

**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**

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I. INTRODUCTION

State legislation and law enforcement often face the difficulty of choosing between a rule of national law and a conflicting provision of international law binding on that state. From the perspective of public international law, it can generally be stated that, in accordance with the provisions of the 1969 Vienna Convention on the Law of Treaties, “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”¹ From time to time, however, there are cases where states (whether for political, economic or other reasons) nevertheless enact or maintain in force national legislation that is contrary to the obligation they had undertaken in an international treaty. In such cases, they must bear the consequences arising from the violation of the treaty under international law.

The European Union (EU)’s legal system is characterized by a number of peculiarities concerning the applicability of the rules of national and international law. The most important principle governing the relationship between EU law and national law is the principle of primacy, as set out by the Court of Justice of the European Union (CJEU) in *Costa v E.N.E.L.*² — a principle whose main source is still the case law of the European Court of Justice, for the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) are silent on the same.³ Under the principle of primacy, if a directly applicable rule of EU law conflicts with the domestic law of a Member State, the rules of EU law shall prevail and be applied in all cases; meanwhile, conflicting national rules shall be disregarded.⁴ According to the approach of the CJEU, the principle of primacy is absolute: even secondary sources of EU law (above all regulations, decisions, directives) take precedence over even the highest-level rules of the Member States (that is, the Member States’ constitutions).⁵ However, the primacy of EU law means precedence in terms of application and not in terms of annulment: a provision of national law that is contrary to EU law does not become invalid or ineffective, but is

1. Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 332 [hereinafter Vienna Convention].

2. Case C-6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 585, 594.

3. See Declaration No. 17 in the Treaty of Lisbon Amending on European Union and the Treaty Establishing the European Community declaration 17, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon] (“The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.”).

4. *Costa*, E.C.R. 585, at 594.

5. Case C-11/70, *Internationale Handelsgesellschaft*, 1970 E.C.R. 114.

inapplicable. Member State authorities (including courts) shall automatically disapply Member State legislation that is contrary to EU law when deciding a case before them, enforcing EU law.⁶

The relationship between EU law and international law is rather complex. On the one hand, the EU, as an international organization, has the power to conclude an international agreement only on a matter in which the corresponding powers are expressly conferred on it under the TFEU or the TEU.⁷ On the other hand, these international treaties concluded by the EU are binding on its institutions and all the Member States.⁸ In the hierarchy of sources of EU law, these international treaties take primacy over secondary sources of law, but may not conflict with the rules of primary EU law.

Based on the foregoing, the following may be established. First, in the case of legislation or enforcement, it must always be examined who has the power to act: the Member States (exclusive competence of a Member State which does not fall within the competence of the European Union), the European Union (exclusive competence of the Union in matters where the Member States no longer have the power to adopt national rules) or both (so-called mixed competences and mixed agreements). Second, in matters covered by EU law, Member States must take into account their obligations under public international law and Union law. Third, in cases where the law of a Member State is contrary to the rules of public international law or Union law, different legal consequences may apply. As far as an international obligation assumed by a state is concerned, that state may decide (on the basis of economic, political or other considerations) not to meet the given obligation, bearing the (public international law) consequences thereof. By contrast, the obligations flowing from EU law (owing to the primacy of EU law) must be implemented unconditionally and automatically by the Member States, and those may ultimately be enforced by the CJEU. Fourth, where an issue is governed by international law and EU law in the same way, the EU Member States are also required (in accordance with the principle of the primacy of EU law) to implement the rules of public international law unconditionally. However, where an issue is governed differently by public international law and EU law, Member States are required to enforce the provisions of EU law—their own international obligations notwithstanding.

6. Case C-106/77, *Simmenthal* (II), 1978 E.C.R. 629.

7. See Consolidated Version of the Treaty on the Functioning of the European Union art. 216, Oct. 26, 2012, 2012 O.J. (C 326) 144 [hereinafter TFEU].

