

# Procedure file

Basic information	
COD - Ordinary legislative procedure (ex-codecision procedure) Regulation	2010/0197(COD) Procedure completed
Bilateral investment agreements between Member States and third countries: transitional arrangements	
Subject 2.50.03 Securities and financial markets, stock exchange, CIUTS, investments 6.20.03 Bilateral economic and trade agreements and relations 6.20.06 Foreign direct investment (FDI)	

Key players			
European Parliament	Committee responsible	Rapporteur	Appointed
	<b>INTA</b> International Trade		06/11/2012
		S&D <a href="#">MOREIRA Vital</a>	
		Shadow rapporteur	
		PPE <a href="#">ZALEWSKI Pawel</a>	
		ALDE <a href="#">KOCH-MEHRIN Silvana</a>	
		Verts/ALE <a href="#">KELLER Ska</a>	
		ECR <a href="#">STURDY Robert</a>	
		Former committee responsible	
	<b>INTA</b> International Trade		17/03/2010
		Verts/ALE <a href="#">SCHLYTER Carl</a>	
	Former committee for opinion		
	<b>ECON</b> Economic and Monetary Affairs		06/09/2010
		PPE <a href="#">CASA David</a>	
Council of the European Union	Council configuration	Meeting	Date
	<a href="#">Employment, Social Policy, Health and Consumer Affairs3188</a>		04/10/2012
	<a href="#">Foreign Affairs</a>	<a href="#">3154</a>	16/03/2012
	<a href="#">Foreign Affairs</a>	<a href="#">3086</a>	13/05/2011
European Commission	Commission DG	Commissioner	
	<a href="#">Trade</a>	DE GUCHT Karel	

Key events			
07/07/2010	Legislative proposal published	<a href="#">COM(2010)0344</a>	Summary

07/09/2010	Committee referral announced in Parliament, 1st reading		
13/04/2011	Vote in committee, 1st reading		Summary
15/04/2011	Committee report tabled for plenary, 1st reading	<a href="#">A7-0148/2011</a>	
09/05/2011	Debate in Parliament		
10/05/2011	Results of vote in Parliament		
10/05/2011	Decision by Parliament, 1st reading	<a href="#">T7-0206/2011</a>	Summary
13/05/2011	Debate in Council	<a href="#">3086</a>	Summary
16/03/2012	Debate in Council	<a href="#">3154</a>	Summary
04/10/2012	Council position published	<a href="#">11917/1/2012</a>	Summary
25/10/2012	Committee referral announced in Parliament, 2nd reading		
27/11/2012	Vote in committee, 2nd reading		
30/11/2012	Committee recommendation tabled for plenary, 2nd reading	<a href="#">A7-0389/2012</a>	Summary
10/12/2012	Debate in Parliament		
11/12/2012	Decision by Parliament, 2nd reading	<a href="#">T7-0471/2012</a>	Summary
12/12/2012	Final act signed		
12/12/2012	End of procedure in Parliament		
20/12/2012	Final act published in Official Journal		

### Technical information

Procedure reference	2010/0197(COD)
Procedure type	COD - Ordinary legislative procedure (ex-codecision procedure)
Procedure subtype	Legislation
Legislative instrument	Regulation
Legal basis	Treaty on the Functioning of the EU TFEU 207-p2
Stage reached in procedure	Procedure completed
Committee dossier	INTA/7/10941

### Documentation gateway

Legislative proposal		<a href="#">COM(2010)0344</a>	07/07/2010	EC	Summary
Committee draft report		<a href="#">PE452.807</a>	18/11/2010	EP	
Amendments tabled in committee		<a href="#">PE454.644</a>	21/01/2011	EP	
Committee opinion	<b>ECON</b>	<a href="#">PE452.846</a>	01/03/2011	EP	
Committee report tabled for plenary, 1st reading/single reading		<a href="#">A7-0148/2011</a>	15/04/2011	EP	

