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The Door Is Open for the ECJ to Rule on Intra-EU BIT Arbitration

In a press release of 10 May 2016 (No. 81/2016), the Federal Court of Justice of Germany, *the Bundesgerichtshof*, announced that it requested a preliminary ruling from the European Court of Justice (ECJ) on the compatibility of investor-state arbitration clauses in investment treaties between EU Member States (intra-EU BITs) with EU law. The Court's decision to that effect of 3 March 2016 has been published on 11 May 2016.

The underlying dispute concerns the Final Award in the UNCITRAL case *Achmea (formerly known as Eureko) v Slovak Republic*. On the basis of the BIT in force between the Kingdom of the Netherlands and the Slovak Republic, the Dutch insurance company Eureko had initiated arbitral proceedings against the Slovak Republic in 2008 with regard to measures enacted in the Slovak health insurance sector. The arbitration resulted in an award in 2012 in favor of Eureko, which by then had changed its name into Achmea. The Frankfurt-seated tribunal awarded Achmea and amount of € 22.1 million plus interests and also the reimbursement for legal fees and costs.

The Slovak Republic first challenged the 2010 Award on Jurisdiction, Arbitrability and Suspension before the Higher Regional Court of Frankfurt. It argued that the Tribunal had no competence to adjudicate the dispute because the BIT's arbitration clause was invalid due to incompatibility with EU law, particularly articles 344, 267 and 18 TFEU. Largely for the same reasons, the Slovak Republic later also argued that the Final Award was to be set aside, inter alia, because its recognition and enforcement would violate the *ordre public*. In a decision of December 2014, the Higher Regional Court rejected all these arguments. With regard to EU law, it held the following:

Article 344 TFEU, which obliges EU Member States not to submit a dispute concerning the interpretation or application of the EU Treaties to any method of settlement other than those provided for in the EU Treaties, was not violated. Rather, the Higher Regional Court pointed out, the EU Treaties lacked a mechanism to settle disputes between Member States and individuals. Further, it read Article 344 TFEU in conjunction with Article 19(1) TEU, which does not protect the competence of the ECJ in a general fashion. The Higher Regional Court also relied on the ECJ's jurisprudence on commercial arbitration to reaffirm that, although arbitral tribunals cannot ask the ECJ for a preliminary ruling, arbitration clauses do not violate article 267 TFEU. It also did not consider Article 18 TFEU (non-discrimination of EU nationals) violated. Instead, it argued that nothing would militate against extending the arbitration clause also to investors from other EU Member States (instead of abrogating the otherwise valid arbitration agreement).

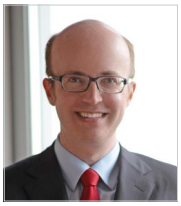
While the Higher Regional Court of Frankfurt found that all questions related to EU law had been sufficiently answered in the jurisprudence of the ECJ and – relying on the *acte claire* doctrine – refrained from requesting a preliminary ruling by the ECJ, the Federal Court of Justice took a different approach.

According to the press release, it considered that the questions whether an arbitration agreement in a BIT is compatible with EU law and in particular Articles 344, 267 and 18 had not been answered by the ECJ yet. The Federal Court of Justice, hence, provides the ECJ with an opportunity to take a position on this.

The European Commission currently makes every effort to eliminate intra-EU investment arbitration. Already in June 2015, it initiated infringement proceedings against five EU Member States (Austria, the Netherlands, Romania, Slovakia and Sweden) and requested them to terminate their intra-EU BITs. Should the Commission succeed, this would deprive EU nationals investing in another EU Member State from the possibility to have recourse to a neutral forum for the settlement of their disputes with that State. As the Higher Regional Court of Frankfurt rightly observed, a mechanism for the settlement of disputes between Member States and individuals does not exist under EU law.

In contrast to the European Commission, the German Federal Court of Justice fortunately expressed its tendency to follow the line of reason of the Higher Regional Court of Frankfurt in its press release. It remains to be seen, however, whether the ECJ will allow for that.

If you want to know more about the above mentioned case or, more specifically, about recent developments regarding intra-EU investment disputes, please contact:



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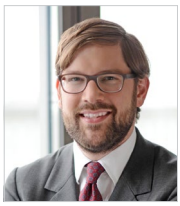

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