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BILATERAL INVESTMENT TREATIES WITHIN THE EU /

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Abstract: *Foreign direct investment falls under the scope of the common commercial policy, a competence exclusively defined for the Union by the Lisbon Treaty. Bilateral investment treaties are also encompassed within the realm of foreign direct investment. Within the context of the European Union, this area is also important from the perspective of completing the EU's internal market. EU Member States have been, and continue to be, parties to numerous bilateral investment treaties. The present article aims to delineate the effects of the Lisbon Treaty on bilateral investment treaties, both intra- and extra-EU, and to present the status quo of this area under analysis within the European Union. A partial objective is also to scrutinize the potential impact on practice and assurances afforded to investors within the Union.*

Key words: *Bilateral Investment Treaties; Foreign Direct Investment; the EU Internal Market; Treaty of Lisbon*

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1. INTRODUCTION

The completion of the EU's internal market, anchored in the assurance of the four fundamental freedoms, has significantly impacted the attainment of the EU's economic objectives. Naturally, the economic environment created by the Union has both attracted investors from third countries and stimulated investments within EU member states. The terms and conditions governing investments by entities from one country in a host country require regulation, with the preferred instrument globally being bilateral investment treaties (hereinafter referred to as "BITs"), which fall under the category of International Investment Agreements. This instrument has been used by EU Member States both *vis-à-vis* third countries and among themselves. The Lisbon revision of the founding treaties, forming part of primary law and standing at the top of the hierarchy of sources of Union *acquis*, has introduced several changes. It has also formally incorporated foreign direct investment as part of the EU's competences under the framework of the common commercial policy. From our perspective, this step was inevitably necessary considering the completion of the internal market, which is based on the principle of non-discrimination, equal treatment, and the exhaustive definition of permissible restrictions on the four guaranteed freedoms: the free movement of goods, persons, services and capital.

The presented article aims to delineate the impact of the Lisbon Treaty on bilateral investment treaties binding the Member States of the Union. In this article, we will concentrate on both bilateral investment treaties concluded between EU Member

States (hereinafter referred to as “intra-EU BITs“) and those concluded by Member States with third countries (hereinafter referred to as “extra-EU BITs“), as they are governed by different regimes and have varying legal effects. The article primarily focuses on the practical consequences of the Lisbon revision on BITs, not only from the standpoint of the provisions of EU law, but especially in light of the key case law of the Court of Justice of the European Union (hereinafter referred to as the "CJEU") addressing the subject under analysis. Additionally, the article addresses the question of whether the Lisbon Treaty revision in the area of foreign investment was a necessary step to ensure the effective functioning of the EU internal market. We will also examine the effects and position of BITs in the EU legal order. A partial objective is to scrutinize the practices of the Slovak Republic and identify the consequences of the EU perspective for the Slovak Republic, which has been or still is a party to several BITs. Furthermore, we will attempt to assess whether the status quo potentially has a negative impact on investors within the EU.

2. BILATERAL INVESTMENT TREATIES IN GENERAL

In the globalised world, bilateral investment treaties are the preferred instrument through which States regulate the terms of investment between entities across borders and other investment-related elements. Nevertheless, this is not an entirely novel instrument, as investment treaties in a comparable form have been present in the practices of states since the 1950s. Historically, they took the form of bilateral trade agreements, known as treaties of friendship, commerce, and navigation. As stated by J. W. Salacuse, these treaties were initially designed to enhance trade between the contracting parties and occasionally included conditions for the establishment of entities within those countries, among other provisions. The incidence of such treaties was particularly significant in the post-war period in the USA, aiming to safeguard domestic entities investing in other countries. During this period, trade agreements were not a novelty in Europe either, with the late 1960s seeing a boom in the conclusion of such agreements by European countries focused exclusively on foreign investment. Some authors posit that this increase in contracting by European countries, compared to the US, was attributed to the comparatively lesser demands made by European states during the negotiation of treaty terms at that time (Salacuse, 1990, p. 657).