8. *Internationale Handelsgesellschaft*, E.C.R. 114.

II. THE RELEVANCE OF BILATERAL INVESTMENT PROTECTION AGREEMENTS

In today's globalized world, foreign investment is becoming ever more important, since multinational and transnational enterprises and corporations play an increasing role in shaping (and developing) world trade and international economic relations. It is of paramount importance for these foreign undertakings to receive adequate legal protection for their typically long-term investments, as the longevity of the investment and the legislative and enforcement opportunities offered by the host country may affect the value and operation of foreign investment in several ways.

Emerich de Vattel was the first to raise the idea that the elevated protection of foreign investors should be guaranteed by separate rules,⁹ one of the most obvious ways thereof being the conclusion of bilateral international agreements (investment protection agreements). The first generation of investment protection agreements is the so-called FCN treaties which adequately met the requirements of their age as treaties of friendship, commerce and navigation.¹⁰ However, with the intensification of international economic and trade relations, they have been gradually replaced by BITs (bilateral investment treaties) aimed at reciprocally promoting, encouraging and protecting investment made by undertakings resident in one country to be carried out in another country.¹¹ Since protection becomes necessary exactly because the host state may violate the investor's rights and disputes may arise in which neither state's court can be expected to rule impartially, BITs usually provide for a dispute settlement mechanism that is independent of the affected states.¹²

The purpose of the so-called first-generation BITs was to protect foreign investors in politically unstable but resource-rich states.¹³ According to UNCTAD, the first BIT concluded, between the Federal Republic of Germany and Pakistan, on November 25, 1959 (entered into force on April 28, 1962).¹⁴ However, from the second half of the 1980s, and even more so from the 1990s, an increasing number of BITs have been

9. EMMERICH DE VATTEL, *THE LAW OF NATIONS, OR THE PRINCIPLES OF NATURAL LAW* 207 (Béla Kapossy & Richard Whatmore eds., 2008).

10. Wolfgang Alschner, *Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law*, *GOETTINGEN J. OF INT'L L.*, 455, 461 (2013).

11. *See id.* at 475.

12. *See id.* at 475-76.

13. *Id.* at 472.

14. U.N. Conference on Trade and Development, *Bilateral Investment Treaties 1959-1999*, at 57, UNCTAD/ITE/IIA/2 (2000) [hereinafter UNCTAD].

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 the contracting states to create and maintain mutually favorable conditions for their investors in the territory of the other contracting party, thereby promoting the development of trade relations between the states concerned and strengthening confidence in investment.¹⁷ While the interest of capital-exporting states may be best explained by protecting the interests of their investors, the interest of capital-importing states may be best explained by attracting foreign investors.¹⁸ Legislation must therefore deal with a rather contradictory situation: while foreign investors require maximum safety of their investments and profits (and, in addition, often require special treatment), host states seek to ensure the benefits of foreign capital investment primarily for their own national economy and economic development, while they reject any attempt to restrict their own (partly economic, partly political) freedom of choice.

Hungary (while still a socialist state) concluded its first investment protection treaty in 1986.¹⁹ As of late March 2022, Hungary has a total of forty-three BITs in force.²⁰ In the 1980s and the first half of the 1990s, Hungary concluded BITs primarily with states whose business associations could be counted on as potential investors during the transition period (such as Austria, the United States, France, the United Kingdom, Germany, Italy). Today, Hungary is basically concluding treaties with states that may be the target of Hungarian investments.²¹ Hungary has never had a bilateral investment protection treaty with two Member States of the European Union: Estonia and Malta.²² As discussed below, the EU Member States have gradually terminated these BITs between each other in recent years due to their corresponding obligation under EU law. A common feature of Hungary's BITs is that they almost invariably require the application of the

15. *Id.* at 4.

16. *Id.* at 62.

17. *Id.* at 1.

18. *Id.*

19. *Id.* at 62.

20. *International Investment Agreements Navigator: Hungary*, UNITED NATIONS UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/94/hungary> (last visited Oct. 6, 2022).

