AT THE INTERSECTION OF NATIONAL, INTERNATIONAL, AND EUROPEAN LAWS: THE EXAMPLE OF THE HUNGARIAN FOOD VOUCHER CASES – SOME THOUGHTS ON THE RELATIONSHIP BETWEEN NATIONAL, INTERNATIONAL, AND EUROPEAN LAWS

Marcel Szabó*

I. INTRODUCTION

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I. INTRODUCTION

State legislation and law enforcement often face the difficulty of

II. The Relevance of Bilateral Investment Protection Agreements

In today's globalized world, foreign investment is becoming ever more

concluded between developing countries, making the need to protect foreign investment a generally accepted rule.[15] The first BITs of the Central and Eastern European states (including Hungary) were also concluded in that period.[16] The purpose of these currently existing bilateral treaties is for

International Centre for Settlement of Investment Disputes (ICSID)'s procedure in the event of a dispute between an investor and Hungary.[23]

III. HUNGARIAN FOOD VOUCHER CASES – FACTUAL AND LEGAL CONTEXT

The Hungarian Personal Income Tax Act[24] has long allowed employers to provide fringe benefits known as "cafeteria" to their employees under taxation rules that are more favorable than those applicable to wages. The market for these fringe benefits has traditionally been dominated by three French enterprises: Edenred, Le Cheque Déjeuner and Sodexo.[25] The activities of these enterprises fell under the first BIT concluded by Hungary on November 6, 1986, when the Government of the Hungarian People's Republic signed an agreement with the Government of the French Republic on mutual promotion and protection of investments (entered into force on September 30, 1987).[26] The BIT remained in force after Hungary's accession to the European Union in 2004.

In 2010, the Hungarian government decided to restructure the fringe benefits scheme: on the one hand, the Széchenyi Pihen Kártya,[27] commonly known as the Széchenyi Leisure Card or SZÉP card, was introduced with the aim of increasing the use of services related to the preservation of health and a healthy lifestyle and, on the other hand, the already existing traditional cafeteria market was transformed, and the Erzsébet vouchers were introduced.[28]

23. With states that are not parties to the Washington Convention establishing the ICSID, ad hoc

The Erzsébet vouchers were issued by the Hungarian public benefit foundation Magyar Nemzeti Üdülési Alapítvány (Hungarian National Holiday Foundation), which was established by the government back in 1992 together with six trade unions.[29] The vouchers may be used to buy both cold and hot food, as well as certain products and services.[30] Accordingly, the newly released Erzsébet vouchers became a direct market competitor of the cafeteria vouchers issued by Edenred, Le Cheque Déjeuner and Sodexo. In the case of the Erzsébet vouchers, however, the government provided that the proceeds from the issuance of such vouchers could be used by the foundation to "significantly reduce the number of children who are deprived of multiple meals a day, to ensure healthy food for their age, the health status necessary for studies and the possibility of active recreation for regeneration."[31] Based on the legislator's decision, fringe benefits for purchasing ready-to-eat food (cold or hot food, up to a monthly HUF 8,000, i.e. approximately USD 27) received more favorable taxation than salaries only if the employer provided the benefit in the form of Erzsébet vouchers.[32] Meanwhile, the same benefit was subject to a higher tax rate on vouchers issued by Edenred, Le Cheque Déjeuner and Sodexo.[33]

IV. Assessment of Hungarian Food Voucher Legislation From the Perspective of EU Law

The European Commission found the Hungarian cafeteria legislation, presented in the previous section, contrary to EU law in respect of both the SZÉP card and GIS sÉjtiae d 8.-3 (. 2.3 (he)0.9 (e)-1.7 ( )-3.4e)9.2 3forred,,n c-3.9 (ouj EMC 6.

