

Reconceptualising Legal Certainty for Cross-Border Investors in the European Private Law Framework

A PROPOSAL FOR A TRANSNATIONAL PRINCIPLE OF LEGITIMATE INVESTMENT EXPECTATIONS

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THE RULE OF LAW AND INVESTOR CONFIDENCE UNDER STRAIN

The progressive erosion of the rule of law within certain European Union Member States and other Western jurisdictions poses a systemic risk not only to public governance, but also to the legal certainty upon which private investment fundamentally relies (Mahmutovic, 2021). For cross-border investors, legal predictability is not an abstract ideal; rather, it constitutes a precondition for the rational allocation of capital, the formation of contractual commitments, and the realisation of expected returns. Where regulatory frameworks shift abruptly, judicial approaches become inconsistent, or public authorities interfere unpredictably in financial markets, investors may no longer rely on the stability of the legal environment in which their economic decisions are embedded.

Against this backdrop, the present article pursues a twofold objective. First, it advances the case for the development of a transnational principle of “legitimate investment expectations”¹ as a unifying standard within European private law. Secondly, it seeks to demonstrate how such a principle may operate to reinforce the accountability of Member States in implementing European law and in honouring commitments made towards private economic actors. The analytical approach in this paper combines a doctrinal examination of general principles of EU law – particularly legal certainty and legitimate expectations – with a comparative assessment of civil-law and common-law traditions relating to good faith, fair dealing, and the prohibition of abuse of rights.

In doing so, the paper argues that European private law² may serve as a normative bridge between contractual autonomy and public authority, thereby contributing to the restoration of market confidence and the mitigation of systemic risks associated with legal uncertainty (Möllers, 2018). Strengthening the protection of legitimate reliance does not aim to immobilise public policy, but to promote a framework of responsible predictability in which both public interests and fiduciary duties can be effectively safeguarded.

The current article has two main objectives within a specific framework involving the European Union. On the one hand,

the author attempts to justify the need for establishing a transnational doctrine of “legitimate investment expectations” as a consolidating concept in European private law and the internal market of the European Union. On the other hand, the author attempts to explain the possible way in which such a doctrine would strengthen the responsibility of the Member States while applying European Union law and while creating governing frameworks that directly impact cross-border investment. Even though the focus remains within the European legal framework, in consideration of the EU’s high level of market integration, common rule-of-law principles, and the high level of cross-border capital flow in the EU, the questions raised in this article are of a global nature. This is a particular feature of the European

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Union, which enables one to assess the interaction of legal certainty and regulatory changes, as well as the confidence of investors in the most developed financial markets.

LEGAL CERTAINTY AS A CORNERSTONE OF EUROPEAN PRIVATE LAW

Legal certainty is a basic principle of European law and a key requirement for sound economic decision-making (Shcherbanyuk, Gordiciev, Bzova 2023). For cross-border investors, it guarantees that contracts and regulations stay predictable enough for long-term capital investment. When predictability worsens, investment choices become unclear, risk premiums increase, and market efficiency drops.

Judicial system of the European Union recognises legal certainty and the protection of legitimate expectations as general principles common to the legal systems of the Member States (Lenaerts, 2007). Yet their development has occurred mainly within administrative and public law, leaving private law protections fragmented. References to legal certainty appear implicitly in concepts of good faith and fair dealing within instruments such as the DCFR and PECL³ (Castronovo, 2009), but without a dedicated framework applicable to investment relationships.

Legal certainty operates along two dimensions as a static dimension, requiring that legal rules be accessible, clear, and non-retroactive and a dynamic dimension, ensuring consistency in judicial and regulatory practice over time. It is this dynamic dimension that is particularly relevant for investors who rely on the assumption that authorities will not arbitrarily alter essential regulatory or contractual conditions. Sudden legislative changes, inconsistent supervisory enforcement, or shifting judicial interpretation translate legal uncertainty into tangible economic risk.

To provide effective protection, European private law requires a principle capable of linking private autonomy with public authority (Dagan, 2016). Such a principle would reassure investors that the internal market remains a reliable legal space for the establishment and performance of cross-border economic relations.

