

AGREEMENT

FOR THE TERMINATION OF BILATERAL INVESTMENT TREATIES BETWEEN THE MEMBER STATES OF THE EUROPEAN UNION

THE PARTIES, the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Croatia, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand-Duchy of Luxembourg, Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia and the Slovak Republic,

Having in mind the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) and general principles of Union law;

Having in mind the rules of customary international law as codified in the Vienna Convention on the Law of Treaties (VCLT);

Recalling that the Court of Justice of the European Union (CJEU) held in Case C-478/07 *Budějovický Budvar* that provisions laid down in an international agreement concluded between two Member States cannot apply in the relations between those two States if they are found to be contrary to the EU Treaties;

Considering that, in compliance with the obligation of Member States to bring their legal orders in conformity with Union law, they must draw the necessary consequences from Union law as interpreted in the judgment of the CJEU in Case C-284/16 *Achmea* (*Achmea* judgment);

Considering that investor-State arbitration clauses in bilateral investment treaties between the Member States of the European Union (intra-EU bilateral investment treaties) are contrary to the EU Treaties and, as a result of this incompatibility, cannot be applied after the date on which the last of the Parties to an intra-EU bilateral investment treaty became a Member State of the European Union;

Sharing the common understanding expressed in this Agreement between the Parties to the EU Treaties and intra-EU bilateral investment treaties that, as a result, such a clause cannot serve as legal basis for Arbitration Proceedings;

Understanding that this Agreement should cover all investor-State arbitration proceedings based on intra-EU bilateral investment treaties under any arbitration convention or set of rules, including the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and the ICSID arbitration rules, the Permanent Court of Arbitration (PCA) arbitration rules, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) arbitration rules, the International Chamber of Commerce (ICC) arbitration rules, the United Nations Commission on International Trade Law (UNCITRAL)

arbitration rules and *ad hoc* arbitration;

Noting that certain intra-EU bilateral investment treaties, including their sunset clauses, have already been terminated bilaterally, and that other intra-EU bilateral investment treaties have been terminated unilaterally and the period of application of their sunset clauses has expired;

Agreeing that this Agreement is without prejudice to the question of compatibility with the EU Treaties of substantive provisions of intra-EU bilateral investment treaties;

Considering that this Agreement addresses intra-EU bilateral investment treaties; it does not cover intra-EU proceedings on the basis of Article 26 of the Energy Charter Treaty. The Union and its Member States will deal with this matter at a later stage;

Considering that when investors from Member States exercise one of the fundamental freedoms, such as the freedom of establishment or the free movement of capital, they act within the scope of application of Union law and therefore enjoy the protection granted by those freedoms and, as the case may be, by the relevant secondary legislation, by the Charter of Fundamental Rights of the European Union, and by the general principles of Union law, which include in particular the principles of non-discrimination, proportionality, legal certainty and the protection of legitimate expectations (Judgment of the CJEU in Case C-390/12 *Pfleger*, paragraphs 30 to 37). Where a Member State enacts a measure that derogates from one of the fundamental freedoms guaranteed by Union law, that measure falls within the scope of Union law and the fundamental rights guaranteed by the Charter also apply (Judgment of the CJEU in Case C-685/15 *Online Games Handels*, paragraphs 55 and 56);

Recalling that Member States are obliged under the second subparagraph of Article 19(1) TEU to provide remedies sufficient to ensure effective legal protection of investors' rights under Union law. In particular, every Member State must ensure that its courts or tribunals, within the meaning of Union law, meet the requirements of effective judicial protection (Judgment of the CJEU in Case C-64/16 *Associação Sindical dos Juizes Portugueses*, paragraphs 31 to 37);

Recalling that disputes between the Parties concerning the interpretation or application of this Agreement pursuant to Article 273 TFEU shall not concern the legality of the measure that is the subject of investor-State arbitration proceedings based on a bilateral investment treaty covered by this Agreement;

Bearing in mind that the provisions of this Agreement are without prejudice to the possibility for the European Commission or any Member State to bring a case before the CJEU based on Articles 258, 259 and 260 TFEU;

