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THE EU REGULATION ESTABLISHING TRANSITIONAL ARRANGEMENTS FOR BILATERAL INVESTMENT AGREEMENTS BETWEEN MEMBER STATES AND THIRD COUNTRIES: THE DESTINY OF MEMBER STATES' BITS

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In July 2010 the European Commission issued a *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*, COM(2010)344 final and a Communication entitled *Towards a Comprehensive European International Investment Policy* (COM(2010)343 final) (hereinafter the Communication). The above documents were the two first initiatives over investment matters taken by the Commission after the entry into force of the Lisbon Treaty. As it well known, the Lisbon Treaty extended the external competence of the EU over Common Commercial Policy to include "foreign direct investment."

The Draft Regulation establishing a transitional regime for BITs between Member States and third countries, proposed by the EU

Commission in July 2010 and strongly opposed by the Council, has been amended by the European Parliament (EP) during the first reading on May 10, 2011 and transmitted to the Council, which intended to seek a negotiated agreement with the EP with the view to allowing the Regulation to enter into force as soon as possible. Since the approval by the Permanent Representatives Committee of the negotiating mandate in June 2011, a number of informal meetings have been held with the EP, the latest on February 28, 2012. During their informal meetings, the Council and the EP reached an agreement on the changes to be introduced to the text of the Regulation.

On 4 October 2012 the Council adopted its position at first reading (Position (EU) No 11/2012 of the Council 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, 2012/C 352 E/02).

The text of the Regulation, agreed between the Council and the EP and included in the Council's Position, is expected to be adopted by the Plenary Assembly of the EP without amendments at its second reading. Therefore the agreed text is highly likely to be the final and definitive text of the Regulation.

The present article will provide a brief overview of the transitional regime for Member States' bilateral investment treaties (hereinafter BITs), contained in the text of the Regulation, agreed on between the Council and the EP.

In the first place, existing BITs between Member States and third countries, signed before the entry into force of the Treaty of Lisbon (December 1, 2009) (or for new Member States the date of their accession to the EU) and notified by Member States to the Commission within thirty days from the entry into force of the Regulation, can be maintained into force (or enter into force) until their replacement with an investment agreement between the same third country and the EU (Article 3). The text of the Regulation, agreed between the Council and the EP, should enable Member States to maintain into force their BITs with third countries signed before December 1, 2009, without any authorization by the Commission.

This is in line with the position, taken by EU Council in its Conclusions on a comprehensive European international investment policy (EU Council, Conclusions on a comprehensive European international investment policy, of October 25, 2010). According to the Council, BITs concluded by Member States with third countries should remain effective until “they are replaced by at least equally effective EU agreements.” (EU Council, Conclusions on a comprehensive European international investment policy, of October 25, 2010, para. 9) Conversely, under the Draft Regulation proposed by the Commission in July 2010, Member States would have needed explicit authorization by the Commission not only to amend their BITs with third countries or to conclude new BITs, but also to maintain existing BITs. (See Article 3 Draft Regulation; for a more extensive discussion of the text of the Draft Regulation initially proposed by the Commission, see De Luca, *New Developments on the Scope of the EU Common Commercial Policy under the Lisbon Treaty, Investment Liberalization vs. Investment Protection?*, in Karl P. Sauvant (ed.), Yearbook on International Investment Law & Policy 2010/2011, 165–215 (2012), on p. 171–173). The Commission would not have granted (and would have being able to withdraw) the authorization necessary for a Member State to maintain an existing BIT under certain circumstances. (See Article 5 Draft Regulation on the review by the Commission of existing Member States’ BIT and Article 6 Draft Regulation on the grounds of withdrawal by the Commission of the authorization required for a Member State BIT to remain in force)

Under the text of the Regulation agreed between the Council and the EP, a cooperation mechanism replaces the authorization mechanism envisaged by the Commission in its initial proposal.

