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## Intra-EU investment protection in a post-Achmea world*

by
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The judgment of the Court of Justice of the European Union (CJEU) in *Slovak Republic v. Achmea BV* (*Achmea* Judgment)[1] has been described as the "death knell" for bilateral investment treaties between EU member states (intra-EU BITs) because it concluded that EU law precludes provisions in intra-EU BITs authorizing investor-state arbitration.[2] This diagnosis was confirmed by a Declaration of 22 member states on the legal consequences of the *Achmea* judgment and on investment protection (*Achmea* Declaration), in which the signatories committed to terminate intra-EU BITs.[3]

If nature abhors a vacuum, the CJEU soon rushed to fill that created by the *Achmea* Judgment and the *Achmea* Declaration in its judgment in *Commission v Hungary*.[4] The occasion arose out of infringement proceedings in which the European Commission requested the Court to declare that, due to various national measures taken, Hungary failed to fulfil its obligations under Articles 49 and 63 of the Treaty on the Functioning of the European Union (TFEU) and Article 17 of the Charter of Fundamental Rights of the European Union "by restricting in a manifestly disproportionate manner [EU investors'] rights of usufruct over agricultural and forestry land."

Article 63 TFEU prohibits:

> "all restrictions on the movement of capital between Member States and between Member States and third countries" and "all restrictions on payments between Member States and between Member States and third countries".

Article 17 of the Charter, in turn, provides in paragraph 1:

> "Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest."

The CJEU accepted the application, holding that:

> "130 […] cancellation effected by the contested the provision of rights of usufruct held directly or indirectly by nationals of Member States other than Hungary […] does not comply with Article 17(1) of the Charter. Consequently, the restrictions on the free movement of capital thus arising from the deprivation of property acquired using capital protected by Article 63 TFEU cannot be justified.
>
> 131 Accordingly, the Court finds that, by adopting the contested provision and thereby cancelling, by operation of law, the rights of usufruct over agricultural land located in Hungary that are held, directly or indirectly, by nationals of other Member States, Hungary has failed to fulfil its obligations under Article 63 TFEU in conjunction with Article 17 of the Charter."

What does this mean for the future of intra-EU investment protection?

The Commission has consistently advanced the proposition that EU internal market law can be relied upon to ensure adequate protection of EU investors in another member state and that, to that extent, intra-EU BITs are superfluous.[5] In its very initiation of the infringement action, the Commission may be underscoring its willingness to act on its own to protect intra-EU investors from measures taken by other member states, rather than leave it to those investors to fend for themselves in intra-EU arbitration. Furthermore, it has laid down a highly visible marker for investor protection under EU law by member state courts in the wake of the *Achmea* Judgment. This may incentivize intra-EU investors to seek damages in host country courts for a state's failure to comply with its investment protection obligations under EU law (despite investors' historic aversion to litigating in host state courts)

The CJEU judgment may herald an era of intra-EU investment-dispute resolution in this post-*Achmea* world, and raises many questions about intra-EU investment protection going forward. For instance:

- Will complaints to the Commission by intra-EU investors become one of the preferred means by which intra-EU investment protection is secured?
- Will increased resort to national courts result in a significant number of preliminary references to the CJEU, and thus a further development of EU law in the area of investment protection?
- How will the fact that intra-EU investment claims proceed in member state courts rather than BIT tribunals affect the measure of recoverable damages?

The answers to these questions will reveal how close EU law, and in particular the TFEU articles relied on in *Commission v. Hungary*—freedom of establishment and free movement of capital, coupled with the principle of proportionality, and provisions of the EU Charter of Fundamental Rights—will come to approximating the level of protection currently enjoyed under investor-state arbitration. These developments merit close attention.

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[1] Case C-284/16, Slovak Republic v. Achmea BV (Mar. 6, 2018).

[2] John I. Blanck, 'Slovak Republic v. Achmea BV: The death knell for intra-EU BITs?', *ASIL Insights*, vol. 22, Issue 8.

[3] See: https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en.

[4] Case C 235/17 (May 21, 2019)

[5] See e.g., COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Protection of intra-EU investment, COM/2018/547 final (Brussels: European Commission, 2018) (providing "guidance to help EU investors to invoke their rights before national administrations and courts and to help Member States to protect the public interest in compliance with EU law.")



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