From our perspective, the emphasis on the regulation of foreign investment is also directly linked to the integration processes that unfolded on the European continent during this period. In 1952 and 1958, Euratom, the European Economic Community, and the European Coal and Steel Community were established. The original objectives were purely economic, focusing on removing trade barriers, ensuring the free movement of persons, and protecting competition, etc. (Siman and Slašťan, 2012a, p. 36). We therefore think that, as economic integration deepened, it was only a matter of time before there arose a necessity to focus on the area of foreign direct investment, even though the original treaties did not explicitly mention these competences. From our standpoint, it is precisely the integration processes on the European continent and the interest of countries in cooperating in trade that have influenced, among other factors, the expansion of bilateral investment treaties concluded by countries worldwide. Naturally, such treaties were primarily entered into by key actors, notably Switzerland, France, Italy, the United Kingdom, the Netherlands, Belgium, and Germany, with the objective of recovering investments lost due to the Second World War defeat (Salacuse, 1990, p. 657).

Nowadays, bilateral investment treaties are a preferred instrument for regulating the relations relating to the investment of entities within the contracting parties. In recent years, we have heard about them in the context of the European Union, particularly in connection with their effects in light of the Lisbon revision of the founding treaties and the key case law of the CJEU. Before focusing on the Union's perspective on bilateral investment treaties, we consider it important to at least briefly introduce the nature of this instrument. Bilateral investment treaties are international treaties falling under the public international law area and the Vienna Convention on the Law of Treaties regime. They are treaties setting out the terms and conditions for direct investment by nationals and companies of one country in another, host country (EUR-Lex, 2017). The UNCTAD database to date registers 2219 BITs in force worldwide (UNCTAD, 2023a). Looking at the content of some of the more recent BITs, we can see that they include really broad perspectives on the terms and conditions of investment within the contracting states. Standardly, they contain general conditions for the promotion and protection of investment, conditions for expropriation, the institute of related damages and compensation for losses, the guarantee of the free movement of payments and provisions on transfers, etc. BITs also usually contain provisions for the settlement of disputes between a contracting party and the investor of the other contracting party, including arbitration clauses. In addition to the above, BITs, like other international treaties, contain provisions on the scope of the treaty, rules of implementation, the purpose of the treaty normally contained in the preambular part, etc.[1] These types of international agreements typically contain so-called sunset clauses (sometimes also referred to as survival or grandfathering clauses) in order to enhance investor protection and respect the principle of legitimate expectations. Such clauses guarantee the protection of investments originated during the period when the agreement was in force even after its termination, for a predetermined protection period, usually set for 5, 10, 15, or 20 years (Lavranos, 2023). In the following parts of the article, we will deal exclusively with Union perspectives on bilateral investment treaties, focusing on both intra- and extra-EU BITs and their effects within the Union law.

3. INTRA-EU BILATERAL INVESTMENT TREATIES

The European Union has successfully realized the completion of the internal market, ensuring the unrestricted movement of the four fundamental freedoms: the free movement of goods, services, persons, and capital. For the purposes of the present article, the most pertinent is the free movement of capital, introduced as freedom by the Maastricht Treaty. The free movement of capital not only facilitates the practical implementation of the other freedoms but also constitutes a crucial step in the subsequent establishment of the Economic and Monetary Union, representing a higher level of economic integration (European Parliament, 2023). The founding treaties, forming part of the EU's primary law, prohibit all restrictions on the free movement of capital and payments between Member States and between Member States and third countries,[2] thereby imparting an extraterritorial dimension to this freedom. The general prohibition of restrictions is accompanied by a set of exceptions considerably broader than those for the other freedoms, a characteristic attributed to the extraterritorial nature

[1] See e. g. Agreement on the Promotion and Reciprocal Protection of Investments between the Government of the Slovak Republic and the Government of the Republic of Kazakhstan; Agreement between the Government of the Czech and Slovak Federal Republic and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments; Agreement between the Government of the Slovak Republic and the Government the State of Kuwait on Promotion and Reciprocal Protection of Investments and others.

[2] Art. 63 of the Consolidated version of the Treaty on the Functioning of the European Union (hereinafter referred to as the "TFEU").