Text adopted by Parliament, 1st reading/single reading		<a href="#">T7-0206/2011</a>	10/05/2011	EP	Summary
Commission response to text adopted in plenary		<a href="#">SP(2011)5858</a>	30/06/2011	EC	
Council statement on its position		<a href="#">14224/2012</a>	28/09/2012	CSL	
Council position		<a href="#">11917/1/2012</a>	04/10/2012	CSL	Summary
Commission communication on Council's position		<a href="#">COM(2012)0603</a>	16/10/2012	EC	Summary
Committee draft report		<a href="#">PE498.053</a>	29/10/2012	EP	
Committee recommendation tabled for plenary, 2nd reading		<a href="#">A7-0389/2012</a>	30/11/2012	EP	Summary
Text adopted by Parliament, 2nd reading		<a href="#">T7-0471/2012</a>	11/12/2012	EP	Summary
For information		<a href="#">N8-0024/2017</a> <a href="#">OJ C 147 11.05.2017, p. 0001</a>	12/12/2012	EU	
Draft final act		<a href="#">00066/2012/LEX</a>	12/12/2012	CSL	
Follow-up document		<a href="#">COM(2020)0134</a>	06/04/2020	EC	Summary

#### Additional information

National parliaments	<a href="#">IPEX</a>
European Commission	<a href="#">EUR-Lex</a>

#### Final act

[Regulation 2012/1219](#)  
[OJ L 351 20.12.2012, p. 0040](#) Summary

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

**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.

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

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The Committee on International Trade adopted the report by Carl SCHLYTER (Greens/EFA, SE) on the proposal for a regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

It recommended that the European Parliament's position at first reading under the ordinary legislative procedure should be to amend the Commission proposal as follows:

**Aim and scope:** this Regulation establishes 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.

**Notification to the Commission:** within 30 days from the entry into force of this Regulation, the Member States shall notify the Commission of all bilateral agreements with third countries relating to investment concluded and/or signed before the entry into force of this Regulation that they either wish to maintain in force or permit to enter into force under this Chapter. The notification shall include a copy of those bilateral agreements. Member States shall also notify the Commission of future changes to the status of these agreements.

**Review of the agreements:** the report limits the power of the Commission to review the existing bilateral investment agreements by Member States. The amended text provides that the Commission may review the agreements notified by the Member States assessing whether the agreements:

- conflict with the law of the Union other than the incompatibilities arising from the allocation of competences between the Union and its Member States on foreign direct investment, or;
- constitute a serious obstacle to the conclusion of future Union agreements with third countries relating to investment.

No later than ten years after the entry into force of this Regulation, the Commission shall present to the European Parliament and the Council a report on the state of play of the review of existing bilateral investment agreements with third countries.

**Withdrawal of authorisation:** the authorisation provided shall be withdrawn where the Union has already ratified an agreement with the same third country relating to investment negotiated by the Commission.

The amended text stipulates that the authorisation may be withdrawn where: (a) an agreement conflicts with the law of the Union other than the incompatibilities arising from the allocation of competence between the Union and its Member States on foreign direct investment, or (b) an agreement constitutes a serious obstacle to the conclusion of future agreements with that third country relating to investment.

When the Commission considers that there are grounds to withdraw the authorisation, it shall deliver a reasoned opinion to the Member State concerned. Consultations shall take place between the Commission and the Member State concerned. Those consultations may include the possibility for Member States to renegotiate the agreement with the third country within an agreed period of time.

**Authorisation to amend or conclude agreements:** where a Member State intends to enter into negotiations in order to amend an existing bilateral investment agreement with a third country or to conclude a new agreement with a third country relating to investment, it shall notify the Commission of its intentions in writing.

Where a Member State intends to conclude a new agreement with a third country relating to investment, the Commission shall consult the other Member States within thirty days to determine whether there would be added value in an agreement of the Union. If a simple majority of Member States indicate their interest in concluding an investment agreement of the Union with the third country concerned, the Commission may withhold authorisation and instead propose a negotiating mandate to the Council in accordance with Article 207(3) of the Treaty. The Commission shall keep the European Parliament immediately and fully informed at all the stages of the procedure.