Nemzeti Üdülési Alapítvány) to issue preferentially-taxed cafeteria vouchers is contrary to essential elements of EU law, namely, the freedom of establishment[35] and the freedom to provide services,[36] since they exclude other Member States' undertakings from entering the cafeteria voucher market, either as a company established in Hungary or as a cross-border service provider. In the proceedings, the Hungarian Government argued that, in view of the above-mentioned, non-economic, social objectives of the Erzsébet program, the Member State enjoys a high degree of freedom in the adoption of such social policy measures, as opposed to a range of economic activities which are extremely strictly regulated by EU law.[37] However, the CJEU made it clear in its judgment that "the national legislation [...] under which exclusive rights to carry on an economic

relevant third country.[47] This also meant that, over time (as the European Union exercises this new competence), BITs between Member States and third countries were to be gradually replaced by a system of BITs concluded by the European Union. By the time this study was closed in late January 2022, the European Union had concluded a total of seventy-treaties containing investor protection provisions. This approach is significantly broader than the scope of BITs in the traditional sense.[48] However, this seemingly favorable picture is overshadowed by the fact that only two of these treaties are specd(ie)3.4 (p.6 (h)(c)-110.9 (l)-4.7 (e s)10.5 (2.3 22 ( )1Aa)3.3

As mentioned earlier, however, the primacy of EU law means, on the one hand, only a priority of application and not a priority of annulment: that is, it merely renders rules contrary to EU law inapplicable and not invalid. On the other hand, the scope of the principle of primacy is limited: it is binding only on the authorities of the Member States (including the courts of the Member States). Yet, as described above, one of the characteristics of BITs is that disputes between investors and Member States are not dealt with by Member State authorities but by an independent external forum (the ICSID in many cases or ad hoc arbitration in other cases) to which the principle of primacy does not apply.

The European Commission's position on this issue has long been clear: the existence of BITs between Member States is contrary to EU law, since the special protection guaranteed by the BITs is only provided by the host Member State to investors of the other Member State participating in the BIT and not to investors of the other Member States. This ultimately constitutes discrimination on the basis of citizenship (nationality in the case of legal persons). In addition, the Commission argued that maintaining BITs between Member States was unnecessary, since EU internal market rules (in particular the provisions governing the freedom of establishment and free movement of capital) adequately regulate and protect cross-border investments, and all Member States are subject to uniform rules.[52] The Commission has consistently sought to enforce this position (that is, that the existence of BITs is contrary to EU law) in proceedings before the ICSID and other arbitration courts, but with little success. Without being exhaustive, the Commission made such submissions in, e.g., Eastern Sugar,[53] Eureko,[54] EURAM,[55] and Micula,[56] but the Commission's argument was not upheld in any of those judgments. The arbitration courts, which are independent of the Member States in each case, without exception, held that the BITs invoked in these cases were valid and effective treaties under public international law and that any conflict between the BITs and EU law had no relevance to the resolution of an international dispute. The arbitration courts reasoned that, contrary to the Commission's position, it should be assessed whether the Treaty of Lisbon (and, consequently, the TFEU) and the BITs invoked in individual disputes can be regarded as

52. European Commission—Fact Sheet: September Infringements' Package: Key Decisions, Press Room, EUROPEAN COMMISSION (Sept. 29, 2016), https://ec.europa.eu/commission/presscorner/detail/EN/MEMO_16_3125.

53. Eastern Sugar B.V. (Netherlands) v The Czech Republic, SCC No. 088/2004, ¶ 119 (2007) (quoting the Commission's letter from January 13, 2006).

54. Eureko B.V. v The Slovak Republic, PCA Case No. 2008-13, ¶ 175-96 (2010).

55. EURAM v The Slovak Republic, PCA Case No. 2010-17, at 2 (2011).

56. Micula v Romania, ICSID Case No. ARB/05/20, Award, ¶ 316-17 (Dec. 11, 2013).

successive agreements in the same subject matter. According to Art. 59 of the 1969 Vienna Convention, a treaty shall be considered terminated if all the parties to it conclude a later treaty relating to the same subject matter and it appears from the later treaty or is otherwise established that the parties intended that matter to be governed by that treaty; or the provisions of the later treaty are incompatible with those of the earlier one to the extent that the two treaties cannot be applied at the same time.[57] Based on the approach taken by the arbitration courts, the following three main categories of cases may be distinguished.

