

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 EU's reformed investment policy approach and standards worldwide. Against this backdrop, the Commission recommends continuing the application of Chapter III under the Regulation.