



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

Fields marked with \* are mandatory.

## Introduction

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The creation of a more predictable, stable and clear regulatory environment to incentivise investments is one of the key objectives of the third pillar of the Commission's Investment Plan for Europe. The Capital Markets Union (CMU) action plan is part of this third strand. The Mid-term review of the CMU action plan further emphasises that a stable investment environment is crucial for encouraging more investment within the EU.

As indicated in priority action 8 of the Mid-term review communication, the Commission will launch an impact assessment to explore whether an adequate framework for the amicable resolution of investment disputes should be set up. In parallel, the Commission is working on an Interpretative Communication to provide guidance on existing EU rules for the treatment of cross-border EU investments.

The focus of this public consultation is to inform the Commission's impact assessment work on the need to develop amicable resolution and prevention methods for disputes between investors and public authorities. In addition, some questions will contribute to the work on the Interpretative Communication on existing EU rules for the treatment of cross-border EU investments.

**Please note:** In order to ensure a fair and transparent consultation process **only responses received through our online questionnaire will be taken into account** and included in the report summarising the responses. Should you have a problem completing this questionnaire or if you require particular assistance, please contact [fisma-investment-protection-mediation@ec.europa.eu](mailto:fisma-investment-protection-mediation@ec.europa.eu).

More information:

- [on this consultation](#)
- [on the protection of personal data regime for this consultation](#) 

## 1. Information about you

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\* Are you replying as:

- a private individual
- an organisation or a company
- a public authority or an international organisation

\* Name of your organisation:

General Council of the Bar of England and Wales ("The Bar Council")

Contact email address:

The information you provide here is for administrative purposes only and will not be published

evanna.fruithof@barcouncil.be

\* Is your organisation included in the Transparency Register?

(If your organisation is not registered, [we invite you to register here](#), although it is not compulsory to be registered to reply to this consultation. [Why a transparency register?](#))

- Yes
- No

\* If so, please indicate your Register ID number:

European Transparency register number: 39850528734-23

\* Type of organisation:

- |   |   |
|---|---|
| <input type="radio"/> Academic institution          | <input type="radio"/> Company, SME, micro-enterprise, sole trader |
| <input type="radio"/> Consultancy, law firm         | <input type="radio"/> Consumer organisation                       |
| <input type="radio"/> Industry association          | <input type="radio"/> Media                                       |
| <input type="radio"/> Non-governmental organisation | <input type="radio"/> Think tank                                  |
| <input type="radio"/> Trade union                   | <input checked="" type="radio"/> Other                            |

\* Please specify the type of organisation:

National body representing barristers. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

\* Where are you based and/or where do you carry out your activity?

United Kingdom

\* Field of activity or sector (*if applicable*):

at least 1 choice(s)

- Aeronautics and Space
- Agrofood
- Automotive Industry and Services
- Banking
- Chemicals
- Construction
- Energy
- Engineering
- Financial Services
- Legal and Consultancy
- Pharmaceuticals and Healthcare
- Transport and Logistics
- Textile
- Other
- Not applicable



## Important notice on the publication of responses

\* Contributions received are intended for publication on the Commission's website. Do you agree to your contribution being published?

(see specific privacy statement 

- Yes, I agree to my response being published under the name I indicate (*name of your organisation /company/public authority or your name if your reply as an individual*)
- No, I do not want my response to be published

## 2. Your opinion

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### 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	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Disputes with public authorities based on an international treaty and concerning an investment	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other disputes with public authorities concerning an investment	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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 character(s) maximum*

Contract: mostly Private Finance Initiative (PFI) contracts involving construction of schools, hospitals, housing and highways.  
International treaty: disputes under the Energy Charter Treaty involving petroleum and renewable energy activities  
Other disputes: Claims for damages against public authorities under national rules relating to non-contractual liability for the negligently or unlawfully causing harm to investors; claims under the rule in Francovich for investor losses resulting from non-implementation of Directives in the field of financial services

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 character(s) maximum*

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

*700 character(s) maximum*

**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)

- 0 (not effective)
- 1
- 2
- 3
- 4
- 5 (very effective)
- Don't know / no opinion / not relevant

**Question 2.1. Please explain why you selected this answer to question 2:**

*300 character(s) maximum*

Most public authorities / investors want to avoid litigation / arbitration costs. If not, they must justify both the costs and reasons for them. Better for the dispute to be resolved using minimum management time, in circumstances of confidentiality, & ideally, before the dispute crystallises.