The cooperation mechanism included in the agreed text of the Regulation is modeled on the provisions of Article 351 TFEU, as also interpreted by the CJEU in its case law on BIT clauses on transfer of funds (Case C-249/06, Commission of the European Communities v. Kingdom of Sweden, 2009 E.C.R. I-1335; Case C-205/06, Commission of the European Communities v. Republic of Austria, 2009 E.C.R. I-1301; and Case C-118/07, Commission of the European Communities v. Republic of Finland, 2009 E.C.R. I-10889). The position, put forward by the Council, that Article 351 TFEU should be applied by way of analogy to the case of Member States' BITs with third countries, the great majority of which are concluded after the entry into force of the Treaty of Rome, has prevailed over the opposite position put forward by the Commission. (In this respect, see the position of Mr. Colin Brown, officer of the European Commission, DG Trade in Brown, Alcover-Llubià, *The external Investment Policy of teh European Union in the Light of the Entry Into Force of the Lisbon Treaty*, in Karl P. Sauvant (ed.), Yearbook on International Investment Law & Policy 2010/2011, 145-164 (2012), on p. 149-153) In accordance with Article 351(1) TFEU, the TEU and TFEU do not (and cannot) affect the rights and obligations arising from agreements concluded by Member States before January 1, 1958 or, for acceding states, before the date of their accession, with third countries. However, according to Article 351(2) "o the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude." The three cases cited above on the clauses on funds transfer of some Member States' BITs with third countries and their incompatibility with the EU rules allowing the Council to adopt measures restricting movement of capital and payments are illustrative of the approach followed by the Regulation in dealing with potential incompatibilities between the provisions of MSs BITs and EU law. The ECJ found these clauses to be not in line with the Treaty's chapter on free movement of capital and payments as far as they do not expressly safeguard the above powers of the Council. (Case C-249/06, Commission of the European Communities v. Kingdom of Sweden, 2009 E.C.R. I-1335, paras. 34–35; Case C-205/06, Commission of the European Communities v. Republic of Austria, 2009 E.C.R. I-1301, paras. 33–34; and Case C-118/07, Commission of the European Communities v. Republic of Finland, 2009 E.C.R. I-10889, paras. 27–28) In this respect, the Court of Justice confirmed that Article 351 TFEU imposes upon the Member States the obligation to remove any existing imcompatibilities with any available means (the suspension or the denuntiation of the agreements included). Furthermore, the Court of Justice described the role of the Member States and Commission, respectively, in dealing with incompatibility issues as follows: "...the Member States are required, where necessary, to assist each other to eliminate the incompatibilities established between the agreements concluded by the Member States prior to their accession and Community law and, where appropriate, to adopt a common attitude. In the context of its duty under Article 211 EC to ensure that the provisions of the Treaty are applied, it is for the Commission to take any steps which might facilitate mutual assistance between the Member States concerned and their adoption of a common attitude." (Case C-118/07, Commission of the European Communities v. Republic of Finland, 2009 E.C.R. I-10889, para. 35; in almost identical terms see Case C-249/06, Commission of the European Communities v. Kingdom of Sweden, 2009 E.C.R. I-1335, para. 44; Case C-205/06, Commission of the European Communities v. Republic of Austria, 2009 E.C.R. I-1301, para. 44).

On the one hand, BITs between Member States and third countries, signed before December 1, 2009, remain effective as a general rule. On the other, under the cooperation mechanism, set out in Article 6 of the Regulation, the Member States have a duty to take any measures necessary to ensure that their BITs do not constitute a serious obstacle to the negotiation or conclusion of bilateral investment agreements with third countries by the EU, in view of their progressive replacement. Furthermore, the Commission may evaluate whether BITs contain provisions that constitute a serious obstacle to the negotiation or conclusion of bilateral investment agreements with third countries by the EU, in view of their progressive replacement (Article 5). If the Commission finds that this is the case, a consultation phase between the Commission and the Member State concerned, lasting no longer than ninety days, is open, and the Commission and the Member State have to cooperate in order to identify the appropriate actions to be taken in order to remove the obstacle. At the end of the consultations, if the matter has not been resolved otherwise, the Commission may indicate the appropriate measures and actions to be taken by the Member State. The text of the Regulation imposes upon the Member States an *obligation de résultat*, namely an obligation to remove the obstacles with any available means. Among these are means having different nature, such as the renegotiation, the suspension, and denunciation of the BIT, in line with the case law of the CJEU on Article 351 TFEU. Article 6 of the Regulation does not clarify the nature of the act through which the Commission points the measures to be taken in order to remove the obstacles to the Member State concerned. Taking account of the variety of the means at disposal (i.e., the renegotiation of the agreement, suspension or termination thereof) and their different nature, the Commission should issue a reasoned opinion, possibly paving the way to the opening of an infringement procedure in the case of a lack of complaince by the Member State concerned.

In the second place, the text of the Regulation, agreed by the Council and the EP, sets out a two-step authorization mechanism allowing Member States to amend existing BITs or to conclude new ones. As a first step, Member States notify the Commission of their intentions to open negotiations with a given third country in order to amend an existing BIT or to conclude a new one. The Commission authorizes the opening of negotiations unless one of the following four circumstances occurs. First, the opening of negotiations is in conflict with EU law other than the incompatibilities resulting from the appropriate allocation of competences between the Union and Member States. Second, the opening of negotiations is incompatible with the EU's principles and objectives under Articles 21–22 of the Treaty on European Union. Third, the opening of negotiations is superfluous because the Commission has submitted or decided to submit to the Council a recommendation to open negotiations with the third country concerned. Fourth, the opening of negotiations constitutes a serious obstacle to the negotiation or conclusion of bilateral investment agreements with third countries by the EU.

