# AUSTRIA: DG FISMA – Intra-EU bilateral investment treaties – 2013/2205

**Reasons for sensitivity**

The protection of investors is a sensitive matter for most Member States. Austria is one of the five Member States against which the Commission launched infringement proceedings given that their bilateral treaties have been relied on in arbitration proceedings and have led to issues regarding compatibility with EU law. However, following the Achmea ruling, Austria has signalled its commitment to comply with the judgment and has signed jointly with all Member States a political declaration committing to termine these treaties.

**Next decision step in the cycle**

Not included in any cycle for the moment.

**Last formal step**

Reasoned opinion under Article 258 TFEU (29 September 2016)

**History of previous formal decisions**

Formal notice Art. 258 TFEU + Press release (18 June 2015)

**Context**

Intra EU bilateral investment treaties (BITs) establish the terms and conditions for private investment by nationals and companies of one Member State in another one. Many of these intra-EU bilateral investment treaties were agreed before the EU enlargements of 2004, 2007 and 2013, typically between an existing and a future Member State ("EU‑13") in order to reassure investors coming from the existing Member States. These reassurances became obsolete after the enlargements.

The Commission had opened infringement procedures against five Member States (Austria, the Netherlands, Romania, Slovakia and Sweden) requesting to terminate their intra-EU BITs. The Commission also contacted via EU Pilot the remaining 21 Member States who still have intra-EU BITs in place. Ireland and Italy have already ended all their intra-EU BITs.

On 6 March 2018, the Court of Justice of the European Union issued the *Achmea* judgment, in a preliminary ruling concerning arbitration under an intra-EU BIT. It follows from the ruling that the intra-EU BITs undermine the system of legal remedies provided in the EU Treaties.[[1]](#footnote-1) As a result, they pose a threat to the autonomy of EU law and the principle of mutual trust. Member States must therefore formally terminate them in order to ensure legal certainty. This confirmed the Commission position that intra-EU BITs were incompatible with EU law.

The infringement procedures are currently on hold as Member States – including Austria- in principle agree to comply with the *Achmea* ruling and terminate the intra-EU BITs. On 15 and 16 January 2019, all Member States signed up to declarations by which they commit to terminate intra-EU BITs by 6 December 2019. The negotiations of a plurilateral termination treaty are facilitated by the Commission and are well advanced.

Following the *Achmea* ruling, an expert group was tasked with finding a solution for a coordinated termination of the intra-EU BITs by all Member States. In the context of discussions on termination Austria, alongside a number of other Member States, expressed concerns about the level of investor protection in the EU "post-*Achmea*" and called for discussions and possibly further action at EU level. The Communication on "Protection of intra-EU investment" of 19 July 2018 is intended to reassure investors in the light of these concerns.

**Line to Take**

* The Capital Markets Union action plan provides that the Commission explores whether additional action is needed to further strengthen investor safeguards thereby reinforcing the Single Market's attractiveness as an investment destination. However, this work is independent from the issue of the intra-EU BITs, which should be terminated immediately.
* There is no link between the Commission's position on the intra-EU BITs (an internal market issue) and the approach to the EU's international investment policy/international agreements.
* The Commission appreciates that Austria has always actively contributed to the discussions on investment protection and has made a number of proposals in this respect. These proposals will be further discussed in the relevant expert group, in particular in view of their compatibility with EU law.
* The Commission thanks Austria for its support (during its Presidency and afterwards) to work towards a coordinated approach to the termination of the intra-EU BITs.

Contact: TW FISM/B/01, (DG FISMA), N/A  
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1. Case C-284/16, Achmea v. Slovak Republic, EU:C:2018:158. [↑](#footnote-ref-1)