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The EU Plurilateral Draft Termination Agreement for All Intra-EU BITs: An End of the Post-Achmea Saga and the Beginning of a New One

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On 24 October 2019, the European Commission announced that the EU Member States have reached agreement on a plurilateral treaty for the termination of all ca. 190 intra-EU bilateral investment treaties (BITs). The agreement follows the political Declarations of the Member States issued in January this year in which they explained the consequences they are drawing from the *Achmea* judgment of the Court of Justice of the EU.

It will be recalled that on 6 March 2018 the Court of Justice ruled in the *Achmea case* that the investment arbitration clause contained in intra-EU BITs is incompatible with EU law, which effectively put an end to the intra-EU BITs (more KAB posts on the interim developments regarding intra-EU BITs can be found here).

More specifically, the *Achmea* judgment means that European investors cannot bring a claim against EU Member States for claiming compensation in case of expropriation, an unfair or discriminatory treatment that resulted in damages to the investors.

Since the *Achmea* judgment was issued the European Commission has been pushing the Member States to terminate all their intra-EU BITs as soon as possible. Whereas some Member States, in particular Central and Eastern European Member States, have been already in the process of terminating some of their intra-EU BITs, the truth is that nonetheless most of the remaining ca. 190 treaties are still in force today.

However, in January this year, the EU Member States issued three political Declarations. In those Declarations, all Member States announced their intention to terminate all their intra-EU BITs by 6 December this year. In addition, most of the Member States extended the effect of *Achmea* also to intra-EU disputes within the context of the Energy Charter Treaty (ECT), while a handful of Member States argued that it would be more appropriate to wait until the Court of Justice has explicitly ruled on the compatibility of the ECT arbitration clause with EU law, which has not been the case yet. In a separate Declaration, Hungary rejected the application of the *Achmea* judgment to the ECT altogether.

Following up on their promise in January, a few weeks ago, the Member States negotiated under the supervision of the European Commission a plurilateral agreement for the termination of the intra-EU BITs (Termination Agreement). In essence, the Termination Agreement regulates two

issues:

1. how the existing intra-EU BITs are to be terminated, including their sunset clauses, and
2. how to deal with new, pending and concluded arbitration proceedings.

While the text of the Termination Agreement has not yet been officially published, a draft agreement has been leaked, which will be used for the analysis below.

Termination of Intra-EU BITs, Including Sunset Clauses, All at Once

The Termination Agreement simply states that all intra-EU BITs, which are listed in an annex, are terminated by this agreement. In addition, it also states that the sunset clauses contained in the intra-EU BITs "shall not produce legal effects".

Sunset clauses are provisions that protect investments made prior to the termination of the BIT in question for a certain period, usually for an additional 10-20 years after the termination. The purpose of the sunset clauses is to protect the legal expectations of investors who made their investments based on the existence of the respective BITs.

Moreover, the Termination Agreement further states that the BITs and their arbitration clauses are "inapplicable" from the date on which the last Member State joined the EU, *i.e*., as of 1 January 2007.

Interestingly, the termination agreement only requires ratifications of two Member States in order to enter into force. Also, a provisional application of the Termination Agreement is envisaged.

Consequently, it can be expected that the Termination Agreement will enter into force within the next months.

Concluded Arbitrations Remain Untouched

The Termination Agreement states that all intra-EU BIT arbitrations which were concluded before the *Achmea* judgment, *i.e*. before 6 March 2018, will remain untouched. In other words, it does not foresee in a retroactive effect for arbitration proceedings that have definitely been concluded with a final award or settlement agreement prior to *Achmea*. This will also include an award that has already been issued in the pending proceedings (commenced before 6 March 2018), but not yet definitively enforced or executed, if the investor undertakes not to start proceedings for its recognition, execution, enforcement or payment in a Member State or in a third country or, if such proceedings have already started, to request that they are suspended.

The Fate of Pending Disputes

The situation is completely different for pending disputes, meaning arbitration proceedings that were initiated prior to the *Achmea* judgment, *i.e*. before 6 March 2018 and which have *not yet been concluded*.

For these pending disputes, the Termination Agreement provides for a so-called "structured dialogue". This "structured dialogue" allows the investor to initiate a settlement procedure with the Member State concerned, but only within six months from the termination of the respective BIT.

The settlement procedure is to be overseen by an "impartial facilitator" "with a view of finding between the parties an amicable, lawful and fair out-of-court and out-of-arbitration settlement".

The facilitator shall be selected by common agreement between the investor and the Member State concerned. Interestingly, besides being independent and impartial, the facilitator must explicitly possess in-depth knowledge of Union law, but not in-depth knowledge of investment law. If the disputing parties fail to agree on a facilitator, an appointing authority, which in the draft text has been left open in brackets, shall appoint the facilitator.

The facilitator shall reach a settlement agreement within six months, but parties can agree to a longer period. It is noteworthy that any settlement agreement must take into account the rulings of the Court of Justice of the EU as well as definite decisions of the European Commission. The latter apparently aims to ensure that State aid Decisions of the European Commission, like the ones in the famous *Micula* case, are not ignored by the facilitator.

Finally, the Termination Agreement provides that the settlement procedure shall be impartial and confidential.

Interestingly, the Termination Agreement does not explain what happens with the dispute if no settlement agreement has been reached. Is the investor allowed to continue the arbitration proceedings or is the dispute suddenly terminated as well?

Besides the access to a facilitator, the Termination Agreement also mentions access to national courts of the Member States within six months of the termination of the respective BIT, even if the time-limits for bringing actions under domestic laws have expired. However, and at the same time, the Termination Agreement stresses that this possibility shall not be construed as creating "any new judicial remedies, which would not be available to the investor under the applicable national law".

