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Directorate-General for Financial Stability, Financial Services and Capital Markets Union

INVESTMENT AND COMPANY REPORTING

Free movement of Capital and application of EU law

Minutes of the 4th Meeting of the Expert Group on intra-EU investment environment

Brussels, 01 June 2018

AGENDA POINT 1: Registration.

AGENDA POINT 2: WELCOME, ADOPTION OF AGENDA, ADOPTION OF THE MINUTES OF THE THIRD MEETING OF 23 March 2018

The Expert Group (EG) adopted the agenda of the fourth meeting, as well as the minutes of the third meeting of 23 March 2018, with one comment. One Member Stated asked the minutes to be supplemented with a statement that the Commission recognized that some Member States had started termination processes on a bilateral level.

AGENDA POINT 3: PRESENTATION OF KEY SUBSTANTIVE STANDARDS OF INVESTOR PROTECTION UNDER EU LAW

The Chair explained that Commission services would make a presentation on key substantive standards of investor protection, which would serve as a basis for the forthcoming Communication. The main message of the Communication would be that EU law grants EU investors complete, strong and effective protection, so as to reassure them. The aim was to provide a user-friendly document for investors and practitioners and therefore a balance should be found between comprehensiveness and focus on most relevant aspects.

The Commission delivered a presentation, including an overview of key EU investment protection rules. The Commission recalled that when investors from Member States exercise their fundamental freedoms, they act within the scope of application of Union law¹. Where a Member State enacts a measure that derogates from the fundamental freedoms, that measure also falls within the scope of Union law and the fundamental freedoms, the general principles of Union law and the rights guaranteed by the Charter apply.² The fundamental internal market freedoms ensure protection at all stages of investment. Furthermore, investors enjoy in particular the principle of nondiscrimination, the fundamental freedoms to conduct a business and right to property under the Charter of Fundamental Rights; the general principles of good administration, legal certainty and legitimate expectations, enforcement of rights under EU law – including direct effect and primacy of EU law, preliminary ruling procedure, the principles of procedural autonomy and equivalence and effectiveness and the right to an effective remedy under Art. 47 of the EU Charter of Fundamental Rights, including a wide range of standards and rights; the principle of state liability for damages for breaches of EU law.

¹ Judgment in *Pfleger*, C-390/12, EU:C:2014:281, paragraphs 30 to 37.

² Judgment in *Online Games Handels*, C-685/15, EU:C:2017:452, paragraphs 55 and 56.

All Member States which intervened were positive and acknowledged the usefulness of an interpretative Communication on investment protection under EU law. The majority of interventions stressed the need to send a clear message that investment protection would not be lowered after intra-EU BITs were terminated and to focus on procedural standards. Enforcement of investment protection rights, rather than substantive EU law is perceived to be the key area of investor concern.

Some Member States considered that a Communication, while useful, would not be sufficient to reassure investors. These Member States were concerned that following the *Achmea judgment* law firms advised their companies to hold back intra-EU investments and invest in third countries or via third countries with which BITs were in place (e.g. Canada, Norway, Switzerland, Serbia). Therefore, several Member States called for further reflections on the need for an alternative investment protection framework to address these concerns, as requested by the ECOFIN Council conclusions of June 2017.

As regards procedural standards to be included in the Communication, Member States referred to the following aspects: indicating that national courts have to observe a number of standards and rights under EU law, the importance of a well-functioning preliminary ruling procedure; possibility for indirect access to the Court of Justice via infringement proceedings; possibility for judicial specialization on enterprises in national courts.

As regards substantive standards, several Member States stressed the importance of Article 17 of the EU Charter of Fundamental Rights and more clarity on rules on expropriation, including conditions when this is lawful, circumstances when retroactivity is allowed and to what extent. A couple of Member States questioned whether Art. 51 of the EU Charter of Fundamental Rights left a loophole as regards protection, given that the Charter only applied when Member States implemented EU law. One Member State called for a clarification of the concept of investor under EU law.

The Chair welcomed the Member States' interventions, noting that feedback from investors was particularly useful. Member States were invited to comment on the presented main elements by 15 June.