When making its decision the Commission shall take into consideration the geographical priorities of the Union's investment strategy and the capacity of the Commission to negotiate a new agreement of the Union with the third country concerned.

**Participation of the Commission in negotiations:** an amendment states that the Commission may participate as an observer in the negotiations between the Member State and the third country as far as the exclusive competence of the Union is concerned.

**Authorisation to sign and conclude an agreement:** where the Commission decides to negotiate a bilateral investment agreement or a foreign direct investment agreement with a third country, it shall duly notify all Member States about its intention and the scope of the new agreement.

**Review:** no later than ten years after the entry into force of this Regulation, the Commission shall present to the European Parliament and the Council a report on the application of this Chapter which shall review the need for a continued application of this Regulation and any of its Chapters.

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

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The European Parliament adopted by 345 votes to 246, with 14 abstentions, a resolution on the proposal for a regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

It adopted its position at first reading under the ordinary legislative procedure. The amendments adopted in plenary are the result of a compromise negotiated between the European Parliament and the Council. They amend the Commission proposal as follows:

**Aim and scope:** this Regulation establishes 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.

**Notification to the Commission:** within 30 days from the entry into force of this Regulation, the Member States shall notify the Commission of all bilateral agreements with third countries relating to investment concluded and/or signed before the entry into force of this Regulation that they either wish to maintain in force or permit to enter into force under this Chapter. The notification shall include a copy of those bilateral agreements. Member States shall also notify the Commission of future changes to the status of these agreements.

**Review of the agreements:** the resolution limits the power of the Commission to review the existing bilateral investment agreements by Member States. The amended text provides that the Commission may review the agreements notified by the Member States assessing whether the agreements:

- conflict with the law of the Union other than the incompatibilities arising from the allocation of competences between the Union and its Member States on foreign direct investment, or;
- constitute a serious obstacle to the conclusion of future Union agreements with third countries relating to investment.

No later than ten years after the entry into force of this Regulation, the Commission shall present to the European Parliament and the Council a report on the state of play of the review of existing bilateral investment agreements with third countries.

Withdrawal of authorisation: the authorisation provided shall be withdrawn where the Union has already ratified an agreement with the same third country relating to investment negotiated by the Commission.

The amended text stipulates that the authorisation may be withdrawn where: (a) an agreement conflicts with the law of the Union other than the incompatibilities arising from the allocation of competence between the Union and its Member States on foreign direct investment, or (b) an agreement constitutes a serious obstacle to the conclusion of future agreements with that third country relating to investment.

When the Commission considers that there are grounds to withdraw the authorisation, it shall deliver a reasoned opinion to the Member State concerned. Consultations shall take place between the Commission and the Member State concerned. Those consultations may include the possibility for Member States to renegotiate the agreement with the third country within an agreed period of time.

Authorisation to amend or conclude agreements: subject to the conditions laid down in the Regulation, a Member State shall be authorised to enter into negotiations to amend an existing bilateral investment agreement with a third country or to conclude a new agreement relating to investment with a third country.

Where a Member State intends to conclude a new agreement with a third country relating to investment, the Commission shall consult the other Member States within thirty days to determine whether there would be added value in having an agreement of the Union.

Authorisation to open formal negotiations: the Commission shall authorise the opening of formal negotiations unless it concludes that the opening of negotiations would: (a) be in conflict with the law of the Union other than the incompatibilities arising from the allocation of competence between the Union and its Member States on foreign direct investment, or (b) undermine the objectives of negotiations underway between the Union and the third country concerned, or (c) not be in line with policies of the Union relating to investments, or (d) constitute a serious obstacle to the conclusion of future Union agreements with that third country relating to investment.

If a simple majority of Member States indicate their interest in concluding an investment agreement of the Union with the third country concerned, the Commission may withhold authorisation and instead propose a negotiating mandate to the Council in accordance with Article 207(3) of the Treaty. The Commission shall keep the European Parliament immediately and fully informed at all the stages of the procedure.