Consequently, this appears to be a very limited option for investors to bring their claim before domestic courts of Member States, which they could have done in any event but have deliberately chosen not to do in the first place.

No "New" Intra-EU Disputes

The Termination Agreement simply states that "arbitration clauses [in intra-EU BITs] shall not serve as legal basis for new arbitration proceedings". New arbitration proceedings are defined as proceedings initiated on or after 6 March 2018, *i.e.* post-*Achmea* judgment. This apparently means that dozens of intra-EU BIT proceedings that were initiated post-*Achmea* are qualified as null and void by this Termination Agreement, despite the fact that most intra-EU BITs are still in force and legally binding on the Member States. In other words, the Termination Agreement imposes a retroactive effect on arbitration proceedings that have been initiated up to almost two years ago. One can seriously question whether such a retroactive effect is compatible with the Rule of Law and the jurisprudence of the European Court of Human Rights. Indeed, some months ago –

regarding a slightly different context – in its Opinion on the investment court system (ICS) as contained in CETA, the Court of Justice explicitly prohibited any retroactive effect of joint binding interpretations of the CETA parties. Therefore, it would have been more appropriate and reasonable to qualify "new" arbitration proceedings as those that are initiated after this Termination Agreement has entered into force.

Intra-EU ECT Cases Are not Covered

It is noteworthy that this Termination Agreement explicitly states in the Preamble that it does not apply to intra-EU ECT disputes. Instead, the Termination Agreement states that the Member States will deal with this issue at a later stage, presumably in the context of the on-going modernization process of the ECT.

As is well known, Spain and many other EU Member States are facing dozens of intra-EU ECT claims. Their efforts to convince ECT arbitral tribunals to decline their jurisdiction or to toss out pending cases have not been successful yet.

Therefore, it can be expected that the Member States will try to find ways to escape their legal obligations under the ECT.

Conclusion

This Termination Agreement marks the culmination of the European Commission's and several Member States' efforts over the past decade to abolish intra-EU investment arbitration proceedings from the European legal order.

Prima facie, the agreement indeed puts a definite end to all pending and new arbitration proceedings that have been initiated post-*Achmea*, with only very limited transitional measures, which, in addition, are designed to be particularly unattractive to investor-claimants.

However, the question must be asked whether the legal expectations of investors and their rights as contained in those BITs are sufficiently respected. In particular, the way the sunset clauses and all post-*Achmea* disputes are simply declared null and void as of 2007 is hardly in conformity with the Rule of Law and the Vienna Convention on the Law of Treaties.

After all, the very purpose of the sunset clause is to kick in when the BIT is terminated. If the Member States want to avoid that, they must first take out the sunset clauses in all BITs and then terminate the modified treaties. Indeed, this has been done before on a few occasions.

In sum, while this Termination Agreement, when it enters into force, puts an end to intra-EU BITs disputes within the next few months, several legal aspects raise a number of serious questions as to the conformity with the Rule of Law and the legitimate expectation of investors-claimants, which probably will have to be clarified by domestic courts and eventually the Court of Justice of the EU.

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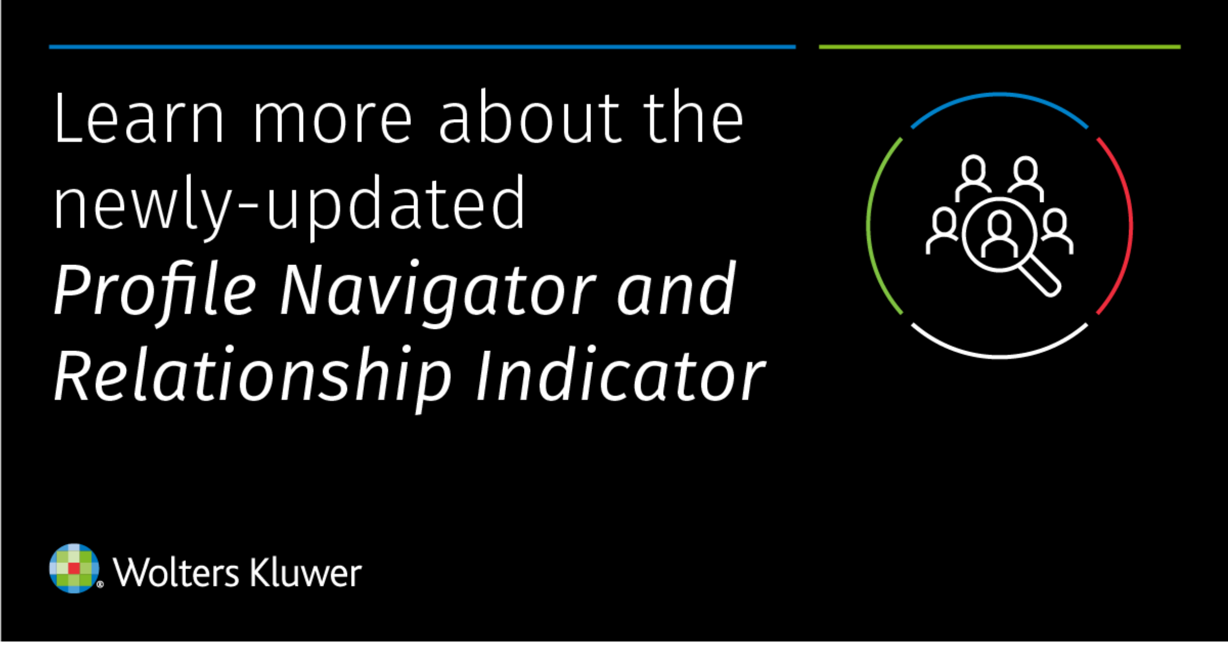

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