competitiveness Index 2016-2017: Rank 89 in the sector institutions
- UNCTAD Investment Dispute Settlement: 8 cases, 7 of them from EU countries

Czech Republic

- The location factors legal certainty, combatting corruption, public administration and transparency of public procurement are not good in the Czech Republic. However, from the point of view of many foreign investors they are balanced with other factors such as the central location, lower costs and tax benefits.
- Discrimination against foreign investors is rather uncommon and limited to few cases.
- There were difficulties particularly in the photovoltaic industry. Support for renewable energy, which was also supposed to attract foreign investment, was not granted as promised. The Commission even helped in this: first, it did not consider funding of renewable energies as state aid, but later after the investments had been made it changed its view, thus protecting the Czech Republic's approach depriving investors of their investment. It did not concern only

foreign investors. Nevertheless, numerous complaints are being filed, especially by foreign investors.

- The investment protection agreements are appreciated, particularly for its preventive effect. Unfortunately, they had to be used on a large scale for arbitration proceedings as the Czech government acts illegally against investors.

Key figures:

- AHK Economic Outlook 2017: As regards legal certainty (2.62), corruption (2.27), public administration (2.40) and public procurement transparency (2.35) companies are dissatisfied; only the predictability of economic policy (3.20) is evaluated slightly better (numbers are based on a scale of 1 = dissatisfied to 5 = very satisfied, unlike in other surveys). However, the willingness to invest is rather rising (41 %). 93 % would invest again in the Czech Republic. Overall, the Czech Republic is one of the top 3 investment locations among the CEE states.
- World Justice Project Rule of Law Index 2016: Rank 17
- Corruption Perceptions Index CPI 2016: Rank 47
- Global Competitiveness Index 2016-2017: Rank 54 in the sector institutions
- UNCTAD Investment Dispute Settlement: 34 cases, 29 of them from EU countries

Estonia

- In Estonia, enterprises are relatively satisfied with the legal system and the public administration.
- The AHK has no experience with unequal treatment of foreign investors. The government is very interested in foreign investors.
- Corruption is not a big problem.
- New regulations are frequent; however, retroactive changes are no problem for the enterprises.
- Individual cases in which legal violations occur cannot be ruled out.
- Investment protection is not a big issue.

Key figures:

- AHK Economic Outlook 2017: Regarding the legal certainty (2,13), the predictability of the economic policy (3,18), corruption (2,33), the public administration (2,52) and the transparency of public procurement (2,64) companies are still relatively satisfied (numbers are based on a scale from 1 = very good to 5 = poor). But the tendency is going down again, in particular concerning the predictability and the public administration. The willingness to invest is not quite as great as in the previous year. Only 83 % of companies would invest again in Estonia – 10 percentage points less than last year.

- World Justice Project Rule of Law Index 2016: Rank 14
- Corruption Perceptions Index CPI 2016: Rank 22
- Global Competitiveness Index 2016-2017: Rank 23 in the sector institutions
- UNCTAD Investment Dispute Settlement: 4 cases, 3 of them from EU countries

Greece

- Intra-EU BITs are considered very important for protecting existing investments and attracting new ones. They provide additional legal protection and help particularly as a possible last resort in negotiations, when ministries and authorities act in a grossly illegal manner.
- The national legal system currently does not provide adequate replacement. It is not efficient, the judges are overburdened and judicial proceedings take years. Even if there are attempts at reform, experience must be gained first.
- Arbitration clauses are already regularly included in contracts. In the event of a termination of the intra-EU BITs, enterprises would probably try even more to agree on arbitration and mediation clauses. The AHK has set up an arbitration and mediation body to provide enterprises with an alternative dispute resolution mechanism.
- In addition, legislative changes lead to legal uncertainty; they are partly retroactive, e.g. in tax and energy law. For example, the feed-in tariffs in the photovoltaic sector have subsequently been sharply reduced, which has led to numerous legal disputes.
- The EU Commission usually does not intervene in case of infringements. At most, it makes recommendations.
- Furthermore, oligarchs often make it difficult for foreign investors to gain access to the market. Many times, they are preferred in tenders, in some cases the tenders are tailored directly to them. Foreign companies often look for local partners to help them entering the Greek market. For SMEs it is even harder in that respect.
- Corruption is less common in courts, even though the pressure on judges is considerable due to the low salaries and work overload.
- If the intra-EU BITs should be removed, it would be useful to replace them with an EU mechanism to avoid the loss of an effective instrument of legal protection.