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of this freedom.[3] The free movement of capital encompasses not only the free movement of payments but also the free movement of capital in the form of any investment. The area of bilateral investment treaties is therefore directly linked to this freedom, guaranteeing the free movement of investment within the internal market for all entities from the Member States, without discrimination and under the same conditions applicable to domestic entities.

The common commercial policy was named in the Treaty establishing the European Community among the activities entrusted to the Community for the purpose of achieving the objectives set out in the founding Treaties. Among the areas covered by the common commercial policy, foreign direct investment was not yet addressed in the EC Treaty.[4] Change was only brought about by the Treaty of Lisbon, which revised the founding Treaties and under which the EU replaced the Community. It renamed the EC Treaty into the Treaty on the Functioning of the European Union, without replacing it, only amending it (Siman and Slašťan, 2012a, pp. 61-62). The Treaty of Lisbon has introduced a number of key changes, the most significant of which, for the area under analysis, is the amendment of the competences in relation to the common commercial policy. It has clearly defined the areas of exclusive competences of the Union, among which it has included the common commercial policy. The Union's exclusive competence means that, by conferring competence on the Union in a certain area, the Member States have lost their legislative powers and exercise them only based on a power of competence conferred by the Union, or to implement Union acts (Siman and Slašťan, 2012a, p. 83). The common commercial policy is thus clearly entrusted to the competence of the Union, and the Member States are significantly paralysed in this field when adopting legislation or taking on obligations in this area through international treaties. The common commercial policy is defined more comprehensively in the TFEU compared to the EC Treaty and Article 207 establishes that the common commercial policy shall be based on uniform principles, inter alia, in relation to foreign direct investment.[5] Based on the aforementioned, it can therefore be stated unequivocally that foreign direct investment falls within the exclusive competence of the Union within the limits of the common commercial policy. To define the scope of foreign direct investment, "[I]t is settled case-law that direct investment consists in investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity" and all the "EU acts concerning 'foreign direct investment' fall within the common commercial policy".[6] In this area, the European Investment Policy focuses on improving the business environment for investment purposes, the principle of non-discrimination, investment promotion activities, increasing the attractiveness of investing in Member States by non-EU entities, etc (European Commission, n.d.).

Investors within the Union are beneficiaries of the internal market freedoms, which include the freedom of establishment and, in particular, the free movement of capital, and which are established directly by the founding treaties forming part of the EU's primary law. In practice, the internal market freedoms are complemented by guarantees stemming both from the fundamental principles of the EU acquis and from the human rights protection enshrined in the Charter of Fundamental Rights of the European Union. Especially the Charter's guarantees are important in the context of the

[3] Exceptions to the prohibition of restrictions are specified in Articles 64-66 of the TFEU.
[4] Articles 3 and 133 of the Treaty establishing the European Community.
[5] Art. 207 TFEU.
[6] Opinion of 16 May 2017 delivered pursuant to Article 218(11) TFEU, 2/15, EU:C:2017:376, paras 80,81.

internal market since the Charter itself is activated in practice only in matters concerning the EU acquis. Although the Union per se is not a contracting party, all the Member States are parties to the European Convention on Human Rights, which guarantees fair and equitable treatment, the right to a fair trial, the conditions and standard of expropriation, and other related rights (Ruoppo, 2022). Therefore, questioning the high standard of investor protection within the Union in the internal market would not be appropriate.

As we have mentioned, bilateral investment treaties are international agreements regulating the terms and conditions of investment by entities of one country in another country. In this part of the article, we will focus on the so-called Intra-EU BITs, which are concluded between EU countries. The EU internal market is based on the principle of non-discrimination and equal treatment and therefore, from our point of view, the question is whether, in the first place, we could speak of reverse discrimination regarding intra-EU BITs, whereby selected entities investing within Union Member States benefit from BITs whereas such benefits would be lacking in the case of entities from other Member States. In addition to the foregoing, the very existence of intra-EU BITs, which since the Lisbon revision regulate an area in which Member States no longer have conferred competence, is problematic. Indeed, the issue has been addressed in the case law of the CJEU, which has examined the existence and validity of intra-EU BITs from several perspectives. In 2015, there were around 200 BITs in force between Member States, most of which date back to the end of the 20th Century when the parties were not yet EU Member States.[7] As the European Commission has rightly declared, in our opinion, the completion of the internal market, in which both the free movement of capital and the freedom of establishment are guaranteed, respecting the principle of non-discrimination, makes the existence of BITs between Member States redundant. Investors within the EU benefit from a uniform level of protection, which is guaranteed directly by the EU acquis. It has drawn attention to the aforementioned conflict with internal market rules and has gradually begun to appeal to Member States, through letters of formal notice, to terminate BITs within Member States. The Commission has drawn Member States' attention to the potential conflict of these BITs with EU law, the lax approach of the Member States to the Commission's pointing out led the Commission to initiate the first step in infringement proceedings against the Member States under the Articles 258-260 of the TFEU (European Commission, 2015).

