

Roadmap

Title of the initiative: **Proposal for a Regulation of the European Parliament and the Council establishing transitional arrangements for international investment agreements between Member States and third countries**

Type of initiative (cwp/catalogue/comitology): CWP

Lead dg / contact person / details: DG Trade Unit B.1

Expected date of adoption of the initiative (month/year): May 2010

Date of modification: 18 March 2010

Version no.:

Initial IA screening & planning of further work

A. Context and problem definition

(i) What is the political context of the initiative? (ii) How does this initiative relate to past and possible future initiatives, and to other EU policies?

The Treaty on the Functioning of the European Union ("the TFEU") establishes the European Union's exclusive competence on foreign direct investment, as part of the common commercial policy. In accordance with Article 2 of the TFEU, only the Union may legislate and adopt legally binding acts in an area where exclusive competence is conferred upon the Union. Since the entry into force of the TFEU, the continuing existence of Member States' international agreements relating to investment, and the commitments undertaken therein, are questionable in relation to the EU's exclusive competence on foreign direct investment.

In the absence of a specific transitional regime in the TFEU clarifying the status of Member States' agreements on investment, the present proposal for a Council and Parliament Regulation seeks to establish legal certainty as regards the conditions under which investors are operating, by authorising the continued existence of all investment agreements currently in force between Member States and third countries.

The content and direction of an EU investment policy, to be developed on the basis of the new EU exclusive competence on foreign direct investment, is not addressed by this Regulation but will be addressed rather in a separate Communication from the Commission to the European Parliament and the Council.

What are the main problems identified?

The problem identified is the legal uncertainty of the present situation, and the risk of a loss of rights and benefits accrued to investors and investments under international investment agreements that Member States have concluded with third countries. Member States have concluded more than 1.000 such agreements which provide (*inter alia*) 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. The main purpose of those agreements is to provide a very high level of legal protection for investors investing in third countries. The Regulation now proposed seeks to provide legal certainty on the status and validity of those agreements. Swift action after the entry into force of the Lisbon treaty and the shift of competence to the EU is necessary to address the situation.

Who is affected?

EU and foreign investors that benefit from international investment agreements concluded by Member States and third countries as well as relevant stakeholders in recipient and source countries.

(i) Is EU action justified on grounds of subsidiarity?

Foreign direct investment has become an area of exclusive EU competence in the Treaty on the Functioning of the European Union (Article 207(1) and Article 3(1)), and is therefore not subject to subsidiarity.

(ii) Why can the objectives of the proposed action not be achieved sufficiently by Member States (necessity test)? (iii) As a result of this, can objectives be better achieved by action by the Community (test of EU added value)?

Foreign direct investment is an area of exclusive EU competence; hence, the objectives cannot be achieved by Member States.

B. Objectives of EU initiative

What are the main policy objectives?

The main objective is to establish legal certainty to investors by confirming the validity of international investment agreements concluded by Member States with third countries.

Do the objectives imply developing EU policy in new areas or in areas of strategic importance?

No. The content and direction of an EU investment policy that will be developed on the basis of the newly-gained exclusive competence on foreign direct investment, is not addressed by this Regulation; it will be addressed in a separate Communication from the Commission to the European Parliament and the Council. This Regulation is only about maintaining the *status quo* as regards existing international investment agreements. It is a transitional arrangement that aims to establish legal certainty on existing investment agreements, as well as the conditions and a procedural framework for the negotiation and conclusion by Member States of such agreements.

C. Options

(i) What are the policy options? (ii) What legislative or 'soft law' instruments could be considered? (iii) Would any legislative initiatives go beyond routine up-date of existing legislation?

The option of utilizing soft-law instruments, such as (eg) a declaration or statement by the Commission services or by the College on the status and validity of international investment agreements, was also considered but was discarded as such instruments would not establish the absolute legal certainty that is required to guarantee the agreements concerned.

The approach chosen is inspired by the introduction of the common commercial policy (Council Decision of 9 October 1961 on the standardisation of the duration of trade agreements with third countries, and Council Decision of 16 December 1969 on the progressive standardisation of agreements concerning commercial relations between Member States and third countries and on the negotiation of Community agreements).

Does the action proposed in the options cut across several policy areas or impact on action taken/planned by other Commission departments?

The proposal is linked to the free movement of capital (Chapter IV of the TFEU), but is without prejudice to the obligations of Member States in this area.

Explain how the options respect the proportionality principle?

The proposal for a regulation is viewed as proportionate as the soft-law alternatives mentioned above would not meet the objective set, i.e. establishing legal certainty.

D. Initial assessment of impacts

What are the significant impacts likely to result from each policy option (cf. list of impacts in the Impact Assessment Guidelines pp. 32-37), even if these impacts would materialise only after subsequent Commission initiatives?

This proposal maintains the *status quo* by authorising the continued existence and application of international agreements relating to investment concluded between Member States and third countries. The main impact of this proposal is to avoid a very negative result, i.e. the erosion of rights and benefits available to investors and investments under international investment agreements. In this respect, there is a potential economic impact of inaction, whereas the action proposed would be neutral as it preserves the *status quo*.

Could the options have impacts on the EU Budget (above 5 Mio €), and/or should the IA also serve as the *ex ante* evaluation, required by the Financial Regulation?

The proposal has no implication for the EU budget.

Could the options have significant impacts on (i) simplification (ii) administrative burden or on (iii) relations with third countries?

The impact on third countries is neutral given that this proposal for a Regulation confirms the status and validity of international investment agreements that Member States have concluded with third countries. There will be no gain in terms of simplification; but equally there will be no change in administrative burden.

E. Planning of further impact assessment work

When will the impact assessment work start? In view of the facts that the "problem" is a state of affairs that has arisen purely as a result of the entry into force of the Treaty of Lisbon; that the Union is compelled to act to relieve the legal uncertainty created; that it is difficult to conceive of an objective other than that which the Commission has set itself, nor of any other course of action (policy alternative) than that identified; and that in practical terms, the incentives and impacts created (ie, investment flows and investment income) will be unchanged in both magnitude and distribution from those that arose under the existing agreements; a impact assessment is not necessary.

(i) What information and data are already available? (ii) Will this impact assessment build on already existing impact assessment work or evaluations carried out? (iii) What further information needs to be gathered? (iv) How will this be done (e.g. internally or by an external contractor) and by when? (v) What type and level of analysis will be carried out (cf. principle of proportionate analysis)?

The Commission has circulated to Member States a questionnaire to obtain a full overview of all international investment agreements that are currently in place. According to the information collected so far around 1.300 agreements exist that contain provisions that are subject to EU exclusive competence. Not all Member States have so far responded to the questionnaire. An analysis of all responses will be conducted, to obtain a full overview of the agreements that exist and the status of which is to be confirmed.

Which stakeholders & experts have been/will be consulted, how and at what stage?

One meeting with experts from the Member States was held in Brussels on 25 January 2010 to discuss the status of international agreements concluded between Member States and third countries relating to investment. During this meeting, the Commission provided a presentation of the new situation since the entry into force of the Lisbon Treaty and the broad intentions of the Commission services to establish legal certainty in the short term. The Commission has also drawn attention to the obligation of Member States to ensure that their investment agreements comply with EU law, as established by the ECJ in three cases on Bilateral Investment Treaties in 2009. Member State experts concur with the principle and need to provide legal certainty in the aftermath of the entry into force of the Lisbon Treaty and preserve, as a transitional measure, the international agreements with third countries that Member States have concluded. A Civil Society Dialogue will also be organised by DG Trade after the adoption of the proposal.