

Minutes of the 9th Meeting of the Member States' Expert Group on intra-EU investment environment, 29 September 2020

The 9th meeting of the Member States' Expert Group on intra-EU investment environment took place on 29 September 2020 via videoconference. It was chaired by the Director for Horizontal Policies, DG FISMA.

DG FISMA updated Member States on the work on the investment protection and facilitation initiative, included as action 15 in the new CMU Action Plan. DG FISMA presented preliminary results of the public consultation on the initiative, as well as preliminary observations on the national legal frameworks in this field, based on Member State's replies to the questionnaire received so far. DG FISMA indicated its intention to include the overview of the replies in the Impact Assessment, and encouraged Member States who have not yet provided their contribution to do so as soon as possible in October. DG FISMA also presented the non-paper on policy options and invited Member States to provide their views.

In general: The majority of MS which intervened welcomed the initiative and the progress since the previous EG meeting. Four Member States welcomed the initiative, with one calling for comprehensive solutions; another supporting the 3-pillar approach and two Member States favouring effective protection, without expressing a preference for specific options yet. Three Member States asked about the representativeness of results of the public consultation, noting that only 75 replies were received (as opposed to thousands in past consultations on TTIP eg). DG FISMA clarified that the public consultation should give the opportunity to all stakeholders to express views, provide evidence and this objective was achieved. In addition, replies from business associations represent large networks of individual companies, which would need to be taken into account in the weighing of the replies. The past consultation may have generated thousands of replies because it included arbitration, which was controversial, but this is not the case this time. In parallel DG FISMA had launched a study to collect data which will complement the consultation.

One Member State considered that any discussion on the future of investment protection in the EU should take place after all MS effectively terminate their intra-EU BITs, noting that only three MS had ratified the plurilateral termination agreement at that point in time. Two Member States noted that they were advancing in their internal process on ratification. In this connection, DG FISMA remarked that termination of intra-EU BITs remained a priority for the Commission, which considered them implicitly terminated since accession of the last contracting party to a BIT to the EU, but had to also be completed explicitly on legal certainty grounds. However, DG FISMA stressed that a delay in the work on intra-EU investment framework was unaffordable in the current economic context.

Strengthening substantive rules (pillar I): One Member State did not exclude harmonisation of rules subject to impact assessment analysis. Another Member State supported clarification and extension of rules if necessary. A third member State favoured the targeted approach. Another one considered that their legal framework on investment protection was already excellent.

Enforcement mechanism (pillar II): One Member State was interested in the Ombudsman option, but noted that its set-up should be clarified; another one favoured legally binding solutions, such as the investment court and asked why the specialised CJEU chamber was excluded from the non-paper on options. DG FISMA clarified that the added value was

limited as investors could not have legal standing to bring claims directly to the CJEU even in a specialised chamber. One Member State noted that their national courts worked very well.

Facilitating measures (pillar III): Two Member States welcomed the option of extending the scope of the Single Digital Gateway. One Member State welcomed facilitating measures in general. Another one asked whether it was politically and legally feasible to extend the mandate of SOLVIT (e.g. to national law).

On the process, the DE Presidency, supported by two Member States, considered it was appropriate for the Council to get involved. It noted they were reflecting on the right forum to start the discussions in the Council, with another Member State noting the need to involve internal market experts.