The issue of intra-EU BITs has assumed a broader perspective since 2015, particularly following the pivotal judgment in the *Achmea* case. The *Achmea* dispute concerned a bilateral investment treaty from 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic. The dispute arose between *Achmea*, a Dutch company which, through a subsidiary, provided private health insurance on the Slovak market, and the Slovak Republic on the other side. It concerned compensation for damages caused by the Slovak Republic to *Achmea* which was decided by an arbitral tribunal on the basis of an arbitration clause in Article 8 of the BIT. The Slovak Republic contested the validity of the arbitral award and the whole case came before the Bundesgerichtshof (Federal Court of Justice, Germany), which referred questions for a preliminary ruling. The first preliminary question basically asked about the potential conflict of the arbitration clause with Article 344 TFEU[8] and, consequently, about the relationship, if any, of such BITs to the preliminary ruling procedure before the CJEU.

[7] The situation was similar in 2018. Among the first countries to terminate BITs between Member States were Ireland and Italy. For more information see: European Commission (2018a).
[8] Art. 344 TFEU: "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."

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The Court also raised the question of whether in the present case, the prohibition of discrimination under Article 18 TFEU[9] was not infringed. The Court stated that the Treaty could not undermine the autonomy of the Union's legal order and reiterated its unique nature and fundamental characteristics, which are its primacy over the laws of the Member States and the direct effect of a number of provisions of the Union's acquis. To respect these characteristics, a judicial system has been created to ensure a uniform interpretation of Union law in order to guarantee the full and consistent application of Union law within the Member States.[10] Through cooperation between the CJEU and the national courts in the context of preliminary rulings, these objectives are also translated into practice. First of all, the Court of Justice has emphasised that, because of the primacy of Union law, the arbitral tribunal is also obliged to apply it regardless of the applicable law. At the same time, it confirmed that it does not meet the conditions and requirements to be able to initiate a preliminary ruling procedure based on Article 267 TFEU. The Court pointed out that this arbitral tribunal could not be qualified as an ordinary commercial arbitration, since by the clause the Member States had in principle excluded disputes which might concern the application or interpretation of Union law from the jurisdiction of their judicial authorities,[11] whereas the TEU, in Article 19, obliged them to establish the remedies necessary to ensure effective legal protection[12] in areas relating to the Union acquis. The arbitration clause contained in Article 8 of the BIT therefore threatens the autonomy of the EU acquis, is capable of undermining the principle of mutual trust between the parties and does not allow the preliminary ruling procedure to be initiated in the dispute concerned. Arbitration clauses in intra-EU BITs therefore directly conflict with the principle of sincere cooperation[13] under which "the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."[14]

Despite the explicit conclusions in the *Achmea* judgment, in the proceedings of *Poland v PL Holdings Sàrl* there was, in our opinion, a kind of attempt to avoid the consequences of the *Achmea* judgment in the form of an ad hoc arbitration agreement that allowed the continuation of the arbitration proceedings which had been initiated based on the same arbitration clause in the BITs, which had already been declared incompatible with selected provisions of the EU acquis in the *Achmea* judgment. This form of *ad hoc* clause has also been declared incompatible with EU law by the Court of Justice.[15]