Key figures:

- World Justice Project Rule of Law Index 2016: Rank 41
- Corruption Perceptions Index CPI 2016: Rank 69
- Global Competitiveness Index 2016-2017: Rank 23 in the sector institutions
- UNCTAD Investment Dispute Settlement: 3 cases, 2 of them from EU countries

Hungary

- German and other foreign companies are still dissatisfied with legal certainty. The location factors predictability of economic policy, combatting corruption, public administration and the transparency of public procurement are partly considered even worse than before. In addition, concerns over political and social stability and the development of the rule of law have been arising during the last years.
- In recent years there have been repeated cases of legislative interventions that de facto deprived German enterprises of their business foundations (for example, in the area of municipal waste management, pharmacy chains, land ownership).
- Although such cases were generally addressed towards the European Commission, this was not always successful. Also, when the Commission decided to pursue infringement proceedings, as concerning the acquisition of agricultural land, there was little progress. In fact, the Commission has virtually no power to influence Hungary if it refuses to transpose EU law.
- In the future, due to the public rhetoric of the Hungarian Government (for example, the government's PR campaign called “Stop Brussels”), it is unlikely that EU legislation will be implemented in the future fully and timely. Rather, the rule of law and democracy seem more and more in danger. This worries investors.
- Several arbitration proceedings against foreign companies are currently pending against Hungary. Investment protection agreements are often the only means of pressure that helps in negotiations. The continuation of investment protection agreements is, therefore, considered very important.

Key figures:

- AHK Economic Outlook 2017: As regards legal certainty (3.38), predictability (3.66), corruption (4.12), public administration (3.26) and transparency of public procurement (3.93) companies are very dissatisfied (numbers are based on a scale from 1 = very satisfied to 5 = dissatisfied). These location factors are at the end of the scale. The trend in recent years is slightly positive. However, compared to 2005, the balance sheet is negative. Nevertheless, the willingness to invest is rather rising (40%). 81% would invest again in Hungary.
- World Justice Project Rule of Law Index 2016: Rank 49, predominantly only evaluations in the middle third
- Corruption Perceptions Index CPI 2016: Rank 57
- Global Competitiveness Index 2016-2017: Rank 65 in the sector institutions
- UNCTAD Investment Dispute Settlement: 14 cases, 13 of them from EU countries

Latvia

- Enterprises are dissatisfied with the public administration, the lack of legal certainty, corruption, the lack of transparency in public procurement and the unpredictability of economic policy.
- For enterprises, which are obtaining initial information about Latvia to settle there, the issue of effective legal protection is less significant than other location factors.
- For investors who encounter difficulties, however, the possibility of arbitration is of great importance. Intra-EU BITs are considered very important for the protection of existing investments. Their preventive protective effect is particularly important. They provide additional legal protection and help particularly as a last resort in negotiations, when ministries and authorities act in a grossly illegal manner. In several cases undertakings could be helped.
- Unfair and unequal treatment are not very common, but they exist, e.g. in competition law and in public procurement.
- Legal proceedings often take a long time; there is a lack of well-trained judges.
- Corruption is unfortunately also prevalent in the courts, in the civil courts more than in the administrative courts.
- Interim legal protection and insolvency law are sometimes abused to force competitors out of the market.
- The European Commission does not support in cases where internal market law is not properly implemented and investors at disadvantage.
- Arbitration clauses are an issue for enterprises. However, there are doubts on the qualification of local arbitrators.

