

Green Light for Romania to Terminate its Intra-EU Bilateral Investment Treaties

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On 8 March 2017, the Romanian Parliament sent to the Romanian President for promulgation the Law allowing for the termination of the Bilateral Investment Treaties between Romania and other Member States of the European Union ("Intra-EU BITs"). This comes after Poland adopted a similar measure at the beginning of January 2017 and with the European Commission starting to assume a more active role in the issue of Intra-EU BITs. (See *Markus Burgstaller*, Recognition and Enforcement of ICSID Awards: The ICSID Convention and the European Union, p. 412, in Crina Baltag (ed.), ICSID Convention After 50 Years: Unsettled Issues, 2017, Wolters Kluwer). With the entry into force of the Lisbon Treaty and the shift in the competencies with respect to Foreign Direct Investment, the European Commission voiced its real concerns with respect to the issue of Intra-EU BITs. For instance, in the Observations submitted in *Eureka BV v. the Slovak Republic* (now, *Achmea BV v. the Slovak Republic*), the European Commission stated that

Eventually, all intra-EU BITs will have to be terminated. Commission services intend to contact all Member States again, urging them to take concrete steps soon. Furthermore, while the Commission is in favour of consensual solutions with EU Member States, as guardian of the EU treaties it cannot exclude eventually having to resort to infringement proceedings against certain Member States. (Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, para. 182)

The measure adopted by the Romanian Parliament is a direct consequence of the infringement proceedings under Article 258 of the Treaty on the Functioning of the EU, commenced in 2015 by the European Commission against Austria, the Netherlands, Romania, Slovakia and Sweden in respect to their Intra-EU BITs. As highlighted by the European Commission, Intra-EU BITs affect the single market by conferring rights to some EU investors on a bilateral basis, which come in conflict with the EU Law and with the principles of a single economic market. As noted by the Commission, there is a high reliance by some investors on these BITs in the recent years and the outcome of this might create legal uncertainty for cross-border investments. The Commission referred here to the outcome in the *Micula I* case against Romania where the European Commission regarded the damages awarded by the ICSID tribunal as illegal state aid. (For the enforcement of the *Micula I* Award, see *Markus Burgstaller*, Recognition and Enforcement of ICSID Awards: The ICSID Convention and the European Union, in Crina Baltag (ed.), ICSID Convention After 50 Years: Unsettled Issues, 2017, Wolters Kluwer).

This position of the European Commission is reflected in the reasoning of the Law by the Romanian

Parliament. It is highlighted here that there are twenty-two Intra-EU BITs in force signed by Romania and, in accordance with the EU Law, such agreements are superfluous given the fact that the EU Law guarantees to EU investors and their investments in the EU Member States proper and equal protection. While the Law refers to termination by consent or by unilateral termination, issues concerning the sunset clauses in the terminated BITs should not be much debated.