FRAGMENTATION OF EXISTING PROTECTIONS

Current investor protection against regulatory unpredictability⁴ in Europe is fragmented across different legal regimes per country, which significantly reduces its effectiveness and creates additional uncertainty for cross-border capital allocation (Wallinga, 2020). These assurances primarily refer to the protection afforded by EU administrative law principles, particularly the doctrines of legal certainty and legitimate expectations as developed in the case law of the Court of Justice of the European Union. Although the concept is usually applied when national authorities or EU institutions deviate from accepted regulations or administrative practices, it provides investors with little assistance in contract negotiations and business disputes. This is because these principles are primarily enforced ex post through judicial or administrative review and are directed at public authorities

rather than private counterparties. As a result, they offer limited guidance during contract negotiations, where investors seek ex ante certainty regarding how regulatory risks will be allocated and managed between the parties. It does not function as a reliable tool for managing legal and regulatory risk in private investment relationships.⁵

A second layer of protection arises from international investment treaties containing fair and equitable treatment clauses (Tudor, 2008), which arbitral tribunals frequently interpret as encompassing an investor's entitlement to a predictable regulatory environment. However, these mechanisms remain largely external to the EU legal order⁶ and are practically accessible only to sizeable institutional investors, given the cost and duration of arbitration proceedings.

This disjointed image is further complicated by domestic private law, which is based on broad ideas like fair dealing, good faith, and the prohibition of rights abuse. Though their breadth and depth differ greatly throughout Member States and legal traditions, these theories all share the functional purpose of safeguarding reasonable reliance. As a result, different protection rules are applied to cross-border investors, which raises the expenses of legal advice, due diligence requirements, and the general complexity of investment structuring.

TOWARDS A TRANSNATIONAL PRINCIPLE OF LEGITIMATE INVESTMENT EXPECTATIONS

To finance professionals, the principle of legitimate investment expectations (Hepburn, 2025) may be understood more in practical terms rather than in doctrinal terms. It aims at protecting the assumptions that constrained rational investors will be able to make. After all, the longer the time frame of the investment, the more of an emotional impact the decision is likely to have to rationalize. There is always an expectation embedded in every investment decision to be made regarding the regulatory, legal, and contractual frameworks that will be in place at the time the investment is made. While the frameworks might not be immutable, the expectations serve as a working premise to survey the investment, assess its risk, evaluate the potential future cash flows, and assign value to the investment through the allocation of capital. From this point of view, legitimate investment expectations serve as the legal equivalent of regulatory risk. The principle does not promise to maintain the same regulatory environment, but rather is intended to provide a discipline surrounding the process of change. It ensures that public regulators or legal frameworks change the conditions of an investment in ways that are expected, balanced, and provide additional legal frameworks to address the reliance concerns that are determined to be substantial. It is not the fact that the conditions have changed that is a problem; rather, it is the fact that the conditions have changed in a way that is abrupt, inconsistent, and that compromises the rationale of the investment decision that is made. The absence of legitimate expectations results in increased risk premia, short investment horizons, and disinvestment from long-term projects. On the other hand, a legal setup that values reasonable reliance minimizes uncertainty,

decreases capital costs, and improves confidence in the markets while not jeopardizing legitimate public policy goals.

Given how disjointed the current protections are, a more cohesive norm that can shield investors against erratic changes in the legal and regulatory landscape is required. In order to fulfill this purpose, the proposed principle of legitimate investment expectations combines fundamental components found in all European legal traditions, namely proportionality, good faith, and legal certainty (Henckels, 2023). These elements do not operate within a strict hierarchy. Legal certainty provides the structural baseline of predictability; good faith governs the conduct of parties and authorities; proportionality serves as the balancing mechanism when legitimate expectations conflict with public policy objectives. Together, they function as complementary components of a single reliance-based standard.

Although the language and doctrinal expression of these ideas vary between the common-law and civil-law systems, both share the normative necessity that contractual counterparts and public agencies behave in a way that is compatible with the reasonable reliance they establish. For example, civil-law systems tend to articulate reliance protection through doctrines of good faith and the prohibition of abuse of rights, while common-law systems rely on concepts such as promissory estoppel, legitimate expectation in public law, and judicial review of arbitrary administrative action. Despite doctrinal differences, both traditions converge in protecting reasonable reliance against unpredictable change.

Fundamentally, the principle acknowledges that investors base their long-term choices on a legal and contractual framework that shouldn't be changed in a way that is capricious, out of proportion, or inconsistent with prior agreements. The notion does not exclude public authorities from modifying regulations in response to evolving situations or justifiable policy objectives, in contrast to a strict assurance of regulatory stability. Instead, it establishes a discipline of responsible predictability, which mandates that each significant deviation from the norm must be sufficiently justified, supported by suitable transitional measures, and evaluated in the context of the reliance interests at stake. What matters is not uniformity, but whether the measures adequately reflect the scale of reliance and the severity of the regulatory change.