Key figures

- AHK Economic Outlook 2017: As regards legal certainty (3.17), the predictability of economic policy (3.53), corruption (3.69), the public administration (3.49) and the lack of transparency in public procurement (3.64) enterprises remain dissatisfied (numbers are based on a scale from 1 = very good to 5 = poor). These location factors are at the bottom of the satisfaction scale. The tendency in the last three years is negative. Only 78 % of the enterprises interviewed would invest again in Latvia. At the same time, however, the willingness to invest is rising (44 %).
- World Justice Project Rule of Law Index 2016: no information
- Corruption Perceptions Index CPI 2016: Rank 44
- Global Competitiveness Index 2016-2017: Rank 64 in the sector institutions
- UNCTAD Investment Dispute Settlement: 7 cases, 4 of them from EU countries

Lithuania

- While legal certainty is evaluated better in Lithuania, enterprises remain dissatisfied with the public administration, corruption, the lack of transparency in public procurement and the unpredictability of economic policy.
- For companies obtaining initial information about Lithuania to settle there, the issue of effective legal protection is less significant than other location factors.
- For investors who encounter difficulties, however, the possibility of arbitration is important. Intra-EU BITs are considered important for Lithuania for the protection of existing investments. Their preventive effect is of great importance. They provide additional legal protection and help particularly as a last resort in negotiations, when ministries and authorities act in a grossly illegal manner.
- Unfair and unequal treatment is not very common. Often, public authorities want foreign suppliers because they expect the quality to be higher. Nevertheless, in individual cases there is also discrimination. In public procurement, foreign companies often use joint ventures with local enterprises in order to use their knowledge of local conditions, but also to prevent discrimination.
- Legal proceedings often take a long time. There is a lack of well-trained judges.
- Corruption is unfortunately still a problem.
- Arbitration clauses are an issue for undertakings, but local arbitration is not yet well developed.

Key figures:

- AHK Economic Outlook 2017: As regards legal certainty (2.83), the predictability of economic policy (3.21), corruption (3.40), the public administration (3.08) and the lack of transparency in public procurement (3.52) companies remain dissatisfied (numbers are based on a scale from 1 = very good to 5 = poor). These location factors are at the end of the satisfaction scale. The trend over the last three years has been stagnating to negative, especially with regard to corruption and public procurement. Nevertheless, 88 % of the undertakings would invest again in Lithuania. At the same time, the willingness to invest is rising (49 %).
- World Justice Project Rule of Law Index 2016: no information
- Corruption Perceptions Index CPI 2016: Rank 38
- Global Competitiveness Index 2016-2017: Rank 51 in the sector institutions
- UNCTAD Investment Dispute Settlement: 5 cases, 3 of them from EU countries

Poland

- Business remains dissatisfied with regard to legal certainty, the predictability of economic policy and the transparency of public procurement. In addition, concerns over political and social stability and the development of the rule of law have been arising during the last years.
- The efficiency of the local legal systems is an important location factor for investors of all sizes. For larger medium-sized enterprises to large investors, investment protection plays a role in the investment decision, especially the preventive effect of BITs. For SMEs, on the other hand, they have little or no relevance to the investment decision and choice of location, not least because of the lack of knowledge about the problems that might arise and about the opportunities afforded by investment protection.
- Expropriations are not known. Discrimination is occasionally discussed, for example, in relation to a bill introducing a tax on retail sales above a certain annual net turnover or with a certain sales area. This would mainly affect foreign groups of companies. However, an intervention by the European Commission helped here.
- The lack of efficiency of the Polish courts is a fundamental problem. Lengthy proceedings are common. They are above average in civil proceedings involving foreign investors. In the field of private construction law, this has led to payment defaults or delays and thus to a risk of insolvency for German enterprises. A targeted approach against German investors is, however, regularly not visible.
- In principle, strengthening arbitration is welcomed. ISDS has also been widely used in the past. An EU-wide investment agreement is considered a useful solution.