**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)

- 0 (not effective)
- 1
- 2
- 3
- 4
- 5 (very effective)
- Don't know / no opinion / not relevant

**Question 3.1. Please explain why you selected this answer to question 3:**

*300 character(s) maximum*

As 2.1 : Most public authorities want to avoid litigation costs. If not, they have to justify both the amount and the reason for them. Better yet If the dispute can be resolved using minimum management time, in circumstances of confidentiality, and ideally, before the dispute crystallises.

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 character(s) maximum*

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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
As regards clarity of conditions for the recourse to mediation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
As regards clarity of the mediation procedure to be followed	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
As regards the freedom of choice by the parties of the mediator	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
As regards the possibility to receive compensation for losses according to a mediated settlement agreement	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
As regards the time needed to conclude the procedure and receive compensation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
As regards transparency to third parties/public	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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:

- |                                    |   |                                   |  |
|------------------------------------|---|-----------------------------------|--|
| <input type="checkbox"/> Austria   | <input type="checkbox"/> Belgium        | <input type="checkbox"/> Bulgaria | <input type="checkbox"/> Croatia         |
| <input type="checkbox"/> Cyprus    | <input type="checkbox"/> Czech Republic | <input type="checkbox"/> Denmark  | <input type="checkbox"/> Estonia         |
| <input type="checkbox"/> Finland   | <input type="checkbox"/> France         | <input type="checkbox"/> Germany  | <input type="checkbox"/> Greece          |
| <input type="checkbox"/> Hungary   | <input type="checkbox"/> Ireland        | <input type="checkbox"/> Italy    | <input type="checkbox"/> Latvia          |
| <input type="checkbox"/> Lithuania | <input type="checkbox"/> Luxembourg     | <input type="checkbox"/> Malta    | <input type="checkbox"/> Netherlands     |
| <input type="checkbox"/> Poland    | <input type="checkbox"/> Portugal       | <input type="checkbox"/> Romania  | <input type="checkbox"/> Slovak Republic |
| <input type="checkbox"/> Slovenia  | <input type="checkbox"/> Spain          | <input type="checkbox"/> Sweden   | <input type="checkbox"/> 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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
As regards clarity of conditions for the recourse to mediation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
As regards clarity of the mediation procedure to be followed	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
As regards the freedom of choice by the parties of the mediator	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
As regards the possibility to receive compensation for losses according to a mediated settlement agreement	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
As regards the time needed to conclude the procedure and receive compensation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
As regards transparency to third parties/public	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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?

- 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 character(s) maximum

An EU framework to cover all the essential elements of mediation would be too difficult given the different legal systems across the EU. It would likely take the form of an outline framework of basic elements (see the Mediation Directive 2008), and leaving Member States to implement the detail. The inevitable result of being overly prescriptive would be different, sometimes contradictory, interpretations, like those that undermine the application of the 2008 Directive in some Member States.

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

Without prejudice for the outcome of the Impact Assessment, the following options to provide effective tools for the (i) prevention and (ii) amicable resolution of disputes between EU investors and Member States with the help of an independent third party could be envisaged at this stage:

### **Option 1: Establishing an EU network of investment contact points within national administrations**

Such contact points could be used by investors before any formal dispute with national public authorities arises, in order to prevent the escalation of any issues and to inform the investors about their rights and existing remedies.