Comparative legal developments support the emergence of such a transnational standard. Civil-law jurisdictions increasingly interpret good faith and abuse of rights in a way that constrains sudden regulatory reversals capable of undermining justified reliance (MacMahon, 2015) while common-law systems rely on doctrines such as promissory estoppel and the protection against arbitrary use of public power to achieve similar outcomes (Henderson, 1969). These converging trends indicate the existence of a shared normative substrate that can accommodate a principle of legitimate investment expectations without disrupting the balance between national sovereignty and market integration.

Formulated in this way, the principle would not replace existing legal instruments but operate as a connective framework across them, strengthening the internal market's credibility for private investors. The principle would operate as an interpretative and coordinating standard rather than as a competing norm. In cases of overlap, it would guide courts and regulators in reconciling existing instruments by emphasising reliance, proportionality, and foreseeability, rather than displacing applicable rules. It also could help legislators and regulators create policies that minimize needless disruptions to market expectations. In such cases, the principle does not prohibit regulatory change but requires that legitimate policy objectives be pursued in a manner that reasonably accommodates reliance interests, for example through advance notice, transitional arrangements, or compensation where appropriate. Lastly, it could give economic actors a more precise standard by which to measure political and legal risk. The principle would contribute to risk assessment by offering clearer qualitative benchmarks – such as foreseeability of change, consistency of enforcement, and availability of transitional safeguards – that investors can incorporate into legal due diligence, scenario analysis, and regulatory risk pricing. By doing this, it would promote more effective capital allocation, lessen uncertainty, and strengthen confidence in the European legal system as a reliable foundation for long-term investment.

IMPLEMENTATION PATHWAYS AND PRACTICAL IMPLICATIONS

The effectiveness of a transnational principle of legitimate investment expectations depends not only on the creation of a new legislative framework, also on its gradual integration into existing legal and regulatory practices. Gradual integration would primarily occur through judicial interpretation and regulatory practice rather than formal codification. Courts may increasingly rely on the principle when assessing disputes arising from regulatory change, while supervisory authorities may reflect it in guidelines, impact assessments, and consultation procedures. Over time, these practices can consolidate into a consistent standard shaping both adjudication and policy design.

The governance frameworks that institutional investors, asset managers, and pension funds use to organize their decision-making provide a second option for implementation. Since transparent rulemaking and regulatory stability are essential to sustainable investment strategies, the idea could be included in internal policies and stewardship codes to encourage public officials and corporate actors to recognize the reliance interests created by long-term, strategic investment commitments.

The causal link operates indirectly. When institutional investors incorporate reliance protection and regulatory predictability into internal policies and stewardship frameworks, these expectations are reflected in engagement with regulators, public consultations, and policy dialogue. Over time, this feedback loop incentivises public authorities to internalise reliance considerations, particularly in sectors dependent on long-term capital commitments.

This would not impose new binding obligations but would strengthen the alignment between responsible investment practices and legal expectations concerning fair and foreseeable regulatory conduct.

Contractual practice offers an additional channel through which the principle may take root. Deals like long-term supply contracts and public-private partnerships already have ways to handle changes in laws and rules (Bloomfield, 2006). If we better protect the parties who rely on these deals, it will foster collaboration when regulations change. This could include adjusting the contract, gradual implementation may take concrete forms such as delayed entry into force of new rules, phased compliance obligations, grandfathering of existing investments, or predefined adjustment periods allowing investors to recalibrate contractual and financial structures, or providing reimbursement where needed. This approach lets governments regulate for the good of the public while also keeping the market steady. When combined, these small changes would help the European internal market build a culture of regulatory dependability. Clearer criteria for evaluating political and legal risk would be advantageous to investors, and public officials would continue to have the freedom to pursue policy goals without jeopardizing the confidence that underpins private capital formation. Therefore, the idea of reasonable investment expectations may eventually serve as a uniting factor that connects public regulatory ability and private autonomy, strengthening the robustness and legitimacy of European financial markets.

COUNTERARGUMENTS AND LIMITATIONS

There are a number of issues raised by the acceptance of a transnational principle of reasonable investment expectations that should be carefully considered. The potential of unnecessarily restricting governments' regulatory liberty is the first point of contention. Such a theory, if applied too far, might cause courts to examine political choices that support justifiable public goals like national defense, public health protection, or energy transition. Although it is impossible to ignore, this worry does not negate the idea. A proportionality-anchored reliance-based approach means that regulatory measures affecting investments should be assessed by weighing the public interest pursued against the extent to which investors reasonably relied on the previous legal framework. The greater the reliance and the longer the investment horizon, the stronger the justification and mitigation required (Reilly, Souder, Ranucci, 2016).

