

THE PROTECTION OF INVESTMENTS WITHIN THE EU

Florin TUDOR*

Abstract

The present lecture analyses the investments within the EU, but it does not necessarily refer to the investments made by investors in third party-countries in the EU, but especially to those belonging to the investors in the member countries. National Juridical norms are comparatively analysed, and they sometimes cover the fundamental norms of the EU, the protection and rights of the investors. In addition to this analysis, the present study also focuses on the measures programmatically adopted by the European structures in order to refresh the economy that was massively affected by the global health crisis caused by the Covid-19 pandemic, on the role of the research-development-innovation, and of the commercial relations with other states.

Keywords: investment, protection, research-innovation, bio-economy.

1. Introduction

The fact that one of the main reliance of the EU, even since CECO appeared, refers to the free market of the goods within its borders is well known. Similarly, financial investments such as commercial relations that are founded upon investments that came from third party countries, as well as those oriented towards those by community investors enjoy the protection conferred by the text of the Treaty on the Functioning of the European Union (Bourgeois, HJ, 2019). The norms, either institutional by means of some provisions or regulations, principally envisage the protection of the investors depending the national norms in some of the member countries that can sometimes be restrictive against the investments of the third-parties, as their main argument pleads for the protection of the local investors. A series of dispositions of the treaty that envisages the largely discussed issue of the right to national sovereignty that allows the member countries in making decisions in relation to the internal agenda and their own development strategies, but within the limits

* Professor, Ph.D, Dunărea de Jos University of Galați, Faculty of Legal, Social and Political Sciences. This study is the result of research conducted within the Project *Excellence, performance and competitiveness in RDI activities at the „Dunărea de Jos” University of Galați, EXPERT* code 14PFE/17.10.2018.

of the community *acquis* are also invoked. In this sense, starting with the dispositions of the Treaty on the Functioning of the EU article 64, line 3, series of programmatic documents of the EU with the purpose of strengthening the main statutory dispositions of the EU Treaty and that also strengthens the idea of the liberalization of the capitals were elaborated⁶⁴.

The main hypothesis of work of the present study refers to the degree of protection of investments within the EU that has as an immediate purpose the consolidation of the relations among the member countries and the cross-border relations between those and the investors of the third party countries. On the other hand, it is important to see to what extent enough work mechanisms in order to facilitate innovation through research and development as the main pillar of refreshing economy post-Covid 19 crisis and the EU strategy for a greener economy.

2. Market opportunities

The provision of the Commission „The protection of investments within the EU” (Krajewski, M, 2019)⁶⁵, adopted on July, 19 2018 envisages the fact that the rights of the EU investors do not benefit from a non-discriminatory treatment. A series of member countries, before the date when signing, also signed bilateral treaties for protecting investments⁶⁶ and still maintain the benefits for their partners in the member countries in the detriment of others. In this way, concrete obstacles for investors are identified, and such obstacles mainly consist of a series of ambiguous provisions of the local or central public administration, often modified, that elaborated diverse taxation responsibilities, with a high level of each taxation responsibility in the situation of investments etc.⁶⁷

⁶⁴ As an example, see for details the proposal of the Comision from September 13 COM (2017) 494, the final Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - *Welcoming Foreign Direct Investment while Protecting Essential Interests*, disponibilă pe <https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-494-F1-EN-MAIN-PART-1.PDF> (20.04.2020);

⁶⁵ Disposition of the European Parliament Comision and the COM Council (2018) 547 final - *The Protection of Investments within the EU* (Aprilie, 27 2020);

⁶⁶ Romania signed a number of 22 such treaties with the member countries aut of a total of 108

⁶⁷ The Conclusions of the Council regarding the blocks in the way of the investments identified

The EU court of law provisioned by the decision of March, 6 2018⁶⁸ that: „Articles 267 and 344 TFUE have to be interpreted in the sense that they oppose a provision included in an international agreement signed among the member countries, such as article 8 of the Agreement regarding the reciprocal promotion and protection of investments between the Netherlands Kingdom and the federal Republics of Cehia and Slovakia, according to which an investor from one of these member states, in the situation of a trial, regarding the investments in the other member state may introduce a procedure against the latter member state in front of an arbitral court of law whose competence the respective member state obliged to accept”.

The dichotomist analysis considers on the one hand the raise of the level of awareness of the investors regarding their rights according to the EU right, as it is provisioned in the Address of July, 19 2018, as well as offering the opportunity for campaigns in order to get feedback in relation to their practical experiences in cross-border investments in the EU.

