

# Bilateral investment agreements between Member States and third countries: transitional arrangements

2010/0197(COD) - 07/07/2010 - Legislative proposal

**PURPOSE** : to establish the terms, conditions and the procedure under which Member States are authorised to maintain in force, amend or conclude bilateral agreements with third countries relating to investment.

**PROPOSED ACT** : Regulation of the European Parliament and of the Council.

**BACKGROUND** : the Treaty on the Functioning of the European Union (the TFEU) establishes the EU's exclusive competence on foreign direct investment, as part of the common commercial policy . Prior to the entry into force of the TFEU, Member States concluded more than 1000 bilateral agreements relating to investment with third countries, which relate in part or in full to foreign direct investment. Such agreements include Bilateral Investment Treaties (BITs) which provide guarantees on the conditions of investment in Member States and in third countries, in the form of specific commitments that are binding under international law. Although agreements remain binding on the Member States as a matter of public international law, in the light of the entry into force of the TFEU the existence of Member States' agreements relating to investment should be addressed from the perspective of the EU's exclusive competence on foreign direct investment. In the absence of an explicit transitional regime in the TFEU clarifying the status of Member States' agreements, this proposal will authorise the continued existence of all investment agreements currently in force between Member States and third countries.

**LEGAL BASE** : Article 207(2) TFEU.

**IMPACT ASSESSMENT** : the Commission evaluated a number of options without carrying out a formal impact assessment. The proposal stresses the importance of legal certainty and notes that soft-law instruments, such as a declaration or statement by the Commission services or by the College on the validity of bilateral investment agreements, would not establish the legal certainty that is required to guarantee the agreements concerned.

**CONTENT** : the draft Regulation provides for an explicit guarantee of legal certainty as regards the conditions under which investors operate. In recognition of the fact that Member States may be required to amend investment agreements, in particular to bring them in compliance with Treaty obligations, the proposal also establishes a framework to empower Member States to enter into negotiations with a third country with a view to modifying an existing bilateral agreement relating to investment. This framework is also available to Member States to negotiate, under certain conditions, a new bilateral agreement with third countries relating to investment. Given that the EU is exclusively competent for foreign direct investment, and that an EU investment policy will be gradually developed, the procedure established by this proposal must be regarded as an exceptional transitional measure.

**Objective**: this is to authorise the continuation in force of international agreements relating to investment concluded between Member States and third countries and to establish conditions and a procedural framework for the negotiation and conclusion by Member States of such agreements.

**Chapter I** sets out the subject matter and scope of the Regulation.

**Chapter II** provides for authorisation for existing bilateral agreements that Member States have concluded with third countries to remain in force.

The provisions:

- require Member States to notify to the Commission of all agreements that they wish to maintain, including agreements which have been concluded but not entered into force;
- authorise the maintenance in force of all existing agreements between Member States and third countries relating to investment that have been notified by Member States, starting upon the entry into force of this Regulation;
- provide for the annual publication of all notified agreements in the Official Journal, to ensure that the exact scope of the legal coverage provided by the Regulation is known by all stakeholders;
- provides for the review of agreements which have been notified. The Commission will assess whether the agreements conflict with the law of the Union, undermine negotiations or agreements relating to investment between the Union and third countries, or undermine the Union's policies relating to investment, including in particular the common commercial policy. No later than five years after the entry into force of the Regulation, the Commission will present a report based on the review of the agreements and any possible recommendations to discontinue the application of the provisions of Chapter II or to modify these provisions;
- detail the possible withdrawal of the authorisation granted under this Chapter. A withdrawal of authorisation may be necessary for agreements with a given third country when (i) these agreements conflict with the law of the Union, or (ii) overlap with an agreement of the Union with that third country; or (iii) undermine the Union's policies relating to investment, including the common commercial policy (e.g. where the existence of agreements undermines the willingness of a third country to negotiate with the Union), or (iv) where the Council has not taken a decision on the authorisation to open negotiations concerning investment within one year of the submission of a recommendation by the Commission.

**Chapter III** provides for the modification of existing agreements and the conclusion of new agreements.

This Chapter:

- provides for the general framework under which Member States may conclude or modify bilateral agreements relating to investment;
- requires the notification to the Commission of a Member States' intent to modify an existing or to conclude a new bilateral agreement with a third country. Member States are requested to provide all relevant documentation relating to the re-negotiation or negotiation of an agreement, which can be made available to other Member States and the European Parliament subject to the requirements of confidentiality;
- details the substantive grounds on the basis of which the Commission would not authorise the opening of formal negotiations by Member States, which include notably the ground that a Member State initiative could undermine the objectives of EU negotiations or EU policy. The Commission may require a Member State to include in a negotiation appropriate clauses, for example with respect to (a) the termination of the agreement in the event of the conclusion of a subsequent agreement between the Union with the same third country (see for example the denunciation or replacement clauses in [Regulation 662/2009](#)); (b) transfer provisions or (c) most-favoured nation treatment with to ensure equal treatment of all EU investors in the relevant third country;
- requires that Member States keep the Commission informed of negotiations that have been authorised. In addition, the Commission may request to participate as an observer in the negotiations concerning investment between the Member State and the third country;
- provides for the procedure under which Member States can be authorised to sign and conclude an agreement;

- provides for the review of authorisations that would be made pursuant to Chapter III of the Regulation.

**Chapter IV** sets out certain requirements regarding the conduct of Member States with regard to agreements covered by this Regulation.

The Chapter:

- requests Member States provide information with respect to meetings which take place under the auspices of covered agreements, and to inform the Commission of any request for dispute settlement and to cooperate with the Commission as regards the activation of dispute;
- provides that Member States may indicate whether any of the information they provide is to be considered confidential and whether it can be shared with other Member States;
- creates a new committee which shall assist the Commission in the management of the Regulation and stipulates the procedures under which this committee shall operate.

**FINANCIAL IMPLICATIONS** : The proposal has no implication for the EU Budget.