When making its decision the Commission shall take into consideration the geographical priorities of the Union's investment strategy and the capacity of the Commission to negotiate a new agreement of the Union with the third country concerned.

Participation of the Commission in negotiations: an amendment states that the Commission may participate as an observer in the negotiations between the Member State and the third country as far as the exclusive competence of the Union is concerned.

Authorisation to sign and conclude an agreement: where the Commission decides to negotiate a bilateral investment agreement or a foreign direct investment agreement with a third country, it shall duly notify all Member States about its intention and the scope of the new agreement.

Review: no later than ten years after the entry into force of this Regulation, the Commission shall present to the European Parliament and the Council a report on the application of this Chapter which shall review the need for a continued application of this Regulation and any of its Chapters.

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

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The Council noted the information provided by Commissioner De Gucht on the state of play and future steps concerning the adoption of the draft Bilateral Investment Treaties (BITs) regulation. The proposed regulation seeks to ensure a smooth transition from the current system of Bilateral Investment Treaties (BITs) between Member States and third countries to future EU BITs to be negotiated by the Commission under the new Union competence for foreign direct investment, introduced by Article 207 of the Lisbon Treaty as part of the common commercial policy. The proposal seeks to clarify the status of more than 1 000 bilateral investment agreements concluded between EU Member States and third countries.

The Council held an exchange of views in which it confirmed its intention to seek a negotiated agreement with the European Parliament that would allow the BITs regulation to enter into force as soon as possible. The European Parliament adopted its position at first reading on 10 May.

The Council has two objectives: (i) to ensure legal certainty to the fullest possible extent, together with maximum protection for EU investors, and (ii) to maintain the EU as a preferred destination for foreign direct investment.

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

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The Council took stock of negotiations with the European Parliament on a draft regulation establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

It welcomed progress made so far, in particular the confirmation that the Commission services were in the process of establishing a new informal compromise that could bridge remaining differences between Parliament and Council.

The draft regulation is aimed at ensuring a smooth transition from the current system of bilateral investment treaties (BITs) between Member States and third countries to a system whereby EU BITs are negotiated by the Commission under EU competence for foreign direct investment, as introduced by article 207 of the Treaty of Lisbon as part of the EU's common commercial policy.

A negotiating mandate was approved in June 2011 by the Permanent Representatives Committee ([doc 10908/11](#)). Since then, five informal trilogue meetings have been held with the Parliament, the latest on 28 February. The parties are aiming for an early second reading

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

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The Council's position at first reading which is the result of a political agreement between the European Parliament, the Commission and the Council, makes the following amendments to the Commission's proposal:

**Purpose and scope:** Parliament did not propose any amendments in this regard. Nevertheless; the text stipulates that, from now on, the Regulation does not have any bearing on the division of competences established by the Treaty. A definition of the term "bilateral investment agreement" is also introduced.

**Maintenance in force of existing bilateral investment agreement:**

- Article 2 (notifications to the Commission): Parliament's amendments were accepted. The text contains also some further technical modifications.
- Article 5 (Commission assessments): the text has been thoroughly modified. While the Council could not accept a substantial part of the Parliament's amendment, it did accept the Parliament's idea of including the notion of "serious obstacle" in the modified text (contained also in several other Articles). In the Council's view, the mere existence of bilateral investment agreements should not be considered as a "serious obstacle".
- Article 6 (duty of cooperation) the Commission's text was substantially modified in order to emphasise the importance of close cooperation between Member States and the Commission in resolving any serious obstacles to the negotiation or conclusion of bilateral investment agreements between the EU and third countries as identified by the Commission. In line with the provisions of this Article, the Commission may indicate the appropriate measures to be taken by the Member State concerned to remove the obstacles referred to above. Parliament's amendments could not be accepted.

