

Webinar on Intra-EU Investment Protection

Trainer's Manual and Factsheet

Background of the training:

The European Union's single market is a unique area of investment opportunities in which EU law guarantees investors with a high level of protection. Cross-border investors in the Union may invoke directly applicable EU rights which have supremacy over national law. Together with the Court of Justice of the EU ("CJEU") through the preliminary reference procedure national judges must ensure the full application of EU law and judicial protection of the rights of individuals in all Member States.

The national judges have a unique role and responsibility to implement EU law and protect intra-EU investments, however, to ensure this, it is important to organise training, so that judges in the national jurisdiction:

- have the relevant knowledge on the EU legislation,
- are able to recognize and understand the EU aspect of the investment protection in pending cases,
- interpret their own role to implement EU law correctly and
- are prepared to take responsibility of applying EU law directly even over and against national legislation.

Governments have encouraged cross-border investments by concluding bilateral investment treaties (BITs) which foresee various protection standards, the violation of which may be claimed before investor-State arbitration tribunals. Some countries with which EU Member States had previously concluded BITs have thereafter joined the European Union. Thus, the substantive rules of BITs between Member States ("intra-EU BITs") became a parallel treaty system overlapping with single market rules. Furthermore, intra-EU BITs confer rights only to investors from one of the two Member States which are contracting parties, contrary to the principle of non-discrimination among EU investors within the single market under EU law. In addition, by foreseeing arbitration as the alternative system of dispute resolution, intra-EU BITs take away from the national judiciary litigation concerning national measures and involving EU law.

As a result, in the *Achmea* judgment the CJEU ruled that investor-State arbitration clauses in intra-EU BITs are unlawful, since the arbitrators adjudicating the dispute may be in need to apply EU law without having a standing to initiate a preliminary ruling procedure on the correct interpretation and application of EU law before the CJEU. Following this landmark decision, the European Commission started a procedure to terminate the intra-EU BITs which eventually resulted in the Agreement on the termination of BITs between the MS of the EU in 2020. In the aftermath of the *Achmea* judgment, the unlawfulness of intra-EU investor-State arbitration may result in the perception that intra-EU investors are left out in the cold in terms of adequate substantive and procedural protection. To the contrary, as already mentioned, the EU legal system protects cross-border investors in the single market. In order to remind of the most relevant substantive and procedural standards in EU law for the treatment of cross-border investments in the Union, the European Commission issued the communication on the protection of intra-EU investment.

The training includes an introductory e-learning course on intra-EU investment protection and the CJEU preliminary reference procedure, and a 1.5-day online webinar.

Aim of the training:

The general objective of the training is to raise awareness among judges about the EU legal framework in the field of cross-border investment protection between EU Member States. Focus lies on the freedoms and principles protecting intra-EU investment, including free movement of capital, freedom of establishment, expropriation, protection of legitimate expectations as well as the preliminary reference procedure.

Learning objective:

At the end of the training the participants will be able to:

- answer how they can best access and understand relevant intra-EU investment protection rules;
- reflect on practices they can adopt in their particular jurisdiction and in accordance with the relevant rules, to ensure the ethical standards of the profession are maintained;
- identify the problems that may arise in the interpretation of specific provisions in the light of hypothetical and actual cases and other considerations.

Key Topics:

- Freedoms and principles protecting intra-EU investment
- Free movement of capital
- Freedom of establishment
- Expropriation
- Protection of legitimate expectations
- Enforcement of investors' rights and effective judicial protection for investor rights under EU law
- Preliminary reference procedure

Target group:

Judges and legal court staff dealing with cross border investment protection, such as administrative, constitutional and relevant civil matters can apply for the training. It considered to be an advantage if the participants

- regularly deal with cross-border cases,
- already have experience with investment protection on national or EU level,
- already have experience as a lecturer.

Format and duration:

During the project a 1.5-day online training programme has been developed. The programme can also be implemented in a 3 × half-day format.

Methodology:

The training is divided into 7 sessions:

1. Introduction to Intra-EU investment protection
2. Justified and Unjustified Restriction to Investments under EU Law
3. Freedoms and Principles Protecting Intra-EU investments
4. Expropriation of Property and Protection of Property under EU Charter of Fundamental Rights and the European Convention of Human Rights
5. Procedural rights and effective judicial remedies under EU law
6. Remedies for the breach of investors' rights under EU law
7. Preliminary ruling procedure and enforcement

Sessions 1, 2, 5, and 6 proposed to be implemented as frontal presentations with the possibility to raise questions from the participants.

Session 3, and 4 are case studies, where the expert guides the participants with a presentation to conclude case studies. The relevant judgments shall be distributed to the participants in advance.

Session 7 is designed to be a presentation with a guided discussion, where participants can share their own experience about the topic.

Assessment:

- Quiz questions at the end of the e-learning course
- Written exercise after the webinar
- Post-course assessment (Kirkpatrick level 1 and 2)
- Long-term assessment (Kirkpatrick level 3)

Training package:

for trainers:

- Template webinar programme
- List of possible speakers
- List of participants template
- Example written exercise
- Presentation slides
- Post-course evaluation sheet

- Long-term evaluation sheet

for the participants:

- Communication of Commission
- Desk research
- List of training providers

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