The signing agenda imposed that the community aquis should be implemented by the member states until the date when the treaty of adherence is to be signed. This technical issue also presupposed the revision of the constitutions in such a way that the norms elaborated by the European legislator and executorial could be put into practice firstly in the member countries.

Paradoxically, there is no mention *expresis verbis* within the treaty that should clarify the priority of the European law against the right of the member states, otherwise an essential element in order to interpret norms all over the EU territory. Actually, two decisions of the European Court of Law pronounced in 1963 and 1964⁶⁹, having the value of juridical antecedent, provisioned the

within the third pillar of the Plan of Investments of Bruxelles, 6 decembrie 2016 (OR. en) 15314/16, available on <http://data.consilium.europa.eu/doc/document/ST-15314-2016-INIT/ro/pdf> (May, 6 2020)

⁶⁸ See cause C284/16 Slovakische Republik against Achmea BV available on http://curia.europa.eu/juris/document/document_print.jsf?doclang=RO&text=&pageIndex=0&part=1&mode=req&docid=199968&occ=first&dir=&cid=142780 (Aprilie, 27 2020) - „Preliminary reference – Reciprocal Treaty of investment signed in 1991 between The Netherlands Kingdom and The Federal Republic of Cehia and Slovakia and put into practice as it follows, beteen The Netherlands Kingdom and the Republic of Slovakia – a disposition that allows an investor of a contractual investor to address to a court of law when tehre is a conflict with the other side *Compatibility to articles18, 267 și 344 TFUE – The concept of a «court of law» – The Autonomy of the Right of the Union*”.

⁶⁹ See for details: Cauza *Van Gend & Loos* și Cauza *Costa/ENEL*

predominance of the European law, so that the national courts of law consider these provisions even if the national parliaments often appeal to national sovereignty and alter the spirit of the European normative acts.

Although the provisions of the EU Treaty conclude without any doubt the fact that the national identities are respected, a compulsory norm that imposes mutual assistance in order to accomplish certain common objectives established by the treaty, a series of states appeal to all kinds of tricks in order to protect certain commercial alliances with other member states or third party states, altering the idea of competition, of mutual commercial policy.

Well, as soon as the investors from the EU start a new project or commercial investment, they consider it natural that the principles of the European law should be put into practice in such a way that commercial societies could be started or second offices open by the proper meaning of the commercial and fiscal law, make use of the benefits of property in commercial activity. That's why, the member states are obliged to admit the commercial structures that develop their activity in their territory, with the clause of them respecting the correlative norms of the respective states. Otherwise, the state host cannot impose restrictions other than those disposed by the European legislator that encourages the free circulation of capitals, of goods, establishing the headquarters, ending the commercial society etc. any other provision would be out of proportion and would create serious unbalance among the member states both regarding the starting and functioning of a commercial society, but moreover the specific aspects concerning the labour market, provisions regarding major objectives, of international assumption, regarding the fight against financial fraud, of prejudicing the EU budget, of limiting evasion and the phenomenon of money laundry.

It is not wrong that some companies should establish the headquarters of some commercial structures in states with a reduced fiscal preeminence, or a permissive legislation in what regards the mobility of the capitals or of the labour force, or the predictability of direct investment. Certainly, the Commission recently proposed a norm that would allow business men, and not only to those from the EU, to have mutual juridical mechanisms of work in order to operate the transnational divisions and transformations, and also the cross-border fusions.

The normative act offers enough guarantees in order to protect the legitimate interests of all the actors involved in governing the company, employees, banks, creditors. Obtaining fiscal advantages is the key of the entire endeavor as the purpose of realizing profit with paying the minimum of taxes is the main objective of any commercial employee. On the other hand, the treaty and a series of provisions that follow limit the right to act of the member states that should guide by the act of law according to the principle of fiscal neutrality. A series of indirect taxes for some of the activities are regulated by directives, and the member states, no matter how they make their norms of internal law, have the obligation of transposing the European legislation and not altering its spirit. The admittance of the qualifications, getting licenses of operation, the access to the market of insurances and the health services indirectly contribute to the decision to invest in another state than that of residence.