**Authorisation to amend or conclude bilateral investment agreements:** Parliament's amendments to Articles 7 (Authorisation to amend or conclude a bilateral investment agreement), 8 (Notification to the Commission), 9 (Authorisation to open formal negotiations) and 11 (Authorisation to sign and conclude a bilateral investment agreement) were accepted in part.

Regarding Article 10 (Participation of the Commission in negotiations), the Parliament's amendment could not be accepted as the text of the Commission proposal was retained.

**Final provisions:** the Council agreed during the informal contacts with the Parliament to follow its suggestion to insert into the Regulation a new Article 12 concerning agreements signed by Member States between the entry into force of the TFEU, i.e. 1 December 2009, and the entry into force of this Regulation, even though the Parliament did not propose any amendment in this respect in its position at first reading.

Regarding Article 15 (Review), a compromise was agreed on the timing of the report on the application of the Regulation, i.e. seven years after the entry into force of the Regulation - instead of ten years proposed by the Parliament and the Council and five years as initially proposed by the Commission.

On Article 16 (Committee procedure), the Council accepted the Parliament's amendment calling for the use of the advisory procedure.

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

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The position of the Council fully reflects the agreement reached in the trilogue between the Council, the European Parliament and the Commission, as concluded on 29th May 2012. The Commission fully supported this agreement, the main points of which are as following:

- to clarify the status under the law of the Union of bilateral investment agreements of the Member States signed before the entry into force of the Lisbon Treaty, by confirming that those agreements may be maintained in force (or enter into force) until they are replaced by the investment agreement of the Union;
- to establish the conditions under which Member States may be empowered to conclude and/or maintain in force bilateral investment agreements signed between the entry into force of the Lisbon Treaty and the entry into force of this Regulation;
- to streamline the conditions and procedures under which Member States may be empowered to amend or conclude bilateral investment agreements with third countries after entry into force of the Regulation;
- to ensure that maintenance in force of investment agreements by Member States, or authorisation to open negotiations or conclude bilateral investment agreements with third countries will not prevent the negotiation or conclusion of future investment agreements by the Union;
- to confer on the Commission implementing powers in accordance with Regulation (EU) No 182/2011, and to apply advisory procedure for the adoption of authorisation decisions pursuant to the Regulation.

**Joint Declaration:** the Commission accepted and subscribed to the joint declaration of the Council, the Parliament and the Commission that the use of comitology in the Regulation should not be considered as a precedent for future acts on empowerment of Member States under the EU exclusive competences, and that the choice of the advisory procedure should not be considered as a precedent for future implementing acts under the Common Commercial Policy.

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

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The Committee on International Trade adopted its recommendation for second reading in the report by Vital MOREIRA (S&D, PT) on the

Council position at first reading with a view to the adoption of a regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

The committee recommends that the European Parliament approves the Council position at first reading unamended.

Members also approved the joint statement by Parliament, the council and the Commission annexed to the motion for resolution. This statement stipulates that this Regulation, including recitals 17, 18 and 19, provides for the use of the procedures referred to in Regulation (EU) No 182/2011 does not constitute a precedent as to future regulations allowing the Union to empower the Member States under Article 2(1) TFEU to legislate and adopt legally binding acts in areas of Union exclusive competence. Furthermore, in this Regulation, the use of the advisory as opposed to the examination procedure shall not be considered as setting a precedent for future regulations establishing the framework for the common commercial policy.

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

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The European Parliament approved the Council position at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

Members also approved the joint statement by Parliament, the Council and the Commission annexed to the motion for resolution. This statement stipulates that this Regulation, including recitals 17, 18 and 19, provides for the use of the procedures referred to in Regulation (EU) No 182/2011 does not constitute a precedent as to future regulations allowing the Union to empower the Member States under Article 2(1) TFEU to legislate and adopt legally binding acts in areas of Union exclusive competence. Furthermore, in this Regulation, the use of the advisory as opposed to the examination procedure shall not be considered as setting a precedent for future regulations establishing the framework for the common commercial policy.

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

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**PURPOSE:** to establish transitional rules on bilateral investment treaties.