The *Achmea* judgment is not solely a preliminary ruling binding on the court that initiated the proceedings, rather, the interpretation provided therein becomes an integral part of the judicial normative framework. It elucidates the meaning of the provisions of EU law from their inception, rendering the interpretation retroactively applicable. In this context, potential conflicts with the principle of legal certainty must be acknowledged, and the Court may, therefore, limit such effects in specific cases (Siman and Slašťan, 2012b, p. 360). Here we would like to explore the previously mentioned sunset clauses, designed to safeguard the legitimate expectations of investors by allowing them to initiate investment claims during a specified period after the termination of the contract. In this regard, we share the perspective that the rule of law may be compromised to some

[9] Art. 18 TFEU: "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited..."
[10] CJEU, judgment of 6 March 2018, Achmea, C-284/16, EU:C:2018:158, paras. 1-23, 32-33, 35-36.
[11] Ibid., paras. 49,55.
[12] Art. 19 of the Consolidated version of the Treaty on European Union (hereinafter referred to as the "TEU").
[13] CJEU, judgment of 6 March 2018, Achmea, C-284/16, EU:C:2018:158, paras 58-59.
[14] Art. 4(3) TEU.
[15] CJEU, judgment of 26 October 2021, PL Holdings, C-109/20, EU:C:2021:875.

extent if intra-EU BITs are terminated without the prior removal of these clauses, based also on the aforementioned *Achmea* judgment (Lavranos, 2023). Nonetheless, as previously noted, the termination of intra-EU BITs should not, in practice, diminish the level of investor protection within the EU. However, we would like to highlight an unfortunate situation concerning the retention of sunset clauses in treaties that are to be terminated due to conflicts with the EU acquis. This is particularly concerning for investors who relied on the provisions of these BITs, believing that, even after the treaty's termination, they remained assured of investment protection through the specified clauses. Although, as we have asserted multiple times, their level of protection will not be compromised in practice, from a legal standpoint, we view the situation as problematic in terms of legitimate expectations and legal certainty for investors.

The *Achmea* judgment confirmed what the Commission has been pointing out since the entry into force of the Treaty of Lisbon, and that is the collision of intra-EU BITs with the EU acquis. Following the situation, the Commission reassured investors that they can rely directly on the protection guaranteed by EU law, which certainly protects all investments throughout their lifecycle (Hallak, 2022, p. 7). In *Achmea*, however, the Court of Justice examined BITs only with regard to the arbitration clauses contained therein and we therefore consider it necessary to point out that even their mere existence, as the Commission notes, does not comply with EU law and, in particular, with the rules of the internal market. Until 2016, the Commission, through its reasoned opinions, sent a formal request to a number of Member States, but following the *Achmea* judgment, the dialogue with all Member States has intensified considerably (European Commission, 2018b). In 2019, Member States signed a declaration on the legal consequences of the *Achmea* judgment and on investment protection in cases where Member States have committed to terminate their bilateral investment treaties within the EU. The Declaration cannot be seen as legally binding, rather it can be seen as a promise by Member States to be open on the issue of terminating all intra-union BITs and its strength is, from our point of view, significant politically. In the wake of the Declaration, the agreement for the termination of intra-EU bilateral investment treaties was signed by 23 Member States on 5 May 2020. It was signed by Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.[16] The agreement entered into force on 29 August 2020 (European Commission, 2020a). Under Article 2, the BITs shall be terminated according to the terms set out in this Agreement, whereby, in order to ensure legal certainty, the sunset clauses referred to above shall be terminated and shall have no legal effect.[17] Since not all the Member States signed the agreement, not all intra-union BITs were covered by the agreement and therefore the Commission continued the dialogue against the remaining states and sent formal notices to e.g. the UK and Finland. The Ministry of Finance of the Slovak Republic has published a list of BITs concluded by the Slovak Republic, but for intra-union BITs, it has indicated that it considers them inapplicable due to their conflict with the EU law (Ministerstvo financií SR, n.d.). The case law of the Court of Justice, the pressure from the European Commission and the agreement on the termination of BITs itself have gradually brought results, and today, if we look at the UNCTAD website, we find that Member States have indeed terminated all intra-EU BITs, even those that were not parties to the Agreement from 2020

[16] See current status and reservations here: https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2019049&DocLanguage=en

[17] Art. 2 of the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union.

