

## CJEU rules against investment arbitrations based on intra-EU bilateral investment treaties

Yesterday (6th March 2018), the Court of Justice of the European Union (“CJEU”) ruled that investor-state arbitration clauses in bilateral investment treaties concluded between EU Member States (“intra-EU BITs”) are incompatible with EU law.

### Background of the case

In a much-anticipated judgment in the case of *Achmea v Slovakia* (C-284/16), the CJEU’s Grand Chamber addressed a request for a preliminary ruling lodged by the German Supreme Court in May 2016. The latter court is hearing Slovakia’s challenge to an arbitral award issued in 2012 in favour of the company Achmea in the investor-state investment arbitration.

The dispute goes back to 2004 when Slovakia opened its healthcare insurance market to private investors. Achmea, a Dutch insurer, then set up a subsidiary in Slovakia through which it offered its insurance services on the local market. However, in 2006, Slovakia adopted measures reversing the said liberalisation of the market and, in particular, preventing the distribution of profits generated by healthcare insurance activities.

Accordingly, in 2008, Achmea initiated investment arbitration against Slovakia under the applicable Netherlands-Czechoslovakia agreement on the encouragement and protection of investments of 1991 (“BIT”).

Achmea succeeded with its claim for damages and obtained a €22.1 million arbitral award. But Slovakia subsequently challenged this in the competent German courts given that Frankfurt am Main was chosen as the place (seat) of arbitration. The German courts then referred the case to the CJEU for a preliminary ruling.

### CJEU’s judgment and its reasoning

The BIT provides that disputes between one Contracting State and an investor from the other Contracting State shall be finally settled before an arbitral tribunal pursuant to the arbitration rules of the UNCITRAL (United Nations Commission on International Trade Law).

The CJEU upheld Slovakia’s position that the BIT established a mechanism for settling investor-state disputes “which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of [EU] law.”

The CJEU based its decision on the fact that the arbitral tribunal in question may be called on to interpret or apply EU law, in particular, the provisions concerning freedom of establishment and free movement of capital. Such tribunal, however, has no power to ask the CJEU for a preliminary ruling on the points of EU law.

In light of the foregoing, the CJEU concluded that the BIT’s arbitration clause 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 the intra-EU bilateral investment treaties are incompatible with EU law.

It shall be stressed that the CJEU distinguished between commercial and investment arbitration to circumvent application of its previous case-law on a possible though limited judicial review of arbitral awards within annulment or recognition and enforcement proceedings, including the EU legal issues at stake (see the judgments in cases *Eco Swiss*, C-126/97, and *Mostaza Claro*, C-168/05).

### Implications of the judgment

The European Commission and the governments of several EU Member States (including Czech Republic, Estonia, Greece, Spain, Italy, Cyprus, Latvia, Hungary, Poland, and Romania) all supported Slovakia’s position. By contrast, the Advocate General, German Supreme Court, and the governments of some other EU Member States (Germany, France, the Netherlands, Austria and Finland) contended that the BIT provision in question is valid as well as similar clauses in other intra-EU BITs.

The judgment will inevitably affect nearly 200 intra-EU BITs in force. As many investment arbitrations under such treaties are currently pending, the CJEU’s decision is, therefore, likely to have far-reaching consequences. The ruling could also have a bearing on trade deals concluded by the EU.

The European Commission has already changed its model for investment protection with the goal to set up “courts” for settling investment disputes, considering the vocal opposition to the existing system.

The official press release is available [here](#) and the full judgment is available [here](#).

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