3. Improving the investment areas and targeting a real economy⁷⁰.

The general objective of the Council is to remove obstacles which oppose direct investments and to provide clear and predictable legislation, especially in sectors where investment require a longer cycle. Primary, it is necessary to stimulate investment by improving the business environment and facilitating access, first and foremost, to finance, especially for small and medium-sized enterprises. reduce the splitting of financial markets, the plan to create a possible merger of capital markets takes shape in the context of increasing the capital supply of companies and the investment market.

For all this, the European legislator must draw up a series of predictable regulations that encourage investment, both domestic and cross-border, but also reduce the burden of administrative obligations, which is a serious barrier for a number of investors. Financing the economy means optimal conditions for traders, common rules and a truly single market. A number of proposals concern the unblocking of the investment environment and the need to develop a set of common rules on the circular economy in order to facilitate the financing and stabilization of energy markets, the digital single market, the merger of

⁷⁰ For details see Conclusions on tackling bottlenecks to investment identified under the Third Pillar of the Investment Plan - <http://data.consilium.europa.eu/doc/document/ST-15314-2016-INIT/ro/pdf>

capital markets, etc.

The 2014 "Junker Investment Plan" is considered by European officials to have changed the "rules of the game"⁷¹ in relation to the proposed targets and initial expectations. As of the date of the Commission's communication⁷², investments worth € 360 billion have been mobilized, with two thirds of the amount being private resources. It is estimated that based on the strategic investment fund, around 850,000 small and medium-sized enterprises have or will have access to financing. *"Estimates show that the EFSI has already supported more than 750,000 jobs, with 1.4 million jobs expected to be created by 2020, which will have a positive impact on millions of European households."* By 2020, GDP at EU level is projected to reach 1.3%, with all countries benefiting from a positive trend.

Experts believe that the "Junker plan" can be a successful model to support direct investment, both for the internal and external markets, so the principles underlying this plan must be among the criteria for the formation of the next financial period 2021 -2027, for a number of components, such as: *"the new InvestEU fund and for the Neighborhood, Development and International Cooperation Instrument, proposed by the Commission for the next long-term EU budget"*.

As the global health crisis has delayed negotiations on the new budget and as solutions for a number of decisions are exceptional in terms of EU financial support, serious steps need to be taken in terms of access to information as long as transparency in decision-making and wide consultation are to suffer. A first answer in this direction could come from the digital economy. There is a serious deadlock at EU level, as shown by the Eurobarometer for a number of indicators.

⁷¹ Jyrki Katainen, Vice-President of the Commission for Jobs, Growth, Investment and Competitiveness, said: *"The investment plan has changed the rules of the game. Four years later, this new and unique approach to mobilizing private investment for the public good has generated fresh funding of EUR 360 billion for the economy. We have also helped launch innovative projects and improved the investment environment in Europe. In the next long-term EU budget, we want to maintain this favorable momentum and ensure that the successful model of the Investment Plan becomes the new European standard for investment support."*

⁷² Further details available at: https://ec.europa.eu/commission/presscorner/detail/ro/IP_18_6484

Table 1 - Europe provides financial support to regions and cities. You have heard of EU co-funded projects to improve your area?⁷³

		Flash Eurobarometer 480																																
VOLUME A' Pondéré/Weighted		Terrain/Fieldwork : 03 - 13/06/2019																																
Q1A L'Europe apporte un soutien financier aux régions et aux villes. Avez-vous entendu parler de projets cofinancés par l'UE visant à améliorer la région où vous vivez ?		Q1A Europe provides financial support to regions and cities. Have you heard about any EU co-financed projects to improve the area where you live?																																
		Flash EB 452	Flash EB 480	Flash EB 480	Flash EB 452	Flash EB 480	Flash EB 452	Flash EB 480	Flash EB 452	Flash EB 480	Flash EB 452	Flash EB 480	Flash EB 452	Flash EB 480	Flash EB 452	Flash EB 480	Flash EB 452	Flash EB 480	Flash EB 452	Flash EB 480	Flash EB 452	Flash EB 480	Flash EB 452	Flash EB 480	Flash EB 452	Flash EB 480								
		EU28 UE28	EU28 UE28	UE6 EU6	UE9 EU9	UE10 EU10	UE12 EU12	FI/AT/SE	UE15 EU15	EURO ZONE	NON EURO	NEM10 NMS10	NEM12 NMS12	NEM13 NMS13	UE25 EU25	UE27 EU27	UE28-UK EU28-UK																	
TOTAL	27173	27144	5717	5716	8725	8716	9726	9716	11727	11716	3006	3004	14733	14720	18162	18134	9011	9010	9435	9423	11439	11423	12440	12424	24168	24143	26172	26143	26172	26144				
Oui	9470	10788	1642	2023	2305	2700	2629	3068	3222	3806	617	788	3987	4727	5549	6727	3913	4056	6753	7133	7308	7775	7939	8459	8251	9427	9058	10323	9728	11254				
Yes	35%	40%	29%	35%	26%	31%	27%	31%	27%	32%	21%	26%	27%	32%	31%	37%	44%	45%	72%	76%	64%	68%	64%	68%	34%	39%	34%	39%	37%	43%				
Non	17221	15890	3972	3588	6280	5870	6943	6486	8297	7712	2345	2154	10487	9741	12255	11079	4974	4815	2486	2136	3927	3443	4275	3747	15480	14306	16652	15369	15947	14422				
No	63%	58%	69%	63%	72%	67%	71%	67%	71%	66%	78%	72%	71%	66%	67%	61%	55%	53%	26%	23%	34%	30%	34%	30%	64%	59%	64%	59%	61%	55%				
NSP/SR	482	466	103	104	141	146	155	162	209	198	44	62	259	252	358	328	124	139	197	154	204	205	226	218	438	410	462	451	497	468				
DK/NA	2%	2%	2%	2%	2%	2%	2%	2%	2%	1%	2%	2%	2%	2%	2%	2%	1%	2%	2%	1%	2%	2%	2%	2%	2%	2%	2%	2%	2%	2%				

