Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries

REGULATION (EU) No 1219/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 12 December 2012

establishing transitional arrangements for bilateral investment agreements between Member States and third countries

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure[(1)],

Whereas:

(1) Following the entry into force of the Treaty of Lisbon, foreign direct investment is included in the list of matters falling under the common commercial policy. In accordance with Article 3(1)(e) of the Treaty on the Functioning of the European Union ('TFEU'), the European Union has exclusive competence with respect to the common commercial policy. Accordingly, only the Union may legislate and adopt legally binding acts within that area. The Member States are able to do so themselves only if so empowered by the Union, in accordance with Article 2(1) TFEU.

(2) In addition, Chapter 4 of Title IV of Part Three TFEU lays down common rules on the movement of capital between Member States and third countries, including in respect of capital movements involving investments. Those rules can be affected by international agreements relating to foreign investment concluded by Member States.

(3) This Regulation is without prejudice to the allocation of competences between the Union and its Member States in accordance with the TFEU.

(4) 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 TFEU does not contain any explicit transitional provisions for such agreements which have now come under the Union's exclusive competence. Furthermore, some of those agreements may include provisions affecting the common rules on capital movements laid down in Chapter 4 of Title IV of Part Three TFEU.

(5) Although bilateral investment agreements remain binding on the Member States under public international law and will be progressively replaced by agreements of the Union relating to the same subject matter, the conditions for their continuing existence and

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their relationship with the Union's investment policy require appropriate management. That relationship will develop further as the Union exercises its competence.

(6) In the interest of Union investors and their investments in third countries, and of Member States hosting foreign investors and investments, bilateral investment agreements that specify and guarantee the conditions of investment should be maintained in force and progressively replaced by investment agreements of the Union, providing for high standards of investment protection.

(7) This Regulation should address 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 this Regulation.

(8) This Regulation should also lay 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.

(9) Moreover, this Regulation should lay down the conditions under which Member States are empowered to amend or conclude bilateral investment agreements with third countries after 9 January 2013.

(10) Where bilateral investment agreements with third countries are maintained in force by Member States under this Regulation, or authorisations have been granted to open negotiations or conclude such agreements, that should not prevent the negotiation or conclusion of investment agreements by the Union.

(11) Member States are required to take the necessary measures to eliminate incompatibilities, where they exist, with Union law, contained in bilateral investment agreements concluded between them and third countries. The implementation of this Regulation is without prejudice to the application of Article 258 TFEU with respect to failures of Member States to fulfil obligations under Union law.

(12) The authorisation to amend or conclude bilateral investment agreements provided for by this Regulation should notably allow Member States to address any incompatibilities between their bilateral investment agreements and Union law, other than incompatibilities arising from the allocation of competences between the Union and its Member States, which are addressed in this Regulation.

(13) The Commission should present to the European Parliament and the Council a report on the application of this Regulation. That report should, inter alia, review the need for the continued application of Chapter III. Where the report recommends discontinuing the application of the provisions of Chapter III or where it proposes modifying those provisions, it may be accompanied, if appropriate, by a legislative proposal.

(14) The European Parliament, the Council and the Commission should ensure that any information identified as confidential is treated in accordance with Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents[(2)].

(15) Investment agreements between Member States should not be covered by this Regulation.

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(16) It is necessary to provide for certain arrangements to ensure that bilateral investment agreements, maintained in force pursuant to this Regulation, remain operational, including as regards dispute settlement, while at the same time respecting the Union's exclusive competence.

(17) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers[(3)].

(18) Specifically, those powers should be conferred on the Commission given that the procedures set out in Articles 9, 11 and 12 empower Member States to act in areas of the Union's exclusive competence and decisions thereon must be taken at Union level.

(19) The advisory procedure should be used for the adoption of authorisations pursuant to Articles 9, 11 and 12, given that those authorisations are to be granted on the basis of clearly defined criteria established in this Regulation,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1

Subject matter and scope

1 Without prejudice to the division of competences established by the TFEU, this Regulation addresses the status of the bilateral investment agreements of the Member States under Union law, and establishes the terms, conditions and procedures under which the Member States are authorised to amend or conclude bilateral investment agreements.

2 For the purpose of this Regulation the term 'bilateral investment agreement' means any agreement with a third country that contains provisions on investment protection. This Regulation covers only those provisions of bilateral investment agreements dealing with investment protection.

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CHAPTER II

MAINTENANCE IN FORCE OF EXISTING BILATERAL INVESTMENT AGREEMENTS

Article 2

Notification to the Commission

By 8 February 2013 or within 30 days of the date of their accession to the Union, the Member States shall notify the Commission of all bilateral investment agreements with third countries signed before 1 December 2009 or before the date of their accession, whichever is later, 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 investment agreements. Member States shall also notify the Commission of any subsequent changes to the status of those agreements.

Article 3

Maintenance in force

Without prejudice to other obligations of the Member States under Union law, bilateral investment agreements notified pursuant to Article 2 of this Regulation may be maintained in force, or enter into force, in accordance with the TFEU and this Regulation, until a bilateral investment agreement between the Union and the same third country enters into force.

Article 4

Publication

1 Every 12 months the Commission shall publish in the *Official Journal of the European Union* a list of the bilateral investment agreements notified pursuant to Article 2, Article 11(6) or Article 12(6).

2 The first publication of the list of bilateral investment agreements referred to in paragraph 1 of this Article shall take place no later than three months after the deadline for notifications made pursuant to Article 2.

Article 5

Assessment

The Commission may assess the bilateral investment agreements notified pursuant to Article 2, by evaluating whether one or more of their provisions constitute a serious obstacle to the negotiation or conclusion by the Union of bilateral investment agreements with third countries, with a view to the progressive replacement of the bilateral investment agreements notified pursuant to Article 2.

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Article 6

Duty of cooperation

1 The Member States shall take any appropriate measures to ensure that the provisions of the bilateral investment agreements notified pursuant to Article 2 do not constitute a serious obstacle to the negotiation or conclusion by the Union of bilateral investment agreements with third countries, with a view to the progressive replacement of the bilateral investment agreements notified pursuant to Article 2.

2 If the Commission establishes that one or more of the provisions of a bilateral investment agreement notified pursuant to Article 2 constitute a serious obstacle to the negotiation or conclusion by the Union of bilateral investment agreements with third countries, with a view to the progressive replacement of the bilateral investment agreements notified pursuant to Article 2, the Commission and the Member State concerned shall enter into consultations expeditiously and cooperate with a view to identifying the appropriate actions to resolve the matter. Those consultations shall take no longer than 90 days.

3 Without prejudice to paragraph 1, the Commission may, within 60 days of the end of consultations, indicate the appropriate measures to be taken by the Member State concerned in order to remove the obstacles referred to in paragraph 2.

CHAPTER III

AUTHORISATION TO AMEND OR CONCLUDE BILATERAL INVESTMENT AGREEMENTS

Article 7

Authorisation to amend or conclude a bilateral investment agreement

Subject to the conditions laid down in Articles 8 to 11, a Member State shall be authorised to enter into negotiations with a third country to amend an existing or to conclude a new bilateral investment agreement.

Article 8

Notification to the Commission

1 Where a Member State intends to enter into negotiations with a third country in order to amend or conclude a bilateral investment agreement, it shall notify the Commission of its intentions in writing.

2 The notification referred to in paragraph 1 shall include relevant documentation and an indication of the provisions to be addressed in the negotiations or to be renegotiated, the objectives of the negotiations and any other relevant information.

3 The notification referred to in paragraph 1 shall be transmitted at least five months before formal negotiations are to commence.