The Commission intervened recognizing the importance of enforcement and procedural aspects. It noted that the EU system contained many enforcement mechanisms, and among others, was geared towards conflict prevention. For instance, Member States have to notify certain measures to avoid unjustified barriers, national administrations are bound to carry out an EU law conform interpretation, the national courts can set aside rules contrary to EU law, the *Koebler* state liability case-law is an incentive for national judges to observe the rules on preliminary ruling references. Furthermore, a package of secondary legislation strengthening the internal market was in the pipeline, including the company law package and the directive on a services notification procedure, the regulation on free flows of non-personal data in the EU. The Commission also clarified that there was no "loophole", as an investor exercising its fundamental freedoms was always within the scope of application of Union law, pointing to the relevant case-law of the Court of Justice.

AGENDA POINT 4: ACHMEA FOLLOW-UP AND TERMINATION PROCESS

The Chair presented an overview of Member States positions on the termination process. There seemed to be a broad agreement of Member States to the proposed two step approach: (1) a political declaration containing a political commitment to terminate intra-EU BITs and (2) a coordinated approach to termination of intra EU BITs, preferably via a plurilateral treaty. It was noted that this does not prevent Member States from proceeding with ongoing bilateral termination processes, which in certain situations may lead to faster compliance.

There was also a broad consensus that currently the focus should be on the political declaration, as it is essential to send a clear message to stakeholders and arbitration tribunals quickly in the interest of legal certainty. Such a political commitment by Member States would also give the Commission the necessary assurances to put infringement proceedings on hold.

As regards questions on the nature of the declaration, the Commission clarified that it would be in its first part an authoritative interpretation of the Member States, describing and informing of the common understanding of Member States on the legal situation after the *Achmea* judgment. While it did not modify treaties, it would have a legal impact by informing arbitration tribunals applying international law. In its second part, it would be a commitment on the political steps to be undertaken.

Member States agreed that discussions on the content of the declaration should continue within the Expert Group on intra-EU investment environment, as it was already dealing with this subject. Several Member States stressed that it was essential to send a clear signal fast.

The Chair acknowledged that Member States still had different views on the forum for preparatory works on the treaty, with views generally split between the auspices of the Council, the Expert Group on intra-EU investment environment, and a suggestion for an intergovernmental approach. Further steps will be discussed once all Member States have commented in writing.

Subsequently, the Chair opened the substantive discussion on the termination, which developed based on the circulated drafts of a declaration and treaty, prepared by 2 MS and COM. After presentation of the drafts Member States commented, raising a number of specific issues, to be resolved either in the declaration or at the treaty phase.

The first issue concerned the non-application of Energy Charter Treaty (ECT) between Member States as a consequence of the *Achmea* judgment.

All Member States' interventions concerning sun-set clauses converged on their immediate non-applicability, which should also be addressed in the declaration.

Member States discussed transitional arrangements for pending arbitration cases. In view of legal and practical complexities, several Member States noted the need for further discussions.

Another issue concerned the possible treatment of concluded arbitration cases.

Other issues suggested to be addressed at the declaration stage included the need for further reflections on the investor protection framework at EU level and a reference to the forthcoming interpretative Commission Communication on investment protection under EU law.

The Chair then proposed an approach to the immediate next steps in the termination process, focusing on the declaration. The Chair noted that there seemed to be a general agreement among Member States to sign this political declaration as soon as possible and in the margins of the Council. The Chair suggested working towards a declaration in the margins of the Council meeting on 26 June, while acknowledging that in view of the open issues and additional time for consultations requested by Member States this timing was ambitious.

The Chair invited Member States to send their comments relating to the declaration in writing by 8 June. The Chair further suggested holding another meeting of the Expert Group on 12 June to discuss the declaration text. If needed, the Commission further offered to organise an additional meeting of the Expert Group on 21 June.

In conclusion, the Chair thanked Member States for the constructive debate and said that Member States' concerns and comments were well noted. The Chair acknowledged the need to reassure investors that they enjoy strong protection under EU law. In this context, the Chair recalled that the

Commission was assisting Member States on improving national justice systems via various tools, including the European Semester, the EU Justice Scoreboard and European funds.