21. *See Id.* (Examples of such states include Kosovo, and Bosnia and Herzegovina, which are close to Hungary, and Azerbaijan, the United Arab Emirates, Jordan, and Mongolia from more remote areas); UNCTAD, *supra* note 14, at 2.

22. *International Investment Agreements Navigator: Hungary*, *supra* note 20.

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 Act²⁴ 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 Pihenő 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* arbitration is usually stipulated in the bilateral treaties. International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulations and Rules* (2006), <https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf> [hereinafter ICSID].

24. 1995. évi XXXVI. törvény a személyi jövedelemadóról szóló (Act CXVII of 1995 on Personal Income Tax) (Hung.).

25. Alexis Cheney, *France's 'Ticket Restaurant,' or 'Ticket Resto,' Program, Explained*, FRENCHLY (June 3, 2019), <https://frenchly.us/frances-ticket-restaurant-or-ticket-resto-program-explained/>.

26. UNCTAD, *supra* note 14, at 62.

27. Named after István Széchenyi (1791-1860), an outstanding figure of the Reformation, also known as “the Greatest Hungarian.” He is known for the establishment of the Hungarian Academy of Sciences, the construction of the Chain Bridge in Budapest, and the creation of Hungarian shipping and shipbuilding; MKB SZÉP Card, MKB Bank Széchenyi Pihenő Kártya.

28. Named after Saint Elisabeth of Hungary (1207-1231), the daughter of the Hungarian king Andrew II who was known as the helper of the poor, the sick, and the needy; *Here is why the Hungarian Government Spent €20 Million Advertising its own Company with a Monopoly*, ÁTLÁTSZÓ (May 15, 2018), <https://english.atlatszo.hu/2018/05/15/here-is-why-the-hungarian-government-spent-e20-million-advertising-its-own-company-with-a-monopoly/>. (Erzsébet vouchers are the most popular fringe benefits in Hungary. The vouchers were introduced in 2010,

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 the Erzsébet vouchers. Therefore, infringement proceedings were launched against Hungary before the CJEU.³⁴ In this study, only the Erzsébet voucher-related elements of the proceedings against Hungary before the CJEU will be elaborated upon, given that only these elements of the proceedings affected the legal situation of the three French undertakings directly. The European Commission argued that a regulation that allowed only one Hungarian undertaking (namely the aforementioned Magyar

and over the next six years “the Hungarian government spent more than 20.4 million euros on advertising the Erzsébet food vouchers,” which are distributed by a “state-owned company.”)

29. *See id.*

30. *Id.*

31. Case C-179/14, *European Commission v. Hungary*, ECLI:EU:C:2016:108, ¶ 21 (Feb. 23, 2016) (quoting 2012. évi CI. törvény a Az Erzsébet-programról Hungarian Act CIII of 2012 on the Erzsébet Program).

32. *Id.* ¶ 11.

33. *Id.* ¶ 1.

34. *Id.*

Nemzeti Üdülési Alapítvány) to issue preferentially-taxed cafeteria vouchers is contrary to essential elements of EU law, namely, the freedom of establishment³⁵ 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 activity are conferred on a single, private or public, operator, constitutes a restriction both of the freedom of establishment and of the freedom to provide services."³⁸ Such restrictions may only be justified in exceptional cases, in accordance with the requirements of necessity and proportionality, but during the proceedings the Hungarian government could not justify the need to monopolize the issuance of Erzsébet vouchers.³⁹

Pursuant to Art. 260(1) TFEU, "[i]f the Court of Justice of the European Union finds that a Member State has failed to fulfill an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court."⁴⁰ The Hungarian State finally fulfilled this obligation under EU law on July 1, 2020, partly by repealing the Act in question and partly by abolishing the Erzsébet vouchers.⁴¹ As a result, the Hungarian cafeteria legislation was in line with EU law again.