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been terminated,[61] and the protection afforded by the BIT was wider than the legalprotection guaranteed by the provisions of the TEC. In view of these findings, the arbitration court decided that the rules of Art. 30 of the 1969 Vienna Convention apply.[62]

On the basis of these cases, it may clearly be established that, under the 1969 Vi

outside the jurisdiction of the CJEU. It is against this background that the CJEU ruled in Achmea in March 2018.[65]

The immediate background to Achmea can be summarized as follows.[66] A BIT was concluded between the Netherlands and Czechoslovakia on April 29, 1991, to which Slovakia also became a legal successor on January 1, 1993 (with the creation of an independent Slovakia). Achmea BV, formerly Eureko BV, was part of a Dutch insurance group that set up a subsidiary in Slovakia in 2004 under the name Union Healthcare and offered private health insurance. In 2006, the newly elected Slovak government took several steps to abolish the private health insurance system in Slovakia, prompting Achmea to appeal to the Permanent Court of Arbitration in October 2008. The ad hoc arbitration court acting in that case was based in Frankfurt am Main, Germany, and on December 7, 2012, found that the measures taken by the government of Slovakia had violated the provisions of the BIT and ordered Slovakia to pay damages. The government of Slovakia then applied to the Provincial High Court in Frankfurt for the annulment of the arbitration award (the jurisdiction of the German court was based on the seat of the ad hoc arbitration court). Following the dismissal of the application by the German court of first instance, Slovakia filed an appeal against that decision and the Bundesgerichtshof (Federal Court of Justice) as court of second instance brought a preliminary reference before the CJEU.

In a landmark judgment on March 6, 2018, the CJEU concluded that arbitration courts acting under a BIT could not be classified as courts that may request a preliminary ruling under Art. 267 of the TFEU on the interpretation or validity of EU law, although a dispute between an investor and an EU Member State cannot be separated from EU law.[67] However, if the BIT allows the interpretation of EU law to be carried out by a forum that does not have the power to bring proceedings before the CJEU on the interpretation of EU law, BITs concluded between Member States are certainly incompatible with EU law in this procedural respect.[68] However, the CJEU has gone beyond this case, holding in general that EU law "precludes a provision in an international agreement concluded between

65. Case C-284/16, Slowakische Republik v Achmea BV, ECLI:EU:C:2018:158 (Mar. 6, 2018).

66. Opinion of Advocate General, Case C-284/16, Slowakische Republik v Achmea BV, ECLI:EU:C:2018:158 (Sept. 19, 2017).

67. Id. ¶ 60.

68. Opinion of Advocate General, Case C-284/16, Span <</BDC 0 TID 19 >prDC(O)o.6 ( )0.ed7 Tw urDC(O)

Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning

were pending before the CJEU), the three French undertakings affected by the amended Hungarian cafeteria legislation, Edenred, Le Checque Déjeuner and Sodexo, initiated the ICSID's procedure separately, on the basis of the BIT concluded between Hungary and France.[70]

When the Achmea judgment was rendered, two of the three proceedings were still pending before the ICSID (in Edenred the ICSID had already adopted a decision in December 2016). In the earlier UP and CD Holding case (the case of Le Checque Déjeuner), the arbitration court had already established its jurisdiction in 2016, but since then the litigants had explicitly referred to the findings in Achmea, and the arbitration court re-examined its jurisdiction and concluded that the decision of the CJEU did not affect its jurisdiction.[71] According to the arbitration court, the ICSID's procedure is fundamentally different from the jurisdiction of the arbitration court in Achmea. In this case, the procedure is based on the ICSID Convention and no national court of a Member State has the power to review or annul the award.[72] The arbitration court also emphasized that, even if it were correct to argue that the ICSID Convention is contrary to EU law as a result of Achmea, and that Hungary is obliged to denounce it, such a decision could not have a retroactive effect on proceedings already commenced, since international treaties may not be terminated retroactively.[73] Finally, the arbitration court pointed out that even if the BIT between Hungary and France had (or should have) been terminated on May 1, 2004 (upon Hungary's accession to the European Union), some of its provisions would have remained in force for 20 years (so-called survival clause),[74] including the rules on the ICSID's jurisdiction. Hence, even if the BIT had been terminated on May 1, 2004, the ICSID's jurisdiction could have been established (however, no such termination was made by Hungary or France either then or thereafter).[75]

