Achmea, Protection of Intra-EU Investments and European Company Law

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This editorial discusses the importance of European company law for intra-EU investments after the recent decision of the CJEU in *Achmea*.[1] The crucial question is whether European company law facilitates intra-EU investments in the absence of bilateral investment treaties (hereinafter, 'BITs') between EU Member States. This question derives from the fact that certain aspects of BITs between EU Member States were found to be unlawful by *Achmea*.

In *Achmea*, the CJEU examined BITs concluded between EU Member States in the light of EU law. This case concerned a BIT concluded in 1991 between Netherlands and Czech and Slovak Federative Republic and still applicable between Netherlands and Slovak Republic. More specifically, the CJEU scrutinized the compatibility of BITs' provisions enabling an investor from one contracting party to bring proceedings before an arbitral tribunal in the event of a dispute with the other contracting party with Articles 18, 267 and 344 TFEU. In its approach, the CJEU considered carefully the concept of 'court or tribunal of a Member State', as well as the autonomy of the EU legal order. In *Achmea*, the CJEU held that:

> *Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.*[2]

This specific arbitral tribunal established by this BIT cannot be characterized as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU, and does not have the right to address a reference to the CJEU for a preliminary ruling.[3]

There were initial concerns that *Achmea* would result in turbulences of the protection of cross-border investments at EU level. The fact that investor-State arbitration prescribed by BITs between EU Member States is incompatible with EU law was a source of uncertainty for certain investors and public authorities. Certain questions about investors' protection arose from this ruling. In the aftermath of *Achmea*, the European Commission issued a Communication on Protection of intra-EU investment[4] (hereinafter, 'Communication'), which tried to explain the landscape of cross-border investments at EU level. The goals of this Communication are to clarify the protection of intra-EU investments in the context of existing EU law, which is currently enjoyed by investors, and to enhance the trust in the EU's investment scene.[5] This Communication contributes to legal certainty and seeks to provide

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1 Case C-284/16 *Slowakische Republik (Slovak Republic) v. Achmea BV* EU:C:2018:158.

2 *Slowakische Republik (Slovak Republic) v. Achmea BV*, *Ibid.*, operative part of the judgment.

3 *Slowakische Republik (Slovak Republic) v. Achmea BV*, *Ibid.*, para. 49.

4 Communication from the Commission to the European Parliament and The Council 'Protection of intra-EU investment' COM(2018) 547 final, 19 July 2018.

5 European Commission – Fact Sheet-Press Release 'Commission provides guidance on protection of cross-border EU investments – Questions and Answers' MEMO/18/4529 (19 July 2018).

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guidance on existing provisions of EU law dealing with cross-border investments at EU level.[6] Actually, the Communication constitutes a 'restatement' of investors' rights and protection at an intra-EU level.[7] In the absence of the protection provided by BITs due to *Achmea*, the European Commission argues that there is no gap in the protection of intra-EU investments and reminds that the overarching role of EU law protects comprehensively intra-EU investments. An overview of both substantive and procedural EU law aiming at the protection of intra-EU investments is provided.

In the Communication's part discussing operations on the market, there is a reference to freedom of establishment of companies.[8] Freedom of establishment of companies (Articles 49–54 TFEU) constitutes the foundation of European company law. The EU fundamental freedom of establishment exercised by companies, which are investors in other Member States, constitutes a shield against protectionist measures adopted by other Member States. The mechanisms of European company law are serving the protection of intra-EU investments. The EU fundamental freedom of establishment was interpreted in several cases before the CJEU. Both primary and secondary establishment were scrutinized by the CJEU. Additionally, the harmonization of company law, which aims at promoting the exercise of freedom of establishment of companies, facilitates companies from other Member States to proceed to intra-EU investments. The Societas Europaea, a supranational corporate type, constitutes a vehicle increasing intra-EU investments. Moreover, the Communication stresses the importance of the rest of the EU fundamental freedoms: free movement of capital, goods, services and workers. Free movement of capital (Articles 63–66 TFEU) is a fundamental freedom, which is closely related to European company law, helps national companies to proceed to cross-border investments and combats national obstacles to intra-EU investments.

6 Communication, *Ibid.*, at 1.

7 S. Hindelang, *After Achmea, EU Commission publishes "Restatement" of Investors' rights in an intra-EU context*, https://www.linkedin.com/pulse/after-achmea-eu-commission-publishes-restatement-rights-hindelang/ (accessed 8 Aug. 2018).

8 Communication, *Ibid.*, at 7.