

Minutes of the 10th Meeting of the Member States' Expert Group on intra-EU investment environment, 24 November 2020

The 10th meeting of the Member States' Expert Group on intra-EU investment environment took place on 24 November 2020 via videoconference. It was opened by the Director for Horizontal Policies, DG FISMA.

DG FISMA updated Member States on relevant policy developments, including the appointment of Ms Mairead McGuinness as Commissioner in charge of financial services, financial stability and Capital Markets Union in October 2020 and the European Parliament [Resolution on the CMU Action Plan](#),¹ which showed support to the initiative on investment protection (Action 15). The evidence collection, including an external study supporting the impact assessment by Ecorys and the results of the public consultation, confirmed the assessment of problems identified.

General: The majority of Member States which intervened welcomed the initiative and the progress since the previous EG meeting. One Member State welcomed the “integrated approach” suggesting possible combinations of options, noting the need to ensure effective links between them. Two Member States noted that all options should be on the table. One Member State called for a balance between investors demands and legal and administrative challenges.

Process and next steps: The Council Presidency up-dated that it had identified the Internal Market Council Working Party (CWP) under the Competitiveness Council as the appropriate forum to take the proposal forward. A preparatory discussion could already take place in December under the German Presidency. The subsequent meeting agenda should be discussed with the incoming Council Presidency. Two Member States welcomed this Council Presidency initiative. In response to a question from one Member State on the interaction between the CWP and this Expert Group, DG FISMA clarified that the Expert Group would continue to fulfil its mission in advising the Commission, but duplication of work should be avoided.

Evidence collection: DG FISMA further provided a detailed up-date on the feedback from the public consultation, including the viewpoints expressed by investors and civil society. DG FISMA up-dated on the study by Ecorys, including its targeted survey with investors and a focus group with a wide range of stakeholders. Two Member States remarked that the survey was limited to investors and noted the importance of consulting also civil society representatives. DG FISMA clarified that the purpose of the survey was to collect more specific feedback from investors, but all stakeholders, including civil society organisations could contribute to the Commission public consultation and that the Ecorys study as well included input from civil society. DG FISMA clarified that the final report of the Ecorys study would be published early 2021 and the overview of Member States replies to the Commission questionnaire on their legal and regulatory framework would be shared with the Expert Group when finalised and would be annexed to the impact assessment report.

Discussion on options: DG FISMA provided clarifications on policy options, following questions from Member States. One Member State reiterated that any discussion on the future

¹ Resolution of 8 October 2020 on further development of the Capital Markets Union.

of investment protection in the EU should take place after all Member States effectively terminate their intra-EU BITs.

Member States then provided feedback on the questions for discussion, focusing on the following aspects:

Strengthening substantive rules (Pillar I): One Member State noted that Member States replies to Commission questionnaire on legal frameworks should be examined closely to determine the need for action. EU intervention should not duplicate existing rules but focus on gaps.

Enforcement mechanisms (Pillar II)

Investment Board: One Member State saw potential for ADR functionalities of this body and encouraged considering conciliation procedures as alternative to mediation. Conciliation went a step further with the conciliator proposing a concrete solution to the parties. One Member State stressed that effectiveness of all ADR mechanisms depended on the possibility to escalate the dispute to a binding mechanism. One Member State noted that the use of the term “ombudsman” could create confusion in this context, as an ombudsman was usually dealing with human rights issues with soft-law tools.

Mediation use and qualification requirements for mediators: One Member State noted that in its country, mediation was only possible for civil and commercial disputes; One Member State noted that in its country, mediation was not possible between investors and the state. One Member State up-dated that mediation in administrative disputes would become possible in its country from 2021, but it was not clear whether this would cover also investment disputes. All Member States that commented on mediation noted that their national frameworks set out specific requirements for the qualification and independence of mediators.

Access of SMEs: One Member State considered such access crucial in view of the CETA Opinion of CJEU; Two Member States concurred that access by SMEs and natural persons should be a guiding principle.

Investment Court: One Member State was against a supranational court also in view of strong civil society objections. Two Member States expressed a preference for a binding mechanism at EU level and did not exclude this option.

Facilitation measures (pillar III):

SOLVIT and investment contact points: Two Member States considered SOLVIT an appropriate tool for problem prevention given its focus on Single Market issues and were open to up-grading it, e.g. with appropriate resources and functionalities. One Member State stressed that to be effective for investment disputes it should be equipped with independence and impartiality safeguards to shield it from political instructions (to which current SOLVIT may be susceptible as part of the executive branch). One Member State considered that SOLVIT in its current form was more relevant for investment facilitation and should not replace dispute resolution mechanisms. Two Member States noted that the dispute prevention function should be separate from investment promotion activities (information on opportunities) in view of their internal division of competences. One Member State suggested that investment promotion agencies could become focal points for information provision, as done in its country.

State of play of termination of intra-EU BITs:

Plurilateral agreement: All Member States reported on progress. Seven Member States had ratified; Several Member States expected imminent ratification within the next couple of months; the remaining signatories were advancing with their internal procedures, but could not point to concrete timing, which also depended on possible discussions in national (and some regional) parliaments. Several Member States referred to delays due to the COVID crisis. One Member State reported negative feedback from national business associations due to decrease in protection, but did not expect this would affect the ratification. No other Member State flagged such risks.

Bilateral terminations: Three Member States reported progress in their bilateral terminations: agreement at technical level reached in all cases, some BITs already terminated bilaterally.