**LEGISLATIVE ACT:** Regulation (EU) No 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries

**CONTENT:** this Regulation establishes the terms, conditions and procedures under which the Member States are authorised to amend or conclude bilateral investment agreements.

At the time of the entry into force of the Treaty of Lisbon, Member States maintained a significant number of bilateral investment agreements with third countries. The Treaty on the Functioning of the European Union does not contain any explicit transitional provisions for such agreements that have now come under the Unions exclusive competence. The regulation will give form to an EU competence for foreign direct investment introduced by Article 207 of the Treaty of Lisbon as part of the EU's common commercial policy. It is aimed at ensuring a smooth transition from the current system of bilateral investment treaties (BITs) between Member States and third countries to a system whereby EU bilateral investment treaties are negotiated by the Commission.

The Regulation:

- addresses the status under Union law of bilateral investment agreements of the Member States signed before 1 December 2009. Those agreements can be maintained in force, or enter into force, in accordance with the Regulation;
- lays down the conditions under which Member States are empowered to conclude and/or maintain in force bilateral investment agreements signed between 1 December 2009 and 9 January 2013;
- lays down the conditions under which Member States are empowered to amend or conclude bilateral investment agreements with third countries after 9 January 2013.

The authorisation to amend or conclude bilateral investment agreements provided for by the Regulation should notably allow Member States to address any incompatibilities between their bilateral investment agreements and Union law.

In order to ensure uniform conditions for the implementation of the Regulation, implementing powers are conferred on the Commission which shall be assisted by the Committee for Investment Agreements, being a committee within the meaning of Regulation (EU) No 182/2011.

The Commission shall present a report on the application of this Regulation by 10 January 2020.

**ENTRY INTO FORCE:** 09/01/2013.

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

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The Commission presented the report on the application of Regulation (EU) No 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

As a reminder, following the entry into force of the Lisbon Treaty on 1 December 2009, the Union acquired exclusive competence on foreign direct investment. There was a need for laying down the relevant procedures and conditions under which Member States would be empowered to conclude new or amend existing agreements with third countries.

Against this background, the European Parliament and the Council adopted Regulation (EU) No 1219/2012 which entered into force on 9 January 2013. During the seven-year period of implementation, the EU's investment protection policy underwent substantial reform and developments.

This report provides: (i) a description of the Regulation and its implementation during the period 9 January 2013 to 31 December 2019; (ii) an overview of the notifications received from the Member States and of the authorisations granted by the Commission; (iii) a justification of whether there is a need for a continued application of the authorisation mechanism.

The Commission announced on 18 February 2020 its intention to henceforth publish all Commission Implementing Decisions on authorisations granted to Member States for bilateral investment agreements. Previously, the European Parliament and the Council had already been kept regularly informed through reporting by the Commission about the authorisations granted to the Member States.

#### Description of the Regulation (Grandfathered agreements)

The Regulation clarifies the legal status of the bilateral investment agreements signed by Member States before the entry into force of the Lisbon Treaty, or before their date of accession to the EU, by setting out a mechanism for Member States to notify all agreements, which they wished to maintain in force (or permit to enter into force). This process is also referred to as grandfathering. The Regulation refers to the process of progressive replacement of bilateral investment agreements by Union-level agreements and further stipulates that bilateral agreements can be maintained in force until an agreement between the Union and the same third country enters into force.

#### Implementation of the Regulation (Grandfathered pre-Lisbon agreements)

Member States notified 1360 pre-Lisbon bilateral investment agreements, which they wished to maintain or permit to enter into force. Member States in 2013 with the largest number of concluded agreements were Germany (123), Italy (113), France (93), UK (93), the Netherlands (86), Belgium and Luxembourg (81), and Spain (63).