Key figures:

- AHK Economic Outlook 2017: With regard to legal certainty (2.75), the predictability of economic policy (2.24), corruption (3.01), the public administration and the transparency of public procurement (2.80), enterprises are dissatisfied (figures are based – unlike the other surveys – on a scale of 1 = dissatisfied to 5 = very satisfied). Nevertheless, 95.6 % of companies would invest in Poland again. This puts Poland among the first in terms of investment attractiveness among CEE countries.
- World Justice Project Rule of Law Index 2016: Rank 22
- Corruption Perceptions Index CPI 2016: Rank 29
- Global Competitiveness Index 2016-2017: Rank 65 in the sector institutions
- UNCTAD Investment Dispute Settlement: 23 cases, 15 of them from EU countries

Romania

- According to the AHK Romania German companies attach particular importance to the fight against corruption and the rule of law. AHK member companies emphasise time and again that predictability, stability, transparency and legal certainty are important in order to maintain confidence in the location and to plan and implement further investments. An efficient legal system – in terms of legal protection against business partners, but also against interference by the state – is important to companies: Experience has shown that investors search for information before they get involved in Romania, in particular with regard to legal certainty.
- With the new political leadership since autumn 2016, the uncertainty and unpredictability in economic life has increased according to the Economic Outlook 2017 of the AHK Romania. Confidence in the government has diminished and with it the hope that the necessary steps will be taken to promote reforms such as the modernisation of administrative structures and the continuation of the fight against corruption.
- In terms of corruption, the Romanian legal system and the judiciary have made further progress in recent years. The measures and developments, e.g. the condemnation of high-level political decision-makers and the commitment of the relevant institutions had led to positive reports under the Cooperation and Verification Mechanism (CVM) and also changed the perception of businesses positively. However, envisaged legislative changes question whether the newly elected government has the will to continue combatting corruption without compromise. This leads to a strong uncertainty among German investors. 62 % of the enterprises were dissatisfied or very dissatisfied with the fight against corruption (only 26 % in 2016) and the number of satisfied respondents dropped to 17 % (2016: 28 %).
- With regard to the public administration, there is also room for further improvement with 49 % of dissatisfied respondents.
- As regards legal certainty, no improvements can be reported. Frequent and unexpected legal changes over the past two years, including in retail and waste management, and in tax and criminal law have led to concerns. More than two-thirds of German companies are now dissatisfied with the predictability of economic policy. The companies are dissatisfied because of the political instability and the resulting change of contact persons. In addition, the bureaucracy and the slow processing of applications still cause many problems. In the area of renewable energy promotion, there have also been cuts in recent years that make investments unprofitable. Their legality has been questioned and is subject to legal proceedings and arbitration. However, this affects all economic operators without discrimination. Targeted discrimination against German enterprises is not known.
- With regard to the transparency of public procurement, half of the companies are still dissatisfied. The AHK hopes that a new law will create a clear and fair framework for awards in the future and improve the situation for companies. So far, however, undertakings have not been changed to a more positive evaluation.

- In general, arbitration tribunals are considered useful, even if the local legal protection system is not seen as inefficient as in other CEE states.
- In recent years, there have been several arbitration procedures – partly with success (Eurofood, Micula), partly without (Rompetrol). In the field of renewable energy, several companies have taken legal action.

Key figures:

- AHK Economic Outlook 2017 (Results of the Survey): Mostly dissatisfied are the enterprises in particular with regard to the predictability of economic policy (69 % dissatisfied or very dissatisfied), legal certainty (52 %) and – more recently – the fight against corruption (62 %). In terms of the transparency of public procurement 49 % are dissatisfied or very dissatisfied and 48 % concerning the public administration. Only 37 % of enterprises expect their capital expenditures to rise, while 21 % anticipate a negative trend. After all, 88 % of companies would invest in Romania again.
- World Justice Project Rule of Law Index 2016: Rank 32
- Corruption Perceptions Index CPI 2016: Rank 57
- Global Competitiveness Index 2016-2017: Rank 92 in the sector institutions
- UNCTAD Investment Dispute Settlement: 13 cases, 8 of them from EU countries