### **Option 2: Creating an EU framework for mediation between investors and public authorities**

This Option aims to create an EU framework for mediation, which could be of a legislative or non-legislative nature. It could provide a basic legal framework that would allow mediation between investors and public authorities in all Member States.. The Option would provide for rules for the appointment, qualifications, and independence, among other requirements, for the mediator; the scope of cases that can be subject to mediation; the enforcement of the mediated settlement; the rights of third parties; and the relationship with judicial proceedings.

### **Option 3: In addition to a common framework regulating the procedure of mediation, creating permanent agencies in each Member State**

Option 3 would go further and envisage, in addition to the framework for mediation (Option 2), the creation of permanent agencies at the national level that would administer mediation services (for example, by establishing a registration system of mediators) or act as mediators.

### **Option 4: In addition to a common framework, creating one EU wide Mediation agency**

Option 4 would envisage, in addition to the framework for mediation (Option 2), the creation of one EU-wide Mediation agency that would administer mediation services (for example, by establishing a registration system of mediators) or act as a mediator.

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

- 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 character(s) maximum*

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 (not important)	1	2	3	4	5 (very important)	Don't know / no opinion / not relevant
Ability of the parties to freely choose a mediator amongst qualified /registered mediators	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Ability to choose a mediator from other Member States to help the parties communicate	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Ability to choose a mediator experienced in the sector concerned by the dispute	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Ensuring mediators are properly qualified	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
High ethics/independence standards of the mediator	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

Existence of a specific agency providing mediation services at the national level	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Existence of a specific agency providing mediation services at the EU level	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Existence of a specific agency at national level that can administer mediation services	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Existence of a specific agency at EU level that can administer mediation services	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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 (not important)	1	2	3	4	5 (very important)	Don't know / no opinion / not relevant
Clear rules on the types of disputes that can be covered by mediation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Clear rules stating conditions under which investors and public authorities are able to engage in a mediation process	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Clear rules stating conditions under which public authorities are able to commit to a settlement agreement, including when compensation is agreed upon	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Clear rules on confidentiality of the mediation procedure	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Clear rules on how to preserve the public interest	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Clear rules on how long the mediation process should last	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Rules on minimum public transparency requirements about initiation of a mediation procedure and its results	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Involvement of concerned third parties in the mediation process	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Rules on enforcement of mediated settlement agreements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Rules on relationship with court proceedings (such as impacts of starting a mediation on time limits to start litigation)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Judicial review of mediated settlements	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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 character(s) maximum*

It is of paramount importance that any such framework guarantees the confidential nature of mediation and provides for effective enforcement of settlement agreements. There is an obvious public interest in the publication of information, after the event, about public expenditure involved in settlement of a dispute which has been resolved through mediation. However, it is critical that the relevant rules contemplated in our answer to point Q.11.7 preserve the confidentiality of the mediation process itself. Otherwise a crucial advantage of mediation is lost and the objective of diverting disputes from costly litigation / arbitration is undermined. Please see Part 3 paper for full response.

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 character(s) maximum*

Any that the parties concerned wish to choose

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	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

At the stage of the internal review of the decision/act in case of appeal in front of the competent public authorities	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Before undertaking litigation in court concerning the litigious decision/act taken by the public authorities	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Once litigation has started and before the judgement	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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 be to define the amount of compensation for losses, if any.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question 14.1. Please specify at what other stage of proceedings should mediation procedure be available?

500 character(s) maximum

The practitioners who have contributed to this response have mediated disputes at every level of the options above, and also between judgment at first instance and the hearing of an appeal. The short answer is that the mediation process should be available at all times and the parties should be free to mediate at any time when they so wish.

