

Briefing

23 March 2017

Romania – the end of intra-EU bilateral investment treaties

On 21 March 2017, Law no. 18/2017 approving the termination of agreements on mutual promotion and protection of investments concluded by Romania with other Member States (Intra-EU BITs) (Law 18/2017) was published in the Official Gazette no. 198 / 2017. The legislation for terminating 22 Intra-EU BITs was enacted as a consequence of the commencement of infringement proceedings by the European Commission on 18 June 2015, against five EU Member States, including Romania, requesting them to terminate all intra-EU BITs.

The European Commission considers the Intra-EU BITs to be incompatible with EU law, mainly because they grant special rights only to certain investors within the EU and, therefore, breach EU law in matters such as the single market or cross border investments.

Law 18/2017 states that termination may occur either by mutual consent or unilateral termination. If the parties to the Intra-EU BITs agree, termination may produce effects as of the date of their agreement, without any prior notice period, but, should Romania recourse to unilateral termination, most treaties provide that such termination only produces effects subject to a 12-month prior notice.

Most treaties protect investors by enclosing so-called "sunset clauses" which are stipulations providing that investments completed until termination of the BIT shall be secured for a longer period of time, generally between 10 and 20 years as of termination of the relevant Intra-EU BIT, irrespective of the termination grounds. Nevertheless, investors seeking to pursue proceedings before an arbitral award based on an Intra-EU BIT should be aware of the risk that the European Commission opposes the enforcement of the arbitral award in case it deems the award is breaching or is incompatible with EU law. For example, in the "Micula" case, the European Commission ordered Romania to recover compensation paid pursuant to an ICSID award regarding an investment made under a bilateral investment agreement between Romania and Sweden, concluding that the grant of such compensation is incompatible with EU State Aid rules.

According to Law 18/2017, as a next step, the Minister for Foreign Affairs will communicate the date when the terminated Intra-EU BITs cease to produce effect, in accordance with the provisions enclosed thereof.

The new enactment can be accessed at the following link: <https://www.senat.ro/legis/PDF/2016/16L567FP.pdf> and the texts of all 22 treaties envisaged to be terminated can be consulted here: <https://www.senat.ro/legis/PDF/2016/16L567TX.pdf>.

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