(UNCTAD, 2023b). Therefore, in the context of intra-EU BITs, we can without any doubt talk about incompatibility with EU law also *pro futuro*, and the only potentially questionable aspect from our point of view is the legal dimension of the withdrawal of sunset clauses from the perspective of legal certainty and legitimate expectations. By guaranteeing the highest level of protection by EU law, this question is probably irrelevant for practice anyway.

4. EXTRA-EU BILATERAL INVESTMENT TREATIES

In addition to intra-EU bilateral investment treaties, EU Member States also conclude so-called extra-EU BITs with non-EU countries. The consequences of the *Achmea* judgment pertain exclusively to intra-EU BITs. However, it cannot be overlooked that the revision of the Lisbon Treaty, which has conferred competence on direct foreign investment to the EU, also affects BITs concluded by Member States with third countries, and these BITs will be the subject of this section of the article. Naturally, the European Union and its Member States provide a lucrative environment for external investors, primarily due to the high degree of economic integration within the EU. As non-Member States are also parties to these BITs, despite the competence of the EU, it is not possible to subsume these treaties under a regime identical to that of intra-EU BITs. By analogy, if we look at the Court of Justice's opinion dealing with CETA, we can apply to extra-EU BITs the conclusion that "[H]owever, that principle of mutual trust, with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State".[18]

It is necessary to note that these treaties are governed by a different regime than purely intra-EU BITs, which are concluded between the countries of the EU internal market, which distinguishes them from those external BITs. Naturally, after the Lisbon revision, it was necessary to pay attention to these treaties as well, which is why the Regulation establishing transitional arrangements for bilateral investment agreements between Member States and third countries[19] was adopted in 2012. The aim of the Regulation was to ensure full compatibility of these BITs with EU legislation. The very fact that the rules adopted in the form of a Regulation indicate the importance of a uniform procedure, since a regulation has general application and "[I]t shall be binding in its entirety and directly applicable in all Member States."[20] The Regulation is basically in force since 9 January 2013. It divides the extra-EU BITs essentially into 3 groups, namely agreements signed before the Lisbon revision, i. e. before 1 December 2009, BITs signed in the period between the Revision and the application of the Regulation, i.e. between 1 December 2009 and 9 January 2013, and BITs concluded after the date of application of the Regulation from 9 January 2013. The first category of contracts concluded before 1 December 2009 were subject to the notification obligation of the Member States to the European Commission. These treaties remain in force until the Union exercises the same competence and concludes a BIT with the country concerned, which will subsequently bind all the Member States. The Commission also assesses these treaties and Member States cooperate with the Commission in this matter, in particular on potential obstacles to the negotiation of a BIT between the EU and the third country concerned.[21] In cases

[18] Opinion of 30 April 2019 delivered pursuant to Article 218(11) TFEU, 1/17, EU:C:2019:341, para. 129.
[19] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries (hereinafter referred to as the "Regulation").
[20] Art. 288 TFEU.
[21] Articles 2-6 of the Regulation.

where such treaties conflict with EU law, the Regulation allows them to be amended or a new treaty to be negotiated, subject to the conditions set out in the Regulation. The same conditions apply to the conclusion of new BITs after the entry into force of the Regulation, but the whole process is monitored by the Commission and the Member States need to be authorised to enter into formal negotiations with a third country. The whole process and conditions for authorisation are contained in Articles 7-11 of the Regulation. Member States are subsequently obliged to submit the results of the negotiations and the text of the intended BIT to the Commission, whereby the Commission has the option to authorise the entry into force of the proposed BIT, or it has the option not to authorise the BIT, in which case the Member State cannot continue the negotiations and the BIT cannot be concluded.[22] Regarding BITs concluded within the above-mentioned intermediate period, they are subject to a similar regime, the Commission will assess these BITs and either authorise their continuation or not authorise the BIT in question and the Member State must subsequently suspend the negotiations or cancel the steps already taken.[23] Therefore, in principle, it is also important for extra-EU BITs for the future that they should not interfere with the EU *acquis*, that no negotiations on a BIT between the EU and the country concerned should be ongoing and that such a BIT will not have the potential to jeopardise the future treaty negotiations between the EU and the country concerned (European Commission, n.d.).