## 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 (not important)	1	2	3	4	5 (very important)	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.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Improve the investment climate	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Be particularly beneficial for SMEs	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Reduce the likelihood of litigation in front of the courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

Reduce expenditures by public authorities as fewer disputes might reach the litigation phase	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>				
Help preserve a long-term relationship between investors and Member States	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>				
Other reasons	<input type="radio"/>	<input type="radio"/>					

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

**Question 16.1. Please specify what other reasons:**

*500 character(s) maximum*

We emphasise that even the most effective mediation scheme cannot avoid contentious proceedings altogether. Mediation by definition remains voluntary, and there will moreover remain cases which by their very nature raise issues unsuited to mediation and where litigation or arbitration represent the most appropriate form of dispute settlement.

As for question 12, please see Part 3 paper for full response..

**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 (no impact)	1	2	3	4	5 (strong impact)	Don't know / no opinion / not relevant
EU mediation framework enabling mediation between investors and the relevant national authorities	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Agencies at national level which could administer the mediation services or act as mediators	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
EU-wide mediation agency which could administer the mediation services or act as a mediators	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**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 impacts on fundamental rights?

- Yes
- No
- Don't know / no opinion / not relevant

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

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
- No
- Don't know / no opinion / not relevant

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

The Interpretative Communication planned by the Commission will bring together and explain the existing EU standards for the treatment of cross-border EU investments. These standards include the rules on free movement of capital, freedom of establishment, and the principle of non-discrimination, as well as on the fundamental rights of investors and the general principles of EU law.

The Communication will help prevent Member States from adopting measures which would infringe EU law relevant for investments. At the same time, the Communication will help investors to invoke their rights before administrations and courts and will enable legal practitioners to consistently apply EU rules.

The purpose of this section is to identify the areas on which the communication should focus, either because they are where investors face biggest problems or because the existing rules are complex.

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 character(s) maximum*

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 non-discrimination, the principle of legal certainty, the protection of legitimate expectations)?

*1000 character(s) maximum*

### 3. Additional information

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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) here:

[ec06e2d1-ff76-4b4f-bc57-107aaa19a0e2/Investor\\_Dispute\\_resolution\\_-\\_Bar\\_Council\\_addendum\\_to\\_EU\\_consultation\\_response\\_\\_November\\_2017.pdf](ec06e2d1-ff76-4b4f-bc57-107aaa19a0e2/Investor_Dispute_resolution_-_Bar_Council_addendum_to_EU_consultation_response__November_2017.pdf)

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

**Part 3 – Additional Information**

**I. General points**

1. The online questionnaire response and this additional information, submitted by the General Council of the Bar of England and Wales (the Bar Council), were developed by practitioners with expertise and experience, both as mediators and as legal representatives, in a variety of different forms of mediation as well as litigation. The experience detailed in the answer to Q1 is that of those practitioners.
2. In our view, investment organisations, public authorities and indeed any enterprises likely to be involved in the types of disputes with which this consultation is dealing, tend to be sophisticated users of legal services. They are likely to be well advised, and accustomed to using and choosing their means of resolving disputes.
3. That said, it is also important that the framework for settlement of investor-State disputes enables SMEs and individuals who find themselves involved in cross-border disputes with public authorities involving more modest sums, also to obtain the benefit of any proposed framework for amicable settlement of such disputes.
4. One key reason why such parties opt for mediation is the advantage it offers over other dispute resolution methods, in helping to preserve the ongoing relationship between the parties - important for businesses, whether engaged in investments or other.
5. It is against this specific background that the Bar Council responds to this consultation.
6. In our view, an EU agency simply would not be selected by sophisticated parties, and there is no obvious reason to suppose that it would command the confidence of less sophisticated or less well-resourced parties. The availability of a range of suitably qualified persons who offer their services as mediators is likely to be more attractive than some sort of institution. Parties to such disputes tend to choose their own mediators.