Source: Eurobarometru -

https://data.europa.eu/euodp/en/data/dataset/S2227_480_ENG

The in-depth study of these surveys also shows that a number of investments in digital physical infrastructure are a priority so that EU citizens and businesses can benefit from timely information and from the innovation

⁷³ The survey, published on 7 October 2019, is part of a series of surveys examining Europeans' awareness and attitudes towards EU regional policy - Flash Eurobarometer Surveys 452, 423, 384 and 298. It starts by asking whether respondents have heard of any co-financed projects in the area where they live and, if so, whether they believe those projects have had a positive or negative impact on their lives. Respondents are asked about their familiarity with the two EU regional funds and whether they have personally benefited from an EU-funded project. The survey also provides information on the sources of information used by respondents to find out about this type of financial support policy from the EU. The survey then examines respondents' views on EU regional policy priorities, asking them what geographical regions and investment sectors the EU should target and who should make decisions about regional investment. It concludes by analyzing public awareness of the EU's outermost regions and EU support for cross-border cooperation, including the Integral and four EU macro-regional strategies - in the Baltic Sea, along the Danube, in the Adriatic and Ionian Seas and in the Alpine region. For further information: : https://data.europa.eu/euodp/en/data/dataset/S2227_480_ENG

wave in the digital economy.

4. Promoting research through innovation. Durable and circular bio-economical solutions.

It is well known that research and innovation can make a decisive contribution to sustainable development. The governments of the Member States, by adopting strategies, consider that research is a constant support for the development of the concept of science and public debate for the wellbeing of the community⁷⁴. Public policies and government strategies must include a number of thematic areas arising from the results of research and development through innovation. The specific issues taken into account in the research analysis can cover a very wide range of areas, from those concerning civil rights and freedoms to health, climate change, agriculture and fisheries.

However, technical research has the potential to make a decisive contribution to creating collaboration between research structures and the business environment in the Member States, but also in third countries, which are directly interested in overcoming the problems and challenges that humanity is currently facing.

The key to collaboration is to identify priorities that could respond to research cooperation initiatives for a number of thematic areas included in states' strategies for poverty eradication, treating incurable diseases, prioritizing the public agenda towards a healthy environment or green energy. The creation of regional bridges and cross-border cooperation, preceded by an inventory of common needs and interests for a number of sensitive areas, coupled with appropriate financial support, can provide a number of support infrastructures for increased research application, innovation dissemination and support institutional structures.

Accelerating the development and promoting the sustainable and circular bioeconomy is the signal for modernization, consolidation and industrial competitiveness at EU level. Promoting artificial intelligence and cutting-edge technologies are the right solutions for implementing innovation.