The Commission constantly monitors the situation, assists Member States in this area, and even has issued Annotations to the Model Clauses for negotiation or re-negotiation of Member States' Bilateral Investment Agreements with third countries. We find there the model formulations of the articles with commentaries, definitions of the basic notions to ensure equal understanding of the key concepts between the parties, a clause that is intended to respect the rights and obligations of a contracting party that is part of the regional economic integration organization, like the EU itself, there is a model formulation of the prohibition of discrimination, as well as other important recommended content of the agreements (European Commission, 2023a). We consider this model document to be extremely beneficial for practice, as it can speed up the whole negotiation process under the supervision of the Commission and, at the same time, the Member State will avoid potential collisions of the treaty that will arise in the future negotiations of the Union itself with the concerned country on the BIT. Also, from the point of simplicity, we think it is beneficial for states to use this document when negotiating any new BITs.

Following the entry into force of the Regulation, Member States have notified the Commission of 1360 Treaties which they wish to maintain or for which they require the Commission's authorisation to enter into force. Germany had the highest number of treaties concluded, followed by Italy and France. According to the Commission's 2020 report, a total of 241 authorisations to open negotiations were granted based on Article 9 out of 304 requested, 76 requests were made under Article 11 for authorisation to conclude a new BIT or to amend an existing BIT, of which 48 were granted. Under Article 12, 62 requests for authorization were submitted and 33 were accepted from the key interim period (European Commission, 2020b). These numbers are not exactly relevant, because some of the processes were still ongoing and the Commission's report is from 2020, but they show us very clearly what the Commission's approach is and that it is trying to make a strict selection between the treaties that are compatible with EU law and those that are not. Also, as we see in the report, the application of the Regulation in practice was most relevant in the early years of its existence, when it made "order" in the

[22] Articles 7-11 of the Regulation.
[23] Art. 12 of the Regulation.

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existence of extra-EU BITs and the number of requests decreased over the years (European Commission, 2020b). We presume that the very fact that the EU per se concludes these agreements, which subsequently bind all the Member States, has significantly influenced states in negotiating BITs along their lines.

Focusing on the Slovak Republic, since 2013, BITs between the Slovak Republic and Turkey (2013), Morocco (2014), Kazakhstan (2016), Iran (2017), and the United Arab Emirates (2018) have entered into force, except the last two having been signed in 2007-2009 (UNCTAD, 2023c). If we look at the model published by the Slovak Republic on the UNCTAD website, we find that to a significant extent some of the articles are identical in content to those proposed by the Commission in the aforementioned Annotations to the Model Clauses. In some parts we see that they are more extensively drafted than in the Commission's model and go beyond, but do not, from our point of view, conflict with EU law, since there we clearly find a stated obligation of the host state to respect the obligations arising from EU membership (UNCTAD, 2023d). We think that, although the Member States still have a number of Extra-EU BITs in force, over time there will be fewer of them as the Union exercises its external powers and we think that, under the influence of globalisation across the world, it will itself negotiate BITs with more and more third countries. This practice is also indicated by the reduction in the number of authorisations granted over time, which have declined significantly in recent years (European Commission, 2023b). Concerning the Slovak Republic, the last authorisation was granted in 2019, by which "[T]he Slovak Republic is authorised to open formal negotiations with the Republic of Ecuador to conclude a bilateral investment agreement with this country."[24] Focusing on the effects of these BITs, in the case of individual treaties between a Member State and a third State, these treaties do not produce legal effects within EU law, only effects in the legal order of the Member State being party to the treaty. The situation is different in the case of BITs to which the Union per se is a contracting party and which are therefore also capable of producing effects in Union law. We are of the opinion that these treaties also contain provisions that are clearly worded, legally perfect and from which there are clear rights and obligations arising for the parties. Selected provisions of these treaties have an immediate and direct effect on trade[25] and we therefore consider that, also given the purpose of the treaties in question, some of their provisions are capable of producing direct effect. However, since the immanent part of the rules of the internal market is covered by primary law, the fact that we would give direct effect to these investment treaties would not alter the fact that the provisions of primary law prevail and the treaties must be negotiated in accordance with them. The situation would be different when considering the provisions of secondary law, which should be in conformity with the directly effective provisions of the international treaty.[26]