Slovakia

- The location factors of legal security, public administration, predictability of economic policy, combatting corruption and transparency in public procurement have been lagging behind for many years. The tendency of the last years is also negative. Although Slovakia is open to foreign investors and even if other location factors speak in favour of Slovakia, this makes investment difficult.
- Judicial proceedings take a long time, even if the legal situation is relatively clear.
- When crimes are committed against foreign companies, criminal proceedings do not provide protection as they too are not effectively pursued by the investigative authorities. Instead, enterprises have the impression that they are sometimes even used to spy the foreign undertakings.
- Corruption is still a common, serious problem.
- Even if a reform of procurement law has begun, this does not work yet. Corruption is currently widespread.
- Many companies attempt to include clauses on the application of German law and German jurisdiction in their contracts. Also arbitration becomes more and more an alternative. Investment protection is considered a good alternative and last resort for emergency situations.

- In some cases, the German Embassy and the AHK supported enterprises. However, they too are sometimes helpless in the face of the government's inactivity. For political reasons, the EU Commission is very reluctant to support individual companies.
- There were also difficulties in the photovoltaic sector in Slovakia, which, however, did not only affect foreign investors.
- The bilateral chambers and other relevant business associations launched a Rule of Law Initiative, which developed an action plan. The main objectives are to improve the transparency and the predictability of the legislative process, to combat corruption that is harmful to the "Slovak brand", and to have a transparent and effective judiciary as a strong base for domestic and foreign investors.

Key figures:

- AHK Economic Outlook 2017: With regard to legal certainty (4), predictability of economic policy (3,59), corruption (4,33), public administration (3,66) and transparency of public procurement (4,17) companies are very dissatisfied (figures of are on a scale of 1 = very satisfied to 5 = extremely dissatisfied). They even see deterioration. Only 79 % of the enterprises would choose Slovakia again as an investment location. However, 37 % of companies expect capital expenditures to increase compared to the previous year. In terms of the most attractive investment locations among the CEE countries, Slovakia is in the front despite of the difficulties.
- World Justice Project Rule of Law Index 2016: no information
- Corruption Perceptions Index CPI 2016: Rank 54
- Global Competitiveness Index 2016-2017: Rank 102 in the sector institutions
- UNCTAD Investment Dispute Settlement: 13 cases, 10 of them from EU countries

Slovenia

- The location factors combatting corruption and public administration have been at the very end for years. This hampers investment although Slovenia is, in general, open to foreign investors. Legal certainty and the predictability of economic policy have improved and enterprises are mostly satisfied with the legal system despite of the sometimes excessive bureaucracy.
- Even if the surveys concerning public procurement have improved, there are still significant problems. The companies are threatened with unfair treatment as there is currently no effective legal protection in the review process: The National Audit Commission is not a court according to EU law. Its members are not judges and have no comparable independence. They are not obliged to take account of all procedural guarantees under Article 6 ECHR. Legal protection against their decisions is limited. As a result, there is a risk of unfair treatment, especially of foreign investors. A complaint to the EU Commission for incomplete implementation of EU law is supported by the AHK.

- An Arbitration Organisation for Commercial Matters has been established as Evropski Center za Reševanje Sporov (European Center for dispute resolution, ECDR) in Ljubljana. Whether it would also support investor-state disputes is unknown.
- An EU act or guide supporting informal procedures and arbitration would be welcomed.

Key figures:

- AHK Economic Outlook 2017: There have been some improvements in 2017 compared to the very negative surveys from previous years, especially in terms of legal certainty. Nevertheless, more than half of the enterprises remain dissatisfied with the fight against corruption (71 %) and the public administration (57 %). Almost half of the companies are dissatisfied in terms of transparency of public procurement (48 %) and the predictability of economic policy (49 %). Only in terms of legal certainty Slovenia gets better results with “only” 39 % dissatisfaction. However, 90 % of enterprises would choose Slovenia again as an investment destination – more than last year (81 %) – and 35 % of companies expect capital expenditure to increase compared to the previous year.
- World Justice Project Rule of Law Index 2016: Rank 27
- Corruption Perceptions Index CPI 2016: Rank 31
- Global Competitiveness Index 2016-2017: Rank 58 in the sector institutions
- UNCTAD Investment Dispute Settlement: 3 cases, 3 of them from EU countries

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