A second constraint pertains to the legitimacy of democracy. In light of changing social and economic priorities, public authorities must continue to have the authority to modify laws and regulations (Schauer, 2008). The proposed principle does not challenge this premise. Instead, it points out that regulatory changes shouldn't be sudden reversals that forget about the incentives and commitments needed for long-term investment. Rather than weakening public action, this approach makes it stronger by encouraging open communication, fair transition periods, and clear policymaking.

A further objection addresses the absence of an explicit legal basis in EU primary or secondary law (European legislation is divided into primary law (founding treaties such as the TEU and TFEU, Charter of Fundamental Rights), which defines objectives and competences, and secondary law, which includes regulations, directives and decisions adopted by the institutions). Some may view the principle as an unwarranted expansion of judicial authority. However, prior to their official codification, generic principles were historically incorporated into European law through judicial elaboration and comparative reasoning. Drawing on well-established standards of good faith, legal clarity, and the preservation of reasonable expectations, the suggested concept takes a similar course.

Lastly, thorough calibration will be necessary for actual implementation. Investors vary in their level of understanding, risk tolerance, and capacity for due diligence, and reliance is context specific (Nguyen, Gallery, Newton, 2016).

The principle would operate in a differentiated manner, considering the characteristics of the investor and the investment. Factors such as the investor's sophistication, access to information, and capacity for due diligence would influence the assessment of what constitutes reasonable reliance, preventing the principle from shielding speculative or inadequately assessed risks.

The idea should not be used as an excuse for speculative investing or poor risk assessment. The development of shared interpretive guidance is essential to prevent inconsistent application. Judicial reasoning plays a central role in this process. At the same time, structured dialogue between regulators and market participants can help ensure that the principle supports, rather than distorts, investment decision-making.

So, all things considered, these limits tell us that we should bring in the idea of fair investment expectations bit by bit and be careful how we understand it. If we get the balance right, it can make regulations seem more trustworthy without getting in the way of fair choices about what's good for the public; it can also help rebuild the trust that financial markets need to work well in the end.

REGULATORY PREDICTABILITY AND INVESTOR RELIANCE IN A GLOBAL CONTEXT

Although the analysis is grounded in the European Union context, the underlying concerns addressed by the principle of legitimate investment expectations are not uniquely European. Advanced economies such as the United Kingdom (James, Quaglia, 2020) and the United States (De Pascalis, 2016) also grapple with the tension between regulatory flexibility and investor reliance, albeit through different legal mechanisms. In common-law jurisdictions, reliance protection is typically mediated through doctrines such as legitimate expectation in public law, promissory estoppel, judicial review of administrative action, and constitutional safeguards against arbitrariness rather than through an integrated private-law framework.

In contrast, jurisdictions such as China present a more complex picture. While long-term investment is often encouraged through policy commitments and industrial planning, the absence of comparable judicial review mechanisms and the central role of administrative discretion make reliance protection more dependent on political credibility than on legal enforceability (Zheng, 2011). This highlights that the practical effectiveness of the principle depends not only on doctrinal formulation, but also on institutional context and the rule-of-law environment.

From a global perspective, the proposed principle should therefore be understood as a functional benchmark rather than a transplantable legal rule. Its core contribution lies in articulating a common analytical lens through which regulatory change can be assessed in terms of foreseeability, proportionality, and reliance, regardless of jurisdiction. In this sense, the European experience offers a reference model rather than a universal template.

REBALANCING PUBLIC POWER AND PRIVATE RELIANCE

The decline of the rule of law in some parts of Europe and other developed economies is not just a legal issue; it poses a real risk to market stability and the effective use of capital (Koyama, Johnson, 2015). Investment relies on the belief that legal and regulatory frameworks will change in a clear and predictable way. When that belief fails, the cost of capital increases, financial planning becomes less certain, and long-term projects vital for economic and social growth might not get enough funding. Thus, improving the connection between legal certainty and private trust is not just an academic concern, but an important goal for the strength of European financial markets (Mülbert, Sajnovits, 2017).

This article has argued that a transnational principle of legitimate investment expectations could contribute to restoring such confidence. By offering a conceptual link between EU administrative principles, international investment protections and domestic private-law doctrines of good faith and fair dealing, the proposal responds to the fragmentation that currently characterises the legal environment for cross-border investment. The rule isn't about shielding investors from every change in regulations or stopping democratic choices. Instead, it encourages a system where the government can chase goals but still understand how long-term money decisions rely on some consistent expectations.

The implementation of this principle does not require a new legislative architecture. The scope of the principle does not extend to all forms of regulatory or legislative change. General and non-discriminatory measures, such as ordinary tax reforms, typically fall outside its protection. However, the principle may become relevant where regulatory changes – including tax measures – specifically target established investment frameworks or withdraw incentives on which investors have reasonably relied, particularly where such regimes were designed to induce long-term commitments.