5. CONCLUSION

The objective of the present article was to identify the key impacts of the Lisbon revision of the founding treaties on bilateral investment treaties to which EU Member States are parties. In the article, we initially focused on so-called intra-EU BITs, which are exclusively concluded between Member States. In light of the competences determined by the Lisbon Treaty, we assessed that there is no room for maintaining these BITs within

[24] Art. 1 of the Commission Implementing Decision of 30.7.2019 authorising the Slovak Republic to open formal negotiations to conclude a bilateral investment agreement with the Republic of Ecuador, C(2019) 5484 final/2. Retrieved from: https://rb.gy/p22fcn (accessed on 31.12.2023).

[25] Opinion of 16 May 2017 delivered pursuant to Article 218(11) TFEU, 2/15, EU:C:2017:376, para. 95.

[26] CJEU, judgment of 9 September 2008, FIAMM a i./Rada a Komisia, C-120/06 P, EU:C:2008:476, para 110.

the EU internal market. The internal market is grounded in the principles of non-discrimination and equal treatment, while a preferential regime under the scope of intra-EU BITs is, in our view, incompatible with the rules of the internal market as it has the potential to favour entities from a specific Member State, for instance, in benefiting from the freedom of establishment in the host Member State. In our opinion, the regime introduced by the Lisbon Treaty for foreign investment was, therefore, a necessary step to ensure the effective functioning of the internal market. The Court of Justice examined the compatibility of these BITs with EU law in the *Achmea* judgment and deemed them incompatible, particularly in the context of arbitration clauses conferring jurisdiction on the arbitral tribunal. As a consequence of the *Achmea* judgment, and also due to the pressure exerted by the Commission in the context of terminating intra-EU BITs, Member States have gradually terminated these treaties, and today, these treaties are no longer in force. A potential legal issue we identified pertains to the sunset clauses contained in these BITs. The abrogation of these clauses, in our opinion, slightly jeopardizes the principle of legitimate expectations and the legal certainty of investors falling under the regime of terminated BITs. This issue is more of a legal concern, as in practice, as guaranteed by the Commission, the termination of intra-EU BITs certainly does not diminish investor protection; on the contrary, they benefit from the guarantees provided by EU law and, in addition, all Member States are parties to key human rights instruments, particularly the European Convention on Human Rights. Therefore, we believe that the practical transition to an internal market regime without intra-EU BITs has been seamless, and investors have not experienced a reduction in guarantees and protection.

The situation differs in the case of extra-EU BITs, which came under considerable scrutiny from the European Commission following the Lisbon revision. The key Regulation establishing transitional arrangements for bilateral investment agreements between Member States and third countries was adopted on this matter. Under this regulation, the Commission assessed the existing BITs that Member States have in force and took a step-by-step view on whether to authorize these BITs or consider them incompatible with Union law, especially internal market rules. In the first years after the entry into force of the Regulation, the Commission fulfilled most of its obligations under the Regulation. Today, its activities are more focused on approving new treaties or amendments to existing extra-EU BITs. Since for a large number of countries the Union has per se negotiated bilateral investment treaties that bind all Member States, individual treaties with a given country would be redundant. Therefore, looking ahead, in our view, globalization will significantly reduce the number of individual BITs and proportionally increase the number of BITs that the Union will conclude with countries around the world. A partial objective was to examine the effects of BITs in the Union acquis, where, as we have indicated, the only BITs capable of producing even a direct effect in Union law are those concluded by the Union per se with third countries. The provisions of these BITs, which are capable of having direct effect, will be given primacy of application over secondary law acts. However, primary law, at the top of the hierarchy of sources of the EU *acquis*, covering, *inter alia*, the freedoms of the internal market, will always prevail. All other treaties concluded individually by Member States have effects only within their legal systems and not within the EU law.

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