

The upcoming end for intra-EU investment arbitrations

The representatives of EU Member States signed a joint declaration on 15 January 2019 ("**Declaration**") on the legal consequences of the judgement of the Court of Justice of the European Union ("**CJEU**") in the *Achmea* case and on the upcoming end of foreign investment protection in the EU based on bilateral investment treaties concluded between EU Member States ("**intra-EU BITs**").

Achmea case

We have already informed you about last year's groundbreaking judgment in case *Slovakia v Achmea* (C-284/16) in which the CJEU concluded that an arbitration clause included in the Czechoslovakia-Netherlands intra-EU BIT of 1991 has an adverse effect on the autonomy of EU law and, hence, shall be deemed as precluded by Articles 267 and 344 of the Treaty on the Functioning of the EU. In other words, the arbitration clauses in intra-EU BITs are incompatible with EU law.

The CJEU based its decision on the fact that an arbitral tribunal established to resolve an investment dispute in line with an intra-EU BIT may be called on to interpret or apply EU law, in particular, the free movement provisions. Such tribunal, however, cannot ask the CJEU for a preliminary ruling on the points of EU law. Thus, it could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law. The CJEU also stressed that its conclusions relate only to investment, not commercial arbitrations.

Conclusions adopted by the Declaration

The European Commission, agreeing with the aforesaid conclusions of the CJEU, initiated a political debate on the further fate of intra-EU BITs in response to the *Achmea* case. The debate culminated in the signing of the Declaration by EU Member States that agreed that "*an arbitral tribunal established on the basis of investor-State arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty.*"

EU Member States, thus, pledged to take the necessary measures to inform investment arbitral tribunals about the legal consequences of the *Achmea* judgment as summarised in the Declaration and to request courts, including in any third country, to set aside or not to enforce arbitral awards related to intra-EU BITs.

The Declaration justifies the foregoing by claiming that when investors from one EU Member State exercise one of the fundamental freedoms of free movement (*i.e.*, goods, people, services, and capital), they act within the purview of EU law and enjoy the protection granted by those freedoms. The protection includes in particular non-discrimination, proportionality, legal certainty, and the protection of legitimate interests. Based on this, and when simplified, the additional protection under intra-EU BITs is not needed within the EU Common Market.

EU Member States, however, stressed that the Declaration should not affect settlements and arbitral awards rendered in intra-EU BIT cases that can no longer be set aside and were voluntarily complied with or definitively enforced before the *Achmea* judgment.

Consequences of the Declaration and investment protection in the EU

The Declaration will inevitably affect several pending investor-State arbitrations and probably also the enforcement of already rendered (but not yet fulfilled) arbitral awards.

Furthermore, the Declaration sets down a commitment for EU Member States to terminate all intra-EU BITs concluded between them by no later than 6 December 2019.

Last but not least, EU Member States informed the investor community that "*no new intra-EU investment arbitration proceedings should be initiated.*" Therefore, investors will have to eventually consider restructuring their foreign investments in order to obtain the relevant international protection.

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