Recalling that in light of the ECOFIN Council conclusions of 11 July 2017, Member States and the Commission will intensify discussions without undue delay with the aim of better ensuring complete, strong and effective protection of investments within the European Union. Those discussions include the assessment of existing processes and mechanisms of dispute resolution as well as the need and, if the need is ascertained, the means to create new or improve relevant existing tools and mechanisms under Union law;

Recalling that this Agreement is without prejudice to further measures and actions that may be necessary within the framework of Union law in order to ensure a higher level of protection of cross-border investments within the European Union and to create a more predictable, stable and clear regulatory environment to incentivise investments within the internal market;

Considering that the references to the European Union in this Agreement are to be understood also as references to its predecessor, the European Economic Community and, subsequently, the European Community, until the latter was superseded by the European Union;

HAVE AGREED UPON THE FOLLOWING PROVISIONS:

SECTION 1 - DEFINITIONS

Article 1 (Definitions)

For the purposes of this Agreement, the following definitions shall apply:

- (1) 'Bilateral Investment Treaty' means any investment treaty listed in Annex A or Annex B;
- (2) 'Arbitration Proceedings' means any proceedings before an arbitral tribunal established to resolve a dispute between an investor from one Member State of the European Union and another Member State of the European Union in accordance with a Bilateral Investment Treaty;
- (3) 'Arbitration Clause' means an investor-State arbitration clause laid down in a Bilateral Investment Treaty providing for Arbitration Proceedings;
- (4) 'Concluded Arbitration Proceedings' means any Arbitration Proceedings which ended with a settlement agreement or with a final award issued prior to 6 March 2018 where:
 - a) the award was duly executed prior to 6 March 2018, even where a related claim for legal costs has not been executed or enforced, and no challenge, review, set-aside, annulment, enforcement, revision or other similar proceedings in relation to such final award was pending on 6 March 2018, or
 - b) the award was set aside or annulled before the date of entry into force of this Agreement;
- (5) 'Pending Arbitration Proceedings' means any Arbitration Proceedings initiated prior to 6 March 2018 and not qualifying as Concluded Arbitration Proceedings, regardless of their stage on the date of the entry into force of this Agreement;
- (6) 'New Arbitration Proceedings' means any Arbitration Proceedings initiated on or after 6 March 2018;
- (7) 'Sunset Clause' means any provision in a Bilateral Investment Treaty which extends the protection of investments made prior to the date of termination of that Treaty for a further period of time.

SECTION 2 - PROVISIONS REGARDING THE TERMINATION OF BILATERAL INVESTMENT TREATIES

Article 2 (Termination of Bilateral Investment Treaties)

1. Bilateral Investment Treaties listed in Annex A are terminated according to the terms set out in this Agreement.
2. For greater certainty, Sunset Clauses of Bilateral Investment Treaties listed in Annex A are terminated in accordance with paragraph 1 of this Article and shall not produce legal effects.

Article 3 (Termination of possible effects of Sunset Clauses)

Sunset Clauses of Bilateral Investment Treaties listed in Annex B are terminated by this Agreement and shall not produce legal effects, in accordance with the terms set out in this Agreement.

Article 4 (Common provisions)

1. The Parties hereby confirm that Arbitration Clauses are contrary to the EU Treaties and thus inapplicable. As a result of this incompatibility between Arbitration Clauses and the EU Treaties, as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union, the Arbitration Clause in such a Bilateral Investment Treaty cannot serve as legal basis for Arbitration Proceedings.
2. The termination in accordance with Article 2 of Bilateral Investment Treaties listed in Annex A and the termination in accordance with Article 3 of Sunset Clauses of Bilateral Investment Treaties listed in Annex B shall take effect, for each such Treaty, as soon as this Agreement enters into force for the relevant Parties, in accordance with Article 16.

SECTION 3 - PROVISIONS REGARDING CLAIMS MADE UNDER BILATERAL INVESTMENT TREATIES

Article 5 (New Arbitration Proceedings)

Arbitration Clauses shall not serve as legal basis for New Arbitration Proceedings.

Article 6 (Concluded Arbitration Proceedings)

1. Notwithstanding Article 4, this Agreement shall not affect Concluded Arbitration Proceedings. Those proceedings shall not be reopened.
2. In addition, this Agreement shall not affect any agreement to settle amicably a dispute being the subject of Arbitration Proceedings initiated prior to 6 March 2018.