However, the infringement proceedings cannot compensate for the damage caused to natural and legal persons (in this case the three French undertakings excluded from the cafeteria voucher market) through the adoption of measures contrary to EU law. In such cases, based on the *Francovich and Bonifaci* case-law of the CJEU, natural or legal persons harmed may bring an action for damages against the infringing Member State before its national courts (and not before the CJEU) for breaching EU

35. *Id.* ¶ 148 (addressing TFEU art. 49).

36. *Id.* ¶ 150 (addressing TFEU art. 56).

37. *Id.* ¶¶ 137-38.

38. *Id.* ¶ 164.

39. *Id.* ¶¶ 170,172.

40. TFEU, *supra* note 7, art. 260.

41. 2020. évi LXIV. törvény - az Erzsébet-táborokról (Act LXIV of 2020 on the Elizabethan Camps) (Hung.) (repealing certain provisions of the Hungarian Act CIII of 2012 on the Erzsébet Program that contradicted EU law).

law.⁴² However, establishing a Member State's liability for damages is conditional upon the infringement being sufficiently serious,⁴³ a criterion that allows a Member State court some discretion in assessing the consequences of an infringement committed by a Member State. BITs, on the other hand, serve the purpose, among many other things, of ensuring that the injured investor's claim for damages is not decided by the court and on the basis of the law of the perpetrating Member State.⁴⁴ This safeguards the adequate and objective protection of the foreign investor's rights and interests. In this respect, it can be concluded that EU law is less effective in protecting the legal interests of foreign investors than BITs.

V. RECENT CHANGES IN EU LAW ON INVESTMENT PROTECTION – EVENTS LEADING UP TO THE *ACHMEA* RULING OF THE CJEU

In the 2000s, fundamental changes took place in EU law concerning the legal protection of foreign investments. Hungary, as a Member State of the European Union, had to take these into account.

Upon the European Commission's initiative, the CJEU had already decided in March 2009 that certain provisions of the BITs of some Member States concluded with third countries (that is, not the BITs themselves at that time) were contrary to EU law.⁴⁵ Following these decisions, the Treaty of Lisbon entered into force on December 1, 2009, amending Art. 207 of the TFEU to extend the common trade policy, which falls within the exclusive competence of the Union, to "foreign direct investments."⁴⁶ This means that, after December 1, 2009, Member States were no longer in the position to conclude BITs with third countries, and the power to conclude such treaties became a sole competence of the European Union. However, the Treaty of Lisbon did not provide for the fate of BITs that had previously been concluded (not only in accordance with the rules of public international law, but also in accordance with EU law). The first step in resolving this complicated legal situation was the adoption of Regulation (EU) No. 1219/2012 which required Member States to notify the Commission of all BITs they had previously concluded, which could remain in force until whichever time the EU would conclude a BIT with the

42. Cases C-6/90 and C-9/90, *Francovich and others*, 1991 E.C.R. I-5403, ¶¶ 34-35.

43. Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, 1996 E.C.R. I-1131, ¶ 51.

44. ICSID, *supra* note 23, ¶ 15.

45. Case C-205/16, *Commission v Austria*, ECLI:EU:C:2009:118, ¶ 39 (Mar. 3, 2009); Case C-249/06, *Commission v Sweden*, ECLI:EU:C:2009:119, ¶ 15 (Mar. 3, 2009); Case C-118/07, *Commission v Finland*, ECLI:EU:C:2009:715, ¶¶ 48-51 (Nov. 19, 2009).

46. TFEU, *supra* note 7, art. 207.

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-one 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 specifically aimed at protecting investments (the European Union concluded such a treaty with Viet Nam and Singapore), but none of these are in force.⁴⁹

Yet, for the purposes of this study (since both Hungary and France are Member States of the European Union and the case of Erzsébet vouchers concerned a BIT concluded between these two states), it is not the legal fate of the BITs concluded between third countries but that of a BIT concluded between two particular EU Member States that is of importance. This issue was not directly regulated by the Lisbon Treaty or Regulation (EU) No 1219/2012, so above all, it was up to the CJEU to assess the compatibility with EU law of BITs concluded between the Member States.