Using legal thinking, how contracts are usually done, and green investing can help add it to how Europe governs its laws and markets, little by little. Sustainable and green investments are particularly dependent on stable and credible regulatory frameworks, given their long-term horizons and reliance on public policy commitments (Falcone, 2020). As a result, the integration of reliance-based standards aligns naturally with sustainable finance practices, reinforcing the credibility of regulatory signals essential for climate-related capital allocation. Even if this article centers on the European Union, the significance of legitimate investment expectations goes far beyond the EU legal order. Today's global financial markets demonstrate increased regulatory activism, geopolitical fragmentation, and swift policy changes, especially in areas such as energy transition, digital regulation, financial supervision, and industrial policy. Thus, cross-border investments today pose the greatest challenges for evaluating legal and regulatory risk, especially through traditional country-risk indicators. The European Union exemplifies a more widespread advanced economy challenge: how to balance regulatory flexibility and the permanent expectations that are necessary for long-term investment. Similar challenges present themselves in common-law jurisdictions, emerging markets, and global financial hubs where policy changes or uneven enforcement undermines investor confidence, even if the legal structure in place is sophisticated.

The legitimate investment expectations doctrine in the EU is not a uniquely European doctrine; rather, it is part of a broader trend of emerging 'responsible governance' in the regulation of global finance. The phenomenon of cross-border investment in regulation-dependent fields like infrastructure, climate finance, and digital networks demonstrates that keeping within the bounds of legal reason is more of a systemic concern than a purely legal one. In this sense, the EU framework provides a reference model that may inform broader discussions on regulatory credibility and market trust in global finance.

Rebalancing public power and private reliance is essential to ensure that the rule of law remains a living guarantee for investors and a cornerstone of the internal market. A legal environment that respects legitimate investment expectations is not static; it is one in which change occurs in a manner that is transparent, proportionate and compatible with the trust on which private economic activity ultimately depends. These requirements can be assessed through qualitative benchmarks, including the foreseeability of regulatory change, the consistency of enforcement, the availability of transitional safeguards, and the coherence between policy objectives and implementation. Such benchmarks already inform regulatory impact assessments and can be further refined through judicial practice.

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Notes

- 1 For non-legal readers, the proposed transnational principle of legitimate investment expectations may be understood as a cross-cutting standard aimed at protecting the assumptions on which investors reasonably rely when committing capital across borders. Rather than constituting a new legal rule or guarantee of regulatory stability, the principle functions as a benchmark for assessing whether changes in the legal or regulatory environment occur in a manner that is foreseeable, proportionate, and consistent with prior commitments. In this sense, it translates the abstract notion of legal certainty into an operational framework relevant for investment decision-making. Section 4 elaborates on this concept in terms familiar to finance professionals.
- 2 For the purposes of this article, "European private law" does not refer to a fully autonomous and codified body of law comparable to national civil codes. Rather, it denotes a composite legal framework consisting of EU regulations and directives, general principles of EU law, and harmonisation instruments that increasingly shape private-law relationships within and across Member States. These elements operate through national legal systems, influencing contract law, remedies, and standards of conduct, particularly in cross-border economic relationships within the internal market.
- 3 The Draft Common Frame of Reference (DCFR) and the Principles of European Contract Law (PECL) are non-binding harmonisation instruments developed to systematise common principles of contract law across Europe. While they do not have direct legal force, they play an important practical role: they inform legislative reforms, guide judicial interpretation, and provide reference standards in cross-border contracting. In particular, their emphasis on good faith, fair dealing, and protection of reliance reflects an emerging European consensus on the behavioural standards expected in private economic relations.
- 4 In investment practice, regulatory unpredictability manifests itself through sudden legislative amendments, retroactive tax measures, abrupt withdrawal of subsidies or incentives, inconsistent supervisory enforcement, or shifts in judicial interpretation affecting existing contracts. These developments directly affect the risk assessment underlying long-term investment decisions and undermine the reliability of regulatory assumptions embedded in financial models.
- 5 In this context, "private investment relationships" refers to contractual and pre-contractual arrangements between private actors – such as shareholders, lenders, project sponsors, and counterparties in long-term commercial agreements – that structure the allocation of capital and risk independently of direct state involvement.
- 6 The term "EU legal order" is used here to denote the integrated system of EU primary law, secondary legislation, and general principles of law, as interpreted and enforced by the Court of Justice of the European Union and implemented through national legal systems.