Article 7 (Duties of the Parties concerning Pending Arbitration Proceedings and New Arbitration Proceedings)

Where the Parties are contracting parties to Bilateral Investment Treaties on the basis of which Pending Arbitration Proceedings or New Arbitration Proceedings were initiated, they shall:

- a) inform, in cooperation with each other and on the basis of the statement in Annex C, arbitral tribunals about the legal consequences of the *Achmea* judgment as described in Article 4; and
- b) where they are party to judicial proceedings concerning an arbitral award issued on the basis of a Bilateral Investment Treaty, ask the competent national court, including in any third country, as the case may be, to set the arbitral award aside, annul it or to refrain from recognising and enforcing it.

Article 8 (Transitional measures related to Pending Arbitration Proceedings)

1. Where an investor is party to Pending Arbitration Proceedings and has not challenged before the competent national court the measure that is subject to the dispute, the transitional measures of Articles 9 and 10 apply.
2. When a final award finding that the measure in dispute does not fall under the Bilateral Investment Treaty concerned, or does not violate that Bilateral Investment Treaty, is issued before the date of entry into force of this Agreement, the transitional measures referred to in this Article shall not apply.
3. Where Pending Arbitration Proceedings include counter-claims by the Party concerned, this Article and Articles 9 and 10 shall apply *mutatis mutandis* to those claims.
4. The Party concerned and the investor may also agree on any other appropriate resolution of the dispute, including an amicable resolution, provided the solution complies with Union law.

Article 9 (Structured dialogue for Pending Arbitration Proceedings)

1. An investor party to Pending Arbitration Proceedings may ask the Party involved in those proceedings to enter into a settlement procedure pursuant to this Article, on condition that:
 - a) the Pending Arbitration Proceedings have been suspended pursuant to a request to that effect by the investor, and
 - b) if an award has already been issued in the Pending Arbitration Proceedings, but not yet definitively enforced or executed, the investor undertakes not to start proceedings for its recognition, execution, enforcement or payment in a Member State or in a third

country or, if such proceedings have already started, to request that they are suspended.

The Party concerned shall reply in writing within two months in accordance with paragraphs 2 to 4.

A Party may also ask an investor involved in Pending Arbitration Proceedings to enter into a settlement procedure pursuant to this Article. The investor may accept in writing within two months provided that the conditions set out in points (a) and (b) of the first subparagraph are fulfilled.

The reply by the Party concerned or the acceptance by the investor must state, where relevant, that the settlement procedure is thereby initiated.

2. A settlement procedure may only be initiated within six months from the termination, pursuant to Article 2 or 3 of this Agreement, of the Bilateral Investment Treaty on the basis of which the Pending Arbitration Proceedings were initiated, by making a request pursuant to paragraph 1 of this Article.
3. A settlement procedure shall be entered into if the CJEU or a national court has found, in a judgment that has become final, that the State measure being contested in the proceedings referred to in paragraph 1 violates Union law.
4. A settlement procedure shall not be entered into if the CJEU or a national court has found, in a judgment that has become final, that the State measure being contested in the proceedings referred to in paragraph 1 does not violate Union law. The same applies if the European Commission has adopted a decision which has become definitive finding that the measure does not violate Union law.
5. If court proceedings, the object of which is to obtain a judgment as referred to in paragraph 3 or 4, are pending, the Party concerned shall in its reply pursuant to paragraph 1 inform the investor of that fact. The initiation of the settlement procedure shall be suspended until the court proceedings have resulted in a judgment that has become final. The Party concerned shall inform the investor within two weeks of such judgment. The same applies if the European Commission has adopted a decision which has not yet become definitive.
6. A settlement procedure may be entered into if a potential violation of Union law caused by the State measure being contested in the proceedings referred to in paragraph 1 can be identified and neither paragraph 3 nor 4 applies.
7. The settlement procedure shall be overseen by an impartial facilitator with a view to finding between the parties an amicable, lawful and fair out-of-court and out-of-arbitration settlement of the dispute which is the subject of the Arbitration Proceedings. The settlement procedure shall be impartial and confidential. Each party to the settlement procedure shall have the right to make its views known.