Pursuant to Art. 351 of the TFEU, “[t]he rights and obligations arising from agreements concluded before January 1, 1958, or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the established incompatibilities.”⁵⁰ Art. 351 of the TFEU applies not only to its wording but also to the approach of the CJEU to contracts between Member States.⁵¹ Hence, in such cases, there is no explicit treaty provision governing the legal fate of BITs concluded between EU Member States. Nevertheless, the principle of the primacy of EU law also applies *mutatis mutandis* in these cases: international agreements concluded by Member States which are contrary to EU law must be set aside by the Member States’ authorities and are therefore inapplicable.

47. Regulation No. 1219/2012, art. 2-3, 2012 O.J. (L 351) 40, 41-43.

48. See *International Investment Agreements Navigator: European Union*, UNITED NATIONS UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements/groupings/28/eu-european-union> (last visited Oct. 6, 2022).

49. *Id.*

50. TFEU, *supra* note 7, art. 351.

51. See, e.g., Case C-235/87, *Matteucci v Communauté française de Belgique*, ECLI:EU:C:1988:460 (Sept. 27, 1988).

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 another 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, *e.g.*, in *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.

(i) In cases where the infringement of investors' rights took place before the accession of the host Member State to the European Union, recourse to the rules of successive treaties with the same subject matter is conceptually excluded.⁵⁸ In such cases, the date of the infringement instead of the date of the commencement (or adjudication) of the dispute will be decisive for the arbitration court. The practical importance of this provision, which logically follows the rules of public international law, was most significant in the years following the accession of the ten new Member States to the EU in 2004.

(ii) In *Eastern Sugar*, the arbitration court concluded that the TFEU (more precisely the Treaty establishing the European Community, TEC) and the BIT concluded between the Czech Republic and the Netherlands could not be considered treaties having the same subject matter. Thus, it was conceptually impossible to apply Art. 59 of the 1969 Vienna Convention.⁵⁹ The arbitration court also pointed out that, even if the two treaties were to be regarded as having the same subject matter, neither of the two alternative conditions in Art. 59 were satisfied: the parties' intention to replace the BIT with the TEC cannot be established and their two treaties do not preclude their simultaneous application as the free movement of capital and the freedom of establishment under the TEC and investment protection under the BIT complement and reinforce each other.⁶⁰

(iii) In *Eureko*, the Commission argued that Art. 30(3) should apply instead of Art. 59 of the 1969 Vienna Convention (which provides for the termination of previous treaties). According to Art. 30(3), although the BIT may not be considered terminated, its provisions shall apply only in so far as they do not conflict with the provisions of the TEC as a subsequent treaty. However, the arbitration court found that the BIT in question had not

57. Vienna Convention, *supra* note 1, art. 59.

58. *Award on Jurisdiction, Binder v Czech Republic*, UNCITRAL ¶ 62 (2007).

59. *Eastern Sugar B.V.*, *supra* note 53, ¶¶ 160-65.

60. *Id.* ¶¶ 167-69.

been terminated,⁶¹ and the protection afforded by the BIT was wider than the legal protection 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 Vienna Convention, the provisions of the BITs between the Member States of the European Union and the provisions of the TEC (TFEU) constitute parallel and applicable international treaties, that is, the existing legal conflict is not manifested fundamentally at the level of international law, but rather at the level of EU law.