⁷⁴ See more:

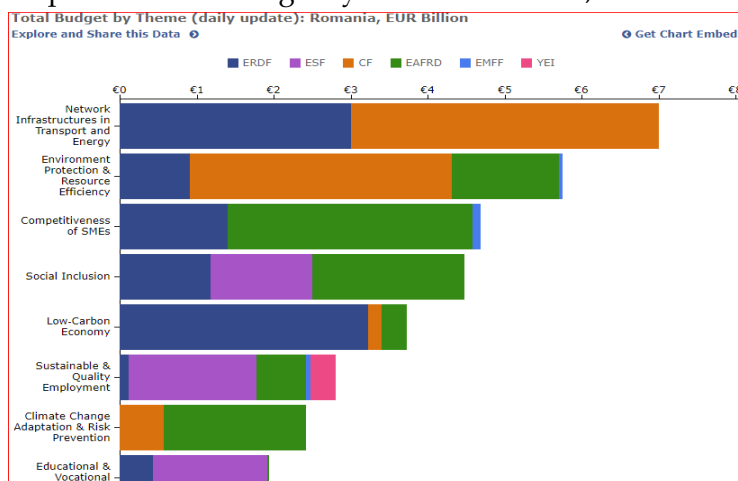
<https://www.government.se/49f23e/contentassets/f929d648751e40859c7eb39812dacb01/strategi-for-forskningsamarbete-pdf-for-webb-eng-2.pdf>

Horizon 2020 (and why not Horizon Europe) “has played a key role in developing and implementing new bioeconomic value chains, based on the use of renewable resources, including waste. This action will lead to the development of a set of solutions for biomass processing in bioproducts, which will support the modernization and renewal of our industries in several areas”⁷⁵

Public data reveals that, in addition to the funding provided by Horizon 2020 / Horizon Europe, the EU will allocate a budget of approx. 100 million euros for investments in sustainable solutions.

There is a growing interest in including innovations in the area of the bioeconomy, among the other classical fields of research, for a much wider access to research results, especially for bioproducts. All this is doubled by the environmental footprint of the products, the development of direct investment in high-performance technologies⁷⁶. Unfortunately, financial resources from EU sources are unfairly granted, which creates a serious obstacle to achieving such major goals.

Graphic 1 - Total Budget by Theme: Romania, EUR Billion



⁷⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A sustainable Bioeconomy for Europe: Strengthening the connection between economy, society and the environment* {swd(2018) 431 final}- COM(2018) 673 final, available at <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52018DC0673&from=BG>

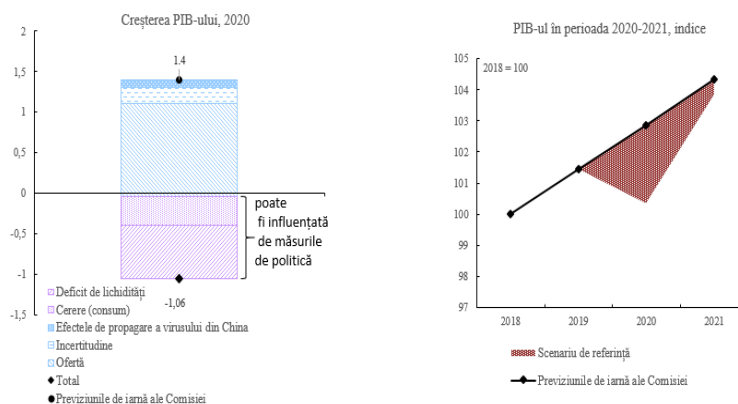
⁷⁶ For example, current estimates indicate the creation of about 300 new biorefineries.

Source: <https://cohesiondata.ec.europa.eu/funds/cf#>

Conclusions:

The essential point is that the Covid-19 epidemic has affected significant investments. Moreover, the health crisis has blocked the entire economic supply chain, which has generated a series of significant business blockages in the chain.

Graphic 2: Estimated impact of the COVID-19 pandemic on the EU economy:
the scenario for 2020



Source: European Commission (COM 2020 112 final – Annex 1-3)

The Frames barometer identified for Romania that “the epidemic, at the current stage, affects the development of the business, but the important processes are not affected. 17% stated that the economic effects of COVID-19 block important business / production processes and 9% stated that the impact is major”⁷⁷.

Experts consider it necessary to provide a "financial buffer" that will allow companies to overcome the current critical situation and Member States to restart the economy through a series of measures that must be defined in terms of public policies and government strategies that include tax incentives, investment guarantee, financial agreements.

⁷⁷ Frames barometer details can be consulted here: <https://framesmedia.ro/blog/efectele-coronavirusului-pest-70-dintre-companii-nu-au-o-strategie-pentru-astfel-de-situatii/>

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