8. The facilitator shall be designated by common agreement of the investor and the Party concerned acting as respondent in the relevant Pending Arbitration Proceedings. He/she shall be chosen from persons whose independence and impartiality are beyond doubt and who possess the necessary qualifications including in-depth knowledge of Union law. He/she shall not be a national of either the Member State in which the investment took place or the home Member State of the investor and shall not be in a position of conflict of interests. If a common agreement on the choice of the impartial facilitator is not reached within one month of the settlement procedure being initiated, the investor or the Party concerned acting as respondent in the relevant Pending Arbitration Proceedings shall ask the Director General of the Legal Service of the European Commission to designate a former Member of the Court of Justice of the European Union who shall appoint, after having consulted each party to the dispute, a person fulfilling the criteria set out in this paragraph. An indicative fee schedule for the facilitator is laid down in Annex D.
9. The facilitator shall ask the investor and the Member State in which the investment took place to provide written submissions within two months of his/her appointment. When the settlement procedure was initiated on the basis of paragraph 6, the facilitator may ask the European Commission to provide, within two months, advice on the relevant issues related to Union law.
10. The facilitator shall in an impartial manner organise the settlement negotiations and support the parties with a view to reaching an amicable settlement within six months of his/her appointment, or such longer period as the parties may agree. The parties shall participate in good faith in that process. In doing so, he/she shall take due account of rulings by the CJEU or a national court as well as of decisions by the European Commission which have become definitive, and the advice referred to in the last sentence of paragraph 9. The facilitator shall also take into consideration the actions taken in order to comply with the relevant rulings of the CJEU by the Party concerned and the case-law of the CJEU on the extent of reparations of damages under Union law.
11. If an amicable settlement is not reached within the timeframe referred to in paragraph 10, the parties to the procedure shall propose within one month a settlement acceptable to them. Each proposal shall be communicated in writing without undue delay to the other party to the procedure for observations. The facilitator shall organise further negotiation on that basis, with the aim of finding a mutually acceptable solution to the dispute.
12. Within one month from the communication of the proposals and taking into account the further exchange of views referred to in paragraph 11, the facilitator shall make a final written proposal for an amended amicable settlement. Within one month from receipt of that proposal, each party to the procedure shall decide whether to accept the final proposal and communicate that decision in writing to the other party.
13. If a party to the procedure does not accept the final proposal, it shall provide a written explanation of the reasons for doing so to the other party to the procedure without undue

delay, where necessary removing any confidential information. Each party to the procedure shall bear its own costs and half of the fees for the facilitator and related to logistics of the settlement procedure.

14. If an agreement on the terms of the settlement is reached, the parties to the procedure shall accept those terms in a legally binding manner without undue delay. The terms of the settlement:
 - a) must include:
 - (i) an obligation for the investor to withdraw the arbitration claim or renounce execution of an award already issued, but not yet definitively enforced or executed, or, where relevant, to take into account any compensation previously paid in the Pending Arbitration Proceedings with a view to avoiding double-compensation, and
 - (ii) a commitment to refrain from initiating New Arbitration Proceedings, and
 - b) may include a waiver of all other rights and claims related to the measure that is the subject of the proceedings referred to in paragraph 1.

Article 10 (Access to national courts)

1. An investor shall be entitled to access the judicial remedies under national law against a measure contested in Pending Arbitration Proceedings even if national time-limits for bringing actions have expired, within the time limits referred to in paragraph 2, on condition that
 - a) the investor withdraws the Pending Arbitration Proceedings and waives all rights and claims pursuant to the relevant Bilateral Investment Treaty or renounces execution of an award already issued, but not yet definitively enforced or executed, and commits to refrain from instituting New Arbitration Proceedings
 - (i) within six months from the termination of the Bilateral Investment Treaty on the basis of which the Pending Arbitration Proceedings were initiated, where the structured dialogue pursuant to Article 9 was not used;
 - (ii) within six months from the date on which the Party concerned rejects the investor's request to enter into a structured dialogue pursuant to Article 9(1) and (6); or
 - (iii) within six months from the date on which the last of the parties communicates its decision pursuant to Article 9(12), where the structured dialogue pursuant to Article 9 was used;
 - b) access to the national court will be used to make a claim based on national or Union law; and