VI. THE *ACHMEA* CASE: A TURNING POINT IN EU LAW

Despite the European Commission's consistent position, the vast majority of Member States have not taken any steps to eliminate BITs concluded with other Member States. In the autumn of 2016, the European Commission therefore decided to initiate infringement proceedings against a number of Member States.⁶³ Based on the Commission's approach, it can be established that BITs were contrary to EU law for three reasons: (i) they regulated issues relating to the freedom of establishment and the free movement of capital, whereas the Member States would have had the option to regulate these areas only where EU law does not address these issues at all; (ii) as already mentioned, the provisions of the BITs constitute a discrimination on the grounds of nationality by not treating investors in all EU Member States uniformly, but guaranteeing additional protection for some investors, thereby violating an essential element of EU law and the internal market; and (iii) providing for the possibility of international arbitration allows EU law to be completely disregarded and possibly to be undermined by arbitration courts,⁶⁴ as disputes between investors and Member States, which are also relevant to EU law, would fall entirely

61. *Eureko B.V.*, *supra* note 54, ¶¶ 244-45.

62. *Id.* ¶¶ 245, 262.

63. *European Commission – Fact Sheet: September Infringements' Package: Key Decisions*, *supra* note 52; See Commission Asks Member States to Terminate their Intra-EU Bilateral Investment Treaties, *Press Release*, EUROPEAN COMMISSION (June 18, 2015), https://ec.europa.eu/info/publications/200505-bilateral-investment-treaties-agreement_en. The Member States concerned were Austria, the Netherlands, Romania, Slovakia, and Sweden. The Commission initiated proceedings against these Member States because they have previously been the subject of arbitration awards based on a BIT.

64. Tamás Szabados, *A tagállamok közötti beruházásvédelmi egyezmények az uniós jogban* [Investment protection agreements between Member States in EU law] LVIII (3-4) *Állam- és Jogtudomány* 17, 34-36 (2017) (Hung.).

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, *Slowakische Republik v Achmea BV*, ECLI:EU:C:2018:158 (Sept. 19, 2017) (The subject matter of the main proceedings was the annulment of an arbitration award, so that the European Court of Justice could examine the situation of BITs between Member States in EU law solely from the aspects of procedural law.)

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 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.”⁶⁹ However, it is also important to point out that *Achmea* could only be brought before the CJEU because the *ad hoc* arbitration court in the main proceedings was based in Germany and the applicable law was ultimately German law, which option is excluded for the ICSID having their own procedural regime.

The preliminary ruling in *Achmea* posed an interesting legal dilemma for Member States and investors. There was no doubt that BITs between Member States were still valid and effective in public international law, but it was now also clear that these BITs are incompatible with EU law. However, the primacy of EU law and the obligations arising from EU law are binding only on the Member States and the Member States’ authorities: neither investors nor arbitrators can be held liable for failing to comply with a judgment of the CJEU. Meanwhile, a Member State may ultimately be held liable before the CJEU for the infringement of EU law in connection with such a decision by the investors and the action of the arbitration court. Member States therefore had to choose between considering the interests of foreign investors, taking on the risk of infringement proceedings before the CJEU, or opting for full compliance with EU law, thereby committing themselves to provide a less favorable legal environment for foreign investors. An assessment of the situation becomes even more complex because, although the European Union may be considered a single market in legal terms, investment within the Member States is directed mainly from the more developed Member States in the West, towards the less developed Member States in Eastern Europe. This also means that the interests of the Member States of the European Union cannot be considered to be exactly the same: Member States receiving foreign investments are more likely to comply with EU law, while investors in the capital-exporting Member States were in favor of maintaining as far as possible the rules of public international law providing for a higher level of legal protection. The interest of Hungary, which joined the European Union in 2004, is an example of the former, exhibiting full compliance with EU law.

VII. THE PROCEEDINGS AGAINST HUNGARY BEFORE THE ICSID

While the *Achmea* case was still pending before the competent German courts (and at the same time, infringement proceedings against Hungary

69. *Achmea*, *supra* note 65, ¶ 60.

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 S.A.S.*, 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.")

