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STATEMENT OF THE COUNCIL'S REASONS

Subject : Council's 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
= Statement of the Council's reasons
- Adopted by the Council on 4 October 2012

I. INTRODUCTION

On 8 July 2010 the Commission submitted to the Council its proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries¹.

The European Parliament adopted its position at first reading and the accompanying legislative resolution during the plenary session on 10 May 2011².

In accordance with paragraphs 16-18 of the Joint Declaration on Practical Arrangements for the Codecision Procedure³, the Presidency, operating under the mandate from Coreper⁴, has been involved in informal contacts with the European Parliament, with a view to reaching an agreement between the institutions at the stage of the Council's first reading. Subsequently, such agreement has been reached at the informal trilogue meeting on 29 May 2012.

The Chairman of the European Parliament's INTA Committee indicated in his letter of 31 May 2012 to the Chairman of Coreper-II that, should the Council transmit formally to the Parliament its position in the form as it stands in the annex to his letter, he would recommend to the plenary to accept the Council's position without amendments, subject to the legal-linguistic verification, at Parliament's second reading.

On 26 June 2012 the Council approved the above-mentioned political agreement⁵.

¹ Doc. 11953/10 WTO 252 FDI 12.

² Doc. 9726/11 CODEC 749 WTO 195 FDI 12 PE 206.

³ OJ C 145, 30.6.2007, p. 5.

⁴ Doc. 10908/11 WTO 228 FDI 15 CODEC 950.

⁵ Doc. 10892/12 WTO 216 FDI 17 CODEC 1557.

II. OBJECTIVE OF THE PROPOSAL

The Treaty on the Functioning of the European Union (TFEU) which entered into force on 1 December 2009 established the EU's exclusive competence on foreign direct investment, as part of the common commercial policy (Article 207(1) TFEU). Against this backdrop, the Commission adopted a proposal for the above-mentioned Regulation addressing only the transitional aspects of the management of the EU's new competence on foreign direct investment. The objectives, criteria and content of this new competence were addressed in a separate Communication from the Commission to the European Parliament and the Council adopted simultaneously with the legislative proposal¹.

The objective of the Commission proposal was to authorise the continuation in force of international agreements relating to investment concluded between Member States and third countries as well as to establish conditions and a procedural framework for the negotiation and conclusion by Member States of such agreements.

¹ Doc. 11952/10 WTO 251 FDI 11. On this basis, the Council of 25 October 2010 adopted conclusions on a comprehensive European international investment policy (doc. 14373/10).

III. ANALYSIS OF THE COUNCIL'S POSITION AT FIRST READING

General

The Council fully supports the development of a common policy framework on investment that establishes a level playing field for all EU investors in third countries and for investors from third countries in the EU.

Given that bilateral investment agreements concluded by Member States with third parties are, so far, the main source of protection and legal security for the European investor abroad, the new legal framework should not negatively affect investor protection and guarantees enjoyed under the existing agreements. For the Council, the concept of replacement of existing Member States' agreements with EU agreements is of central importance in avoiding any legal vacuum, thus assuring continuous protection and legal certainty for investors.

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

Subject matter and scope (Chapter I - Article 1)

The Parliament did not propose any amendments in respect of this Article; however, some modifications were introduced. Paragraph 1 contains some precisions compared to the text of the Commission proposal as well as specifies that the Regulation does not have any bearing on the division of competences established by the Treaty. New paragraph 2 contains the definition of the term "bilateral investment agreement".

Maintenance in force of existing bilateral investment agreement (Chapter II - Articles 2-6)

In Article 2, covering notifications to the Commission, Parliament's amendments were accepted. The text contains also some further technical modifications.

The concept of replacement which is anchored in Article 3 (Maintenance in force) is of critical importance for assuring continuous protection of investors thus assuring legal certainty for them. The Parliament did not propose any amendments in respect of this Article.

Article 5 covering Commission's assessments 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 on duty of cooperation, represents - next to Articles 3 and 5 - the crux of this Regulation. The Commission 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. The Parliament's amendments could not be accepted.

Authorisation to amend or conclude bilateral investment agreements
(Chapter III - Articles 7-11)

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 (Chapter IV - Articles 12-17)

The Council agreed during the informal contacts with the Parliament to follow its suggestion to insert into the Regulation 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. In this way, the Council clearly showed its full acknowledgement of the new EU's competence in the area of foreign direct investment. This Article covers the procedures to be followed (notification by Member States, assessment and authorisation by the Commission) for the above-mentioned category of bilateral investment agreements.

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 advisory procedure.

IV. CONCLUSION

The Council's position at first reading reflects the agreement reached in the informal contacts between the Council and the Parliament, facilitated by the Commission. While fulfilling the key requirement of assuring continuous protection and legal certainty for investors, the text also provides for an effective exercise of the EU's new exclusive competence on foreign direct investment. Hence, the Council expects that its position at first reading will be acceptable to the Parliament.