- c) where relevant, no settlement agreement was reached as a result of the structured dialogue pursuant to Article 9.
2. National time limits to access national courts pursuant to paragraph 1 shall be deemed to run from the date on which the investor, as applicable, withdraws from the relevant Pending Arbitration Proceedings or renounces execution of an award already issued, but not yet definitively enforced or executed, and commits to refrain from instituting New Arbitration Proceedings in accordance with point (a) of paragraph 1 and shall have the duration prescribed by the applicable national law.
3. For greater certainty, the provisions of Bilateral Investment Treaties terminated pursuant to this Agreement shall not be considered as part of the applicable law in proceedings brought before a national court pursuant to this Agreement.
4. For greater certainty, the provisions of this Article shall not be construed as creating any new judicial remedies which would not be available to the investor under the applicable national law.
5. The national courts shall take into account any compensation previously paid in the Pending Arbitration Proceedings with a view to avoiding double-compensation.

SECTION 4 - FINAL PROVISIONS

Article 11 (Depositary)

1. The Secretary-General of the Council of the European Union shall act as Depositary of this Agreement.
2. The Secretary-General of the Council of the European Union shall notify the Parties of:
 - a) any decision on provisional application in accordance with Article 17;
 - b) the deposit of any instrument of ratification, acceptance or approval in accordance with Article 15;
 - c) the date of entry into force of this Agreement in accordance with Article 16(1);
 - d) the date of entry into force of this Agreement for each Party in accordance with Article 16(2).
3. The Secretary General of the Council of the European Union shall publish the Agreement in *the Official Journal of the European Union*.

Article 12 (Annexes)

1. The annexes to this Agreement constitute an integral part thereof.
2. If a Bilateral Investment Treaty listed in Annex A is not in force on the date on which this

Agreement enters into force for the relevant Parties, but investments made prior to such termination may still fall within the scope of its application by virtue of its Sunset Clause, it shall be considered as a Bilateral Investment Treaty listed in Annex B.

Article 13 (Reservations)

No reservations shall be made to this Agreement.

Article 14 (Dispute settlement)

1. Disputes between the Parties concerning the interpretation or application of this Agreement shall, if possible, be settled amicably.
2. If a dispute between the Parties cannot be settled amicably within 90 days, the dispute shall, on the request of one of the Parties to the dispute, be submitted to the CJEU in accordance with Article 273 TFEU.
3. For greater certainty, this Article constitutes a special agreement between the Parties within the meaning of Article 273 TFEU.

Article 15 (Ratification, approval or acceptance)

This Agreement shall be subject to ratification, approval or acceptance.

The Parties shall deposit their instruments of ratification, approval or acceptance with the Depository.

Article 16 (Entry into force)

1. This Agreement shall enter into force 30 calendar days after the date on which the Depository receives the second instrument of ratification, approval or acceptance.
2. For each Party which ratifies, accepts or approves it after its entry into force in accordance with paragraph 1, this Agreement shall enter into force 30 calendar days after the date of deposit by such Party of its instrument of ratification, approval or acceptance.
3. When a Party that is a party to Pending Arbitration Proceedings ratifies, approves or accepts this Agreement, it shall, before the entry into force of this Agreement for that Party, inform the other party to the proceedings of that fact. That communication shall include a reference to whether, by that ratification, approval or acceptance, the relevant Bilateral Investment Treaty is terminated or whether ratification, approval or acceptance by the other Party to that Treaty is still outstanding.

Article 17 (Provisional application)

1. Parties, in accordance with their own constitutional requirements, may decide to apply this Agreement provisionally. Parties shall notify the Depository of any such decision.
2. When both Parties to a Bilateral Investment Treaty have decided to provisionally apply this Agreement, the provisions of this Agreement shall apply in respect of that Treaty 30 calendar days from the date of the later decision on provisional application.

Article 18 (Authentic texts)

This Agreement, drawn up in a single original in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian and Spanish languages, the text in each of these languages being equally authentic, shall be deposited in the archives of the Depositary.

Done in Brussels, on the [DATE]