7. Equally, the confidentiality attached to mediation is an essential element for all parties who may consider mediation as an option. There are many reasons why parties resolve their disputes on the terms that they do, preserving an ongoing commercial relationship being but one of them. The terms are thus often confidential to themselves. This fundamental principle informs our reticence at the prospect of any after-the-event challenge to settlements arrived at between investors and public authorities (see our answer to Question 12), or to have an EU mediation council to mediate such disputes.
8. Article 7 of the Mediation Directive 2008/52/EC enshrines the principle of confidentiality. In 2016 the Commission published a report on the application of that directive, following a lengthy review, in which it confirmed its decision not to revise its terms. Whilst there are known difficulties regarding the scope of the protection afforded by Article 7 in practice, the principle of confidentiality of mediations is thus not questioned at EU level. That principle should therefore be a cornerstone of any extension of the principle of mediation to disputes of the kind to which this consultation relates.
9. If the EU is seeking to promote mediation for investor disputes but with a provision that the settlement must be subject to EU approval (or amenable to challenge by a third party or an EU institution after the event), the Bar is concerned that that would be in breach of Article 7. There is a risk that a refusal by the EU to sanction a mediated settlement, which refusal is then challenged by the parties, could result in an investigation into what went on in the mediation, and confidentiality would be undermined. If that is known to be a possibility, the prospects of such a mediation process being widely adopted and/ or chosen by the parties, are completely undermined.

## II. Extended answers to Questions 12 and 16.1 of the online questionnaire

### **Q12 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?**

It is of paramount importance that any such framework guarantees the confidential nature of mediation and provides for effective enforcement of settlement agreements. There is an obvious public interest in the publication of information, after the event, about public expenditure involved in settlement of a dispute which has been resolved through mediation. However, it is critical that the relevant rules contemplated in our answer to point 7 to Q.11 (which are likely to include rules about the information which public authorities are to provide in their published accounts) *preserve the confidentiality of the mediation process itself*. Otherwise a crucial advantage of mediation is lost and the objective of diverting disputes from costly litigation or arbitration is undermined. The rules on enforceability must make clear that where a public authority has entered into a settlement in good faith following mediation covered by the proposed framework, it is not open to the authority or any other party (including the EU institutions) to challenge the validity or enforceability of the settlement on the basis of alleged incompatibility with domestic or EU law.

The proposed framework should therefore encourage the parties, in particular the public authority, to identify any doubt about the enforceability of any settlement at an early stage of the mediation, and to seek to resolve it by obtaining any necessary legal advice in conditions of confidence before proceeding further. The settlement agreement would need to conform to the requirements of national law governing agreements between natural or legal persons and public authorities. For example, English law pays particular attention to whether the person who purports to enter into a binding agreement on behalf of a legal person (including a public body) has authority to contract on behalf of that person. So mediation can work effectively only if the persons directly involved in the process have such authority or clear mechanisms are in place at the outset to obtain it. If a settlement were liable to be challenged after the event, on grounds relating to defective authority or otherwise, that would be inimical to legal certainty and would moreover result in the very disadvantages of litigation that a mediation scheme is designed to avoid.

**Q. 16.1** We emphasise that even the most effective mediation scheme cannot avoid contentious proceedings altogether. Mediation, by definition, remains voluntary, and there will moreover remain cases which by their very nature raise issues unsuited to mediation and where litigation or arbitration represent the most appropriate form of dispute settlement. Those include cases where there is a serious doubt about the power of the authority to enter into a binding settlement (though rules of the kind proposed in our answer to question 12 should minimise the incidence of such cases) or where the public interest requires the resolution of an important issue of law or principle. In order to bring a degree of predictability to the appropriateness of cases for mediation, the framework should encourage Member States to formulate and publish statements of policy indicating the kinds of investor-state disputes involving their central authorities, and other public bodies, that are likely to be considered suitable, and conversely unsuitable, for mediation under the framework. In cases indicated as being suitable for mediation, the framework should provide that an authority against whom an investor claim is intimated should offer mediation in its response to the claim even if the investor has not first suggested it.

2 November 2017