Member States in Central and Eastern Europe concluded bilateral investment agreements during the period of political and economic transition in the 1980s and 1990s, in particular with OECD countries (e.g. Australia, Canada, Norway, Switzerland and the US). Many Member States have also concluded bilateral investment agreements with various countries of the former Soviet Union (including Kazakhstan, Russia and Ukraine) and with the countries of the Western Balkans. Almost all Member States have entered into bilateral investment agreements with China and Korea. A substantial number of agreements was also concluded with Southern Mediterranean countries (e.g. Algeria, Egypt, Morocco, Tunisia), Turkey, several Latin American countries (e.g. Argentina, Chile, Paraguay and Peru) and some Gulf States (Iran, Kuwait, Qatar, United Arab Emirates and Saudi Arabia) as well as with various Asian (India, Indonesia) and African countries (such as Angola, Nigeria and South Africa).

For reasons of transparency, the Commission annually publishes an updated and consolidated list of all bilateral investment agreements that have been signed and concluded by the Member States.

#### Requests for authorisation to open formal negotiations

During the period 2013 to 2019, the Commission:

- received a total of 304 requests to authorise the opening of formal negotiations on new bilateral investment agreements or amendments to existing agreements;
- granted 241 authorisations, of which 164 were for new agreements and 77 for amendments to existing agreements;
- rejected six requests on the grounds that they concerned agreements with third countries already covered by EU-level investment negotiations;
- 22 notifications were withdrawn by the Member States during the authorisation procedure.

As of 31 December 2019:

- 27 authorisation procedures were pending as Member States had been requested by the Commission to provide additional information on the agreements for which they sought an authorisation;
- the decision-making process was ongoing in relation to eight requests for authorisation.

#### Requests for authorisation to conclude a new agreement or amendment

During the period 2013 to 2019:

- a total of 76 requests to authorise the signing and conclusion of a newly negotiated agreement or an amendment to an existing agreement was notified by the Member States;
- the Commission granted a total of 48 authorisations, of which 24 authorisations were for new agreements and 24 for amendments.

As of 31 December 2019, 25 authorisation procedures were pending as Member States had been requested by the Commission to provide additional information on the agreements for which they sought an authorisation.

#### Requests for authorisation of agreements signed between the entry into force of the Lisbon Treaty and the entry into force of the Regulation

- Member States notified 62 requests for authorisation of agreements signed between 1 December 2009 and 9 January 2013.
- The Commission granted 33 authorisations under Article 12 of which 16 were for new agreements and 17 for protocols amending existing agreements.

As of 31 December 2019, the remaining 29 authorisation procedures were pending as Member States had been requested to provide additional information.

#### Authorisations granted

There was a high number of authorisation requests and authorisations granted - notably to launch new negotiations - during the first two years of implementation of the Regulation in 2013 and 2014. However, there were very few authorisations in 2015. Requests for authorisations

picked up again in the following years though with a significant drop again in 2018. Most of the requests for authorisation under the Regulation originated from the Czech Republic, Hungary, Italy, Lithuania, Malta, Portugal, Romania, Slovak Republic and Spain.

The third countries with the highest number of notification requests from Member States include, inter alia, Iran, Kazakhstan, Nigeria, Saudi Arabia, Qatar and United Arab Emirates.

Continued application of Chapter III of the Regulation concerning the authorisation to amend or conclude agreements

The overall objective of the Regulation to set out the necessary transitional arrangements for bilateral investment agreements by Member States until such time they be progressively replaced by Union-level investment agreements continues to be relevant.

Given the Member States demand for concluding new or amending existing investment agreements and considering that the replacement by EU investment agreements shall take some time, there exists a need to continue operating the transitional arrangements set out under Regulation (EU) No 1219/2012.

In this context, Chapter III of the Regulation not only provides the necessary tools to formally authorise such bilateral initiatives based on criteria that reflect the most recent EU investment policy standards, but also allows for mechanisms to ensure a policy dialogue between the Commission and Member States.

Importantly, Chapter III can be seen as an effective instrument for Member States to promote the EUs reformed investment policy approach and standards worldwide. Against this backdrop, the Commission recommends continuing the application of Chapter III under the Regulation.