Furthermore, the Commission may require Member States to include in or remove from negotiations or future agreements any clauses aimed at ensuring compatibility with EU law or consistency with the investment policy of the EU. The Commission makes its decision on the authorization within ninety days from the notification by the Member State. The Committee for the Investment Agreements, made up of representatives of the Member States, takes part in the authorization procedure, delivering an advisory opinion, pursuant to Article 4 of Regulation (EU) No 182/2011 of the European Parliament and of the Council of February 16, 2011. (Regulation (EU) No 182/2011 of the European Parliament and of the Council, February 16, 2011, Laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55 (Feb. 28, 2001), at 13–18) In accordance with Article 4(2) of Regulation No 182/2011, the Commission shall decide on the authorization "taking the utmost account of the conclusions drawn from the discussions within the committee and of the opinion delivered." In the case that the authorization is not granted, the Commission issues a decision addressed to the Member State concerned, possibly subject to the CJEU's judicial review. As a second step, following the closure of negotiations, Member States notify the Commission of the text of the BIT agreed to with the third country concerned, in order to obtain the authorization by the Commission to sign and conclude the BIT. The authorization to conclude the BIT is granted unless the Commission finds one of the grounds for a refusal to authorize the opening of negotiations (already listed above) exists. The decisions authorizing Member States to sign or conclude a BIT are taken by the Commission with the participation of the Committee for the Investment Agreements, pursuant to the advisory procedure laid down in Article 4 of Regulation No 182/2011. In the case that the Commission decides to refuse an authorization, it issues a decision addressed to the Member State concerned, possibly subject to the CJEU's judicial review.

In the third place, the text of the Regulation, as agreed between the Council and the EP, establishes a transitional regime for BITs signed by Member States between the entry into force of the Treaty of Lisbon (December 1, 2009) and the entry into force of the Regulation. These BITs can be maintained in force or entered into force upon explicit authorization by the Commission. The authorization mechanism, to which Member States are subject to in this respect, is similar to the authorization mechanism allowing Member States to amend their existing BITs and to conclude new ones.

Finally, the agreed text of the Regulation regulates the conduct of Member States with regard to their BITs in almost identical terms to those provided for in Article 13 of the Draft Regulation, proposed by the Commission. The Member States must inform the Commission of any request for arbitration against them under a BIT, and the Commission and Member States shall fully cooperate in order to prepare an effective defense. To this end, the Commission reserves the right to participate in an arbitration procedure. (See Article 13(2) of the Draft Regulation Establishing Transitional Arrangements) Similarly, the Member States must inform the Commission of all meetings that take place under their BITs, as well as all issues under discussion. The Commission can require Member States to take a particular position when an issue under discussion might affect the implementation of investment policies of the EU. Furthermore, the Member States must seek the agreement of the Commission before commencing any dispute settlement proceedings against a third country under the BIT, and commence such proceedings when the Commission so requires.

To conclude, looking at the text of the Regulation, agreed on between the Council and the EP, it can be expected that existing Member States' BITs with third countries will remain effective for a long time to the benefit of EU investors abroad and foreign investors in the EU, because their replacement with investment agreements of the EU in the short term seems to be highly unlikely. Furthermore, the text agreed on between the Council and the EP seems to be more neutral than the Draft Regulation, initially proposed by the Commission, as to the question of the exact scope of the exclusive external competence of the EU in investment matters. It is the Commission's view that the exclusive competence of the EU, as extended by the Treaty of Lisbon to include foreign direct investment, would concern the admission of foreign direct investments, as well as all aspects of treatment and protection of foreign investments. Furthermore, it is the Commission's position that, besides the new rules on Common Commercial Policy, the Chapter on capital and payments (Articles 63–66 TFEU) would also imply the exclusive competence of the EU to conclude international agreements on the protection of investments in general, portfolio investments included, to the extent that international agreements on investment affect the scope of the common rules set by the Treaty's chapter on capitals and payments. (EU Commission's Communication, on p. 8) Consequently, because future EU agreements on investment protection will include investor–state dispute settlement clauses, in line with Member States' BITs with third countries, in the context of treaty-based arbitration proceedings, according to the Commission, there is no need to distinguish between actions and measures taken by EU institutions and those taken by Member States for the purpose of international responsibility. As explained by the Commission in its Communication: “he European Union, represented by the Commission, will defend all actions of EU institutions. Given the exclusive external competence, the Commission takes the view that the European Union will also be the sole defendant regarding any measure taken by a Member State which affects investments by third country nationals or companies falling within the scope of the agreement concerned.” (EU Commission's Communication, on p. 10) The Commission has restated its position that “the Union has exclusive competence to conclude agreements covering all matters relating to foreign investment, that is both foreign direct investment and portfolio investment” in its *Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party*, COM(2012)335 final (on p. 3 where the citation appears and 4–5).

As is well-known, some Member States (such as France, Germany, and the Netherlands) strongly oppose the far-reaching scope of EU exclusive competence over foreign investments claimed by the Commission. The exact scope of EU competence in investment matters is still an unresolved issue. In this respect, it is worth noting that the text of the Regulation, agreed on between the Council and the EP, abandons the premise on which the Commission’s initial proposal was based, that Member States’ BITs would not be compatible with EU law due to the new allocation of competence between Member States and the EU over foreign investments. In other terms, the agreed text does not prejudge the question of the correct allocation of competences between the EU and its Member States over foreign investments under the Treaty.