



## **The non-paper on Intra-EU investment treaties tabled by Austria, France, Finland, Germany and the Netherlands, dated 7 April 2016**

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### **Giving the impression to terminate intra-EU ISDS...**

The non-paper tabled by Austria, France, Finland, Germany and the Netherlands (hereafter the AFFGN) **starts by proposing an effective way to terminate the Bilateral Investment Treaties between EU member states.**

The termination is sought by the European Commission which has started [infringement procedures](#) against a number of EU member states for maintaining such treaties despite the fact that the partner countries have in the mean time joined the EU.

The European Commission maintains that these so-called intra-EU BITS are not compatible with EU law. As they confer rights on a bilateral basis to investors of some member states only they constitute a discrimination among EU investors and should be terminated.

The Commission has also intervened as a third party in investor-to-state disputes based on the intra-EU BITS to state that these BITS are invalid because they contradict EU law. ISDS arbitration panels have however

dismissed the EC's arguments saying that the BITs remain valid as long as the parties do not terminate them.

Central and Eastern European EU member states too have requested Western European EU member states to terminate intra-EU BITs, but only few have done so.

In their non-paper the AFFGN recognise that the current situation where some countries have intra-EU BITs, some have terminated them and some are under infringement procedures is highly detrimental for member states and investors and for the internal market as a whole. In first instance the AFFGN propose to negotiate a "multilateral" agreement (the actually mean a "plurilateral" agreement) between the EU member states that would replace and supersede the existing intra-EU BITs.

The new agreement would immediately terminate all intra-EU BITs without application of the sunset clause (which normally extends the investors rights for another 10 to 20 years after the termination of a BIT). Procedural arrangements would be foreseen to prevent a peak of intra-EU investor-to-state claims prior to the entry into force of the agreement. So far so good.

### **...while in fact introducing ISDS for all intra-EU cross border investments,...**

But in the second part of the paper the AFFGN propose that the multilateral agreement between the EU member states to terminate the intra-EU BITs would immediately introduce ISDS for all cross border investments within the EU along the lines of the ISDS-chapter in CETA and the ISDS proposal for the TTP negotiations (in which ISDS is renamed ICS), including prior investor-to state mediation. In a first stage the AFFGN propose to rely on the Permanent Court of Arbitration (PCA) in The Hague to provide the arbitrators for the intra-EU investor-to-state disputes based on the new agreement. In the long run a full fledged EU mechanism should be worked out.

### **... establishing permanent discrimination against their citizens and domestic investors,**

In doing so they in fact increase discrimination between cross-border investors and domestic investors and citizens which runs counter to the very idea of the single market. The single market is aimed at abolishing distinctions between foreign and domestic market actors within the EU. Granting "foreign" investors within the EU special rights only endangers that goal of a level playing field.

**...calling into question their own domestic legal system,**

The AFFGN go to a great length to argue that the domestic legal system of the EU member states does not offer the same level of protection as BITs do and that the plurilateral intra-EU investment agreement that they propose would be necessary to restate and codify the investment protection standards in the member states in the same way as in the ICS provisions in CETA and for TTIP.

It is cynical how AFFGN without any proper assessment dismiss the overall high degree of substantive legal protection provided to intra-EU investors, merely on account of being too "scattered": "*[R]ights of EU investors are currently not codified at the EU level in a single framework but scattered around in various legal instruments, such as the EU Treaties, the Charter of Fundamental Rights, international treaties to which Member States are parties, such as the European Convention on Human Rights, Member States' constitutions and legislations and national and European courts' jurisprudence.*"

The single market by itself alone provides non-discriminatory treatment and free cross-border movement of goods, persons, business establishment, services and capital all to a very high degree (and unprecedented in history). Therefore, EU investors within the EU already enjoy non-discriminatory treatment and in some regards even privileges, for instance where state measures directly or indirectly limit cross-border business activities without EU law justification. According to EU law, those state measures have to be repealed and, if they caused financial loss, the Member State is liable for damages. However, in EU law, these rights have to be balanced with the public interests laid down in the Treaties, including security, health, environmental protection, consumer protection, social security and the EU fundamental rights.

When announcing infringement procedures last year the European Commission stated "*... such 'extra' reassurances [as in the intra-EU BITs] should not be necessary, as all Member States are subject to the same EU rules in the single market, including those on cross-border investments (in particular the freedom of establishment and the free movement of capital). All EU investors also benefit from the same protection thanks to EU rules (e.g. non-discrimination on grounds of nationality). By contrast, intra-EU BITs confer rights on a bilateral basis to investors from some Member States only: in accordance with consistent case law from the European Court of Justice, such discrimination based on nationality is incompatible with EU law.*"

### **... subjecting the rights of EU citizens and companies to external trade interest,**

The AFFGN also argue that intra-EU ISDS is necessary to support the EU's external trade and investment objectives and to persuade third countries to conclude investment treaties with the EU containing ISDS. On the other hand they argue that the intra-EU cross border investors should have the same rights as foreign investors. In doing so they recognise the discrimination that ISDS in trade and investment agreements create but do not hesitate to increase discrimination between cross-border investors and domestic investors and citizens within the EU.

In fact discrimination between foreign and EU cross-border or domestic investors could simply be avoided by offering all investors and citizens alike the same access to the domestic legal system (i.e. national treatment). By offering foreign investors in EU and EU member investment agreements unnecessary greater substantive and procedural rights such as in CETA and TTIP, they continue to create the problem they would like to solve through this proposal.

### **... ignoring the EU treaties,**

A comprehensive plurilateral intra-EU investment agreement as proposed by the AFFGN would greatly overlap and collide with many EU law provisions (overlap especially regarding anti-discrimination, free movement of capital and free establishment; collision especially regarding

any provisions establishing financial obligations towards the EU or a Member State, such as taxes, fines, penalties, environmental liability...) Such an agreement could arguably not be agreed upon in a mere international agreement between member states but would require a change of the EU treaties themselves. The procedure of Art. 48 TFEU would have to be followed.

**and violating the autonomy of the EU legal order.**

Given the various overlaps of the substantive standards with EU law, the ECJ would consider the creation of a parallel judiciary system enforcing them as a violation of its jurisdiction and the autonomy of the EU legal order. The involvement of national courts or preliminary ECJ rulings as suggested by the AFFGN-proposal would not suffice to achieve compatibility, since they would only concern EU law and not the overlapping and colliding standards introduced by the plurilateral investment agreement. Those would ultimately be interpreted by the ISDS tribunal.