75. *Id.*

curiae brief stating that as a result of *Achmea*, European Union law also took precedence over that provision of the BIT between Hungary and France which allows for the ICSID's procedure in the event of a dispute between the investor and the host state. The European Commission also referred to Art. 30(3) of the 1969 Vienna Convention on this procedural issue, stating that EU law, which could be considered "later law" (*lex posteriori*) due to Hungary's accession to the EU in 2004, undermined the earlier arbitration clause (*legi priori*) set out under the BIT between Hungary and France. Lastly, the Commission stated that, as a result of *Achmea*, the ICSID tribunal's award would not be enforceable at a later date.⁷⁶ However, the arbitration court did not share the Commission's reasoning. First, the arbitration court stated that "the decisions of this arbitration panel are not threatened to be subject to annulment proceedings in an EU Member State"⁷⁷ as the ICSID tribunal is an arbitration court based on a separate international convention (the ICSID Convention) outside the European Union as opposed to the arbitration court established in Frankfurt am Main under the law of a Member State (Germany) and acting in *Achmea*. Second, the ICSID tribunal also stated that it is not its duty to rule on whether Hungary had violated the EU law, "the principles of international courtesy and fair trial do not require any court to deny jurisdiction in favor of another."⁷⁸ Third, given that the material scope of the TFEU and the BIT are not the same, Arts. 30 and 59 of the 1969 Vienna Convention are not applicable to the case.⁷⁹

Regarding substantive issues, the ICSID tribunal found in all three cases that Hungary had infringed the provisions of the Hungary-France BIT, as the radical transformation of the cafeteria market deprived the French undertakings concerned of the use and disposal of their investments and rendered such investments valueless which was tantamount to a state measure equivalent to expropriation. According to the ICSID tribunal, although the reform of the cafeteria market was theoretically of a general nature, it had a *de facto* direct, exclusive, and international impact on the three French undertakings concerned and, although Hungary invoked social aspects, the Hungarian government's measures were expressly directed to drive the three French undertakings out of the Hungarian market.⁸⁰ For all

76. *Sodexo Pass International S.A.S. v Hungary*, ARB/14/20, ¶ 95 (Jan. 28, 2019).

77. *Id.*

78. *Id.*

79. *Id.* ¶ 192.

80. *Id.* ¶¶ 327, 362.

these reasons, the ICSID tribunal awarded a high amount of damages to the three French undertakings.⁸¹

VIII. AND THE STORY CONTINUES...

Although the ICSID tribunal could undoubtedly legitimately decide to settle the disputes before it under the provisions of the valid and effective BIT (pointing out, *inter alia*, the differences between the proceedings before it and the arbitration proceedings on which *Achmea* was based), it is also true that the ruling of the CJEU in *Achmea* provided clear guidance to the effect that BITs concluded between Member States were no longer compatible with EU law. The majority of EU Member States (twenty-three Member States) therefore concluded an international treaty on May 5, 2020, terminating the BITs between them,⁸² which entered into force on August 29, 2020.⁸³ Under the treaty, BITs between individual EU Member States expire on the date on which such treaty enters into force in respect of both parties to that BIT. In the case of Hungary, this date was November 28, 2020, while in the case of France, the treaty entered into force on August 28, 2021. As a result, the BIT concluded between Hungary and France also expired at that time.

Pursuant to Art. 5 of the Treaty, the provisions of a specific BIT relating to arbitration proceedings may not serve as a basis for a new arbitration procedure (initiated after March 6, 2018, the date of the *Achmea* judgment).⁸⁴ Consequently, the arbitration courts shall decline jurisdiction and terminate existing arbitration proceedings. At the very least, it is an interesting question whether a contractual provision of a seemingly self-executing nature such as the arbitration rule under the BITs may be overridden by another international treaty for the period during which the BIT has not yet expired. This issue is particularly interesting if we also take into account that, in many cases, BITs contain provisions that continue to

81. See HUNGARY TODAY, *supra* note 70 (Sodexo was entitled to damages in the amount €72,881,361. Le Cheque Déjeuner was entitled to damages in the amount of €23,160,000. While the award in the case of *Edenred S.A.* is not public, it has been reported that the damages awarded to the applicant was also around €23 billion.).

82. Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union art. 2, May 29, 2020, 2020 O.J. (L 169) 1, 4 [hereinafter 2020 Treaty]. Belgium, Luxembourg, Italy, Portugal, and Romania did not ratify the treaty until the finalization in February 2022. Austria, Finland, Ireland, and Sweden are not parties to the treaty.

83. Information concerning the entry into force of the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, Aug. 29, 2020, 2020 O.J. (L 281) 1, 1.

84. 2020 Treaty, *supra* note 82, art. 5.

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 investment agreements between EU Member states by means of Act LXI of 2020. What is interesting about the promulgating Act is that Section 6(a) of that Act repealed Decree No 59/1987. (XI. 29.) MT of the Council of Ministers promulgating the BIT concluded between Hungary and France in Hungarian law. This also meant that, although the BIT between Hungary and France was valid and effective until August 28, 2021 (that is, the date on which the 2020 Treaty entered into force in respect of France) as a result of the 2020 Treaty and pursuant to Art. 12(2) of the BIT, certain provisions of the BIT must still be applied by the parties for a further period of twenty years, even though the BIT has now become *de facto* inapplicable in Hungarian law. This is because the Hungarian legal system is dualistic, and the promulgation of a given treaty in domestic law

85. *Id.* art. 7.

86. *Id.* art. 9.

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 the judgment under EU law. Sodexo Pass International S.A.S. also initiated proceedings in the case before the Constitutional Court of Hungary, but before the Constitutional Court ruled on the petition, Sodexo Pass International S.A.S. withdrew their constitutional complaint on January 3, 2022.⁸⁹ This may have been due to an agreement between the French undertaking concerned and Hungary, although neither official nor unofficial information on such an agreement has come to light. And while the matter seems to have been resolved, substantial practical experience has been obtained on the relationship between national, international, and EU law.

According to the interpretation of the CJEU, in any matter affecting EU law, only a judicial forum may act, which may, if necessary, seek an interpretation of the law from the CJEU, and arbitration courts are in principle not classified as such a forum.⁹⁰ Indeed, the CJEU's ruling in *Achmea* forced Member States to prevent the application of an international agreement that is otherwise self-executing (namely BITs valid and in force between the Member States) and the implementation of the resulting

87. See Order No 2201-3.Pkf.25.414/2020/4 of Budapest Court of Appeal.

88. 2020 Treaty, *supra* note 82, art. 7.

89. In such cases, the Constitutional Court shall terminate the constitutional complaint procedure in accordance with their current rules of procedure.

90. *Achmea*, *supra* note 65, ¶ 60.

decisions. The rules of EU law are not suitable to prevent foreign investors from initiating proceedings before an international arbitration court under a BIT concluded between Member States (this will remain possible for decades after the termination of the specific BIT) but are suitable to prevent the enforcement of such arbitration awards, ultimately hollowing out the provisions of the BITs. In the author's view, following the ruling in *Achmea*, Member States had to choose between two principles both present in EU law: the CJEU's monopoly on the interpretation of European Union law and the protection of fundamental human rights (including the right to property and fair trial). The CJEU made it clear in its ruling that even the unity of the European internal market and the protection of the interests of the citizens and residents of the European Union cannot be more important than ensuring that the CJEU is fully competent in all circumstances. Otherwise, it would not have been necessary to reduce the level of protection already achieved, *i.e.*, to make it impossible to proceed for the arbitration fora, generally independent of the Member States and generally accepted under international law, but to extend it generally to all investment protection cases.

This approach is particularly worrying because, although the European Union is essentially a single internal market, there are still significant differences in terms of the development and legal systems between the individual Member States. And in the event of an infringement of EU law (as follows by *Francovich and Bonifaci* mentioned above), it is not the CJEU but, ultimately, one of the judicial bodies of the Member State that committed the infringement against the investor.