Who is leading the control of EU jurisdiction? The Achmea BV case and its impact on taxes and investments, e.g. in Spain

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On 6 March 2018, the CJEU has issue its judgment on the case *Achmea BV* (C-284/16 here), that can impact many areas of the EU law, including tax matters. The Court states that "Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept".

In paragraph 57 the Court recognises that "according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to

submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected (see, to that effect, Opinion 1/91 (EEA Agreement — I) of 14 December 1991, EU:C:1991:490, paragraphs 40 and 70; Opinion 1/09 (Agreement creating a unified patent litigation system) of 8 March 2011, EU:C:2011:123, paragraphs 74 and 76; and Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 182 and 183)".

However, in this case, the Court considers in paragraph 58 that "apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT (bilateral investment treaty) may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States. Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation (…)".

Tax implications of *Achmea BV* case

Although the debate on this case does not affect to tax matters, the principles applied in this judgment reveal a clear and logical decision of the CJEU of protecting the EU competences before all the Member States and maybe also before the third parties acquiring by means of a treaty rights and obligations from a EU Member State.

Under these principles it is obvious that certain fiscal matters and EU State aids rules are in the same situation that the issue under litigation. Accordantly, any treaty arrangement in relation to these matters that prevents access to the CJEU for the award of dispute solutions between parties, would be equally forbidden.

One of the cases where the extension of the ECJ ruling is today under discussion is the litigation that Spain is fighting in various Courts of arbitration, mainly in CIADI, against several investors that acquired renewable energy facilities in Spain.

The most important point is if indemnities granted by arbitral courts may be

characterised as State aids and subject to the jurisdiction of the EU institutions. In the ongoing procedures, even the discussion if tax cost impacting the investments acquired by the litigating companies gave place to an indemnity obligation has been on the table, although until now the arbitrators have not accepted this claim. Two awards are remarkable.

The first decision, of 4 May 2017, was issued in the framework of the arbitration procedure between *Eiser Infrastructure Limited and solar energy Luxembourg S.Â.R.L.* against the Kingdom of Spain, with the result of an award condemning Spain to indemnify the investors in the amount of 128 million euros. The case concerns a controversy over the Energy Charter which entered into force on 16 April 1998 for Luxembourg, the United Kingdom and Spain and the CIADI Convention which entered into force on 14 October 1966. In the reasoning of the arbitrators, the claim that the 7% tax on the electric power value of law 15/2012 is equivalent to an expropriation was not accepted for procedural reasons and because the case could be resolved on other grounds. The European Commission has one more time recalled, on the occasion of this award, that any agreement establishing arbitration for investment protection between two Member States is contrary to the EU law if the control of the State aid regime is excluded from the judicial review and the application of the EU law. Moreover, the arbitral courts must apply the EU law that prevails over the treaties, including the Energy Charter.

After the second award of 15 February 2018, in which Spain was condemned (*Novernegía* case), Commissioner Vestager has insisted that any compensation must be passed to her control by the State aid scheme.

According to the view of the Commission and the principles contained in the ECJ judgment of 6 March 2018, any potential State aid including those in the form of tax releases or tax incentives will fall under the competence of the EU institutions no matter if there is any treaty clause referring the discussion to arbitral bodies provided by in a treaty.

As it is easy to understand, the importance of the issue goes far beyond the concrete taxes on energy or subsidies on renewable energies, because any provision concerning taxation established in a treaty could also be under the scrutiny of the CJEU if the matter falls within the EU tax competences or affects the State aids regime or even the fundamental freedoms granted by the TFEU like the freedom of establishment or the free movement of capital.

Characterisation of taxes under the EU law

When dealing with taxes or fiscal State aids subject being the competence of the EU institutions it is also compulsory to take into account the autonomy of EU law. Particularly, in the characterisation of certain payments as taxes, direct or indirect taxes, parafiscal charges or fees there is a need to disregard the label or the characterisation of such a concepts by the Member States, including in this respect not only legislative bodies but also administrative bodies and national courts.

The ruling of the CJEU in the case *Instituto di Recovero Santa Lucía* (C-189/15) has stated that "it must be borne in mind that the nature of a tax, duty or charge must be determined by the Court, under EU law, according to the objective characteristics by which it is levied, irrespective of its classification under national law (see judgments of 12 December 2006, Test Claimants in the FII Group Litigation, C-446/04, EU:C:2006:774, paragraph 107, and of 24 June 2010, P. Ferrero e C. and General Beverage Europe, C-338/08 and C-339/08, EU:C:2010:364, paragraph 25)".

In summary, the position adopted by the CJEU concerning the judicial control of any matter within the competences of EU law will imply that any treaty excluding the judicial review of the arbitration resolutions would be inapplicable. Therefore, taxes, fiscal state aids and other tax measures conflicting with EU fundamental freedoms or other EU regulations will be always subject to the jurisdiction of the CJEU. Any investment or tax planning has to take into consideration this framework and carefully analyse the EU law implications.