In Sodexo, which was also pending when the Achmea judgment was delivered by the CJEU, the European Commission itself lodged an amicus

70. Hungary to Pay EUR 73 Million to French Voucher Company Sodexo, HUNGARY TODAY (May 27, 2021), https://hungarytoday.hu/hungary-pay-eur-73-million-french-voucher-company-sodexo/ (referencing Edenred S.A., ARB/13/21 (Dec. 13, 2016); UP and C.D Holding Internationale, ARB/13/35 (Oct. 9, 2018); and Sodexo Pass International SAS, ARB/14/20 (Dec.10, 2021)).

71. UP and C.D Holding Internationale v. Hungary, ARB/13/35, ¶¶ 254-55 (Oct. 9, 2018).

72. Id.

73. Id. ¶¶ 261-62.

74. Id. ¶ 265 (recalling art. 12(2) of the BIT concluded between Hungary and France: "investments made prior to the expiration of this [treaty shall] remain [in force] for a period of 20 years from the date of expiry").

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apply even after the relevant BIT has ceased to exist for years (as seen in the case of Le Cheque Déjeuner, spanning up to twenty years). In my view, therefore, the answer to this question is negative: as long as the BIT is valid and effective, or at least one of its survival clauses is still in force, there is no doubt that the arbitration court may conduct arbitration proceedings under that BIT. The possible consequences under EU law of arbitration proceedings thus lawfully conducted under international law should not be borne by the Member State concluding the BIT instead of the foreign investor.

The treaty concluded by EU Member States in 2020 also contains clear, but legally questionable rules for the enforcement of arbitration awards pending on March 6, 2018 (the date of the *Achmea* judgment). Pursuant to Art. 7, the concerned states shall request the competent national court to set aside, or as the case may be, annul the arbitration award already rendered or refuse to recognize and enforce it.[85] Art. 9 of the Treaty essentially forces the investor to reach an agreement in the form of a structured dialogue.[86] While the compatibility of the relevant treaty provisions with EU law can hardly be called into question in this case (if only because the Member States concerned comply essentially with their obligations arising from the *Achmea* judgment under this international treaty), these provisions are extremely detrimental to investors who, at the time the *Achmea* judgment was rendered, had ongoing proceedings against an EU Member State under a BIT (such as the three French undertakings).

IX. EPILOGUE

In June 2020, Hungary promulgated the treaty on the termination of bilateral inv

is a procedural precondition for the application of international treaties concluded by Hungary.

Despite the changing legal environment, Sodexo Pass International S.A.S. attempted to implement the ICSID tribunal's decision in Hungary. However, in its order, the Budapest Court of Appeal concluded that at the request of Sodexo Pass International S.A.S., enforcement against the Hungarian state was not possible on the basis of the ICSID tribunal's judgment.[87] This is because, on the one hand, after the annulment of the BIT, an arbitration award based on the BIT cannot be enforced according to the rules of Hungarian law. On the other hand, according to the Budapest Regional Court, the lack of enforceability means that under Article 7 of the 2020 Treaty, state parties (including Hungary) may request the competent national courts to set aside or annul the arbitration award or, as the case may be, refuse its recognition and enforcement, which provision shall also be applicable to the arbitration award of Sodexo Pass International S.A.S.[88] In this context, the Budapest Regional Court also pointed out that the Budapest Regional Court, as a court of an EU Member State, is obliged to follow the findings of the decision made in Achmea in the case pending before it. As a result, Sodexo Pass International S.A.S., although successful in an international forum against the Hungarian state, was unable to enforce