Complaint about alleged breach of EU law by Austria

Complaint form received

Reference	89655
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Language of communication	English
Correspondence should be sent to	Both
Disclosure of personal information	Yes

Personal information

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Which EU country is your complaint about?

The EU country my complaint is about is	Austria
The national authority my complaint is about is	Central administration

What is your complaint about?

What did the Member State and its administration do wrong?	Systematically applied EU law incorrectly in a certain sector. Adopted national rules that prevent national courts applying fundamental principles of EU law.
Pieces of evidence / supporting documents	ANNEX 1_AUSTRIA.pdf ANNEX 2_AUSTRIA.pdf

Describe the problem by outlining the facts and the reasons for your complaint.

This Complaint concerns Austria's violation of Art. 4(3) TEU resulting from its failure to take appropriate steps to eliminate the incompatibilities between its bilateral investment treaties concluded with third countries (BITs) and the autonomy of EU law (1), as well as the EU's sanction powers (2). The Complaint is based on an assessment of a sample of 44 BITs concluded before 1 December 2009 [Annex 1].

1. Incompatibility with the autonomy of EU law

In Opinion 1/17, the CJEU held that an international agreement concluded by the EU with an investor-state dispute settlement (ISDS) mechanism is compatible with EU law "only if it has no adverse effect on the autonomy of the EU legal order" (§ 108). The CJEU stated that an agreement would have such an effect if tribunals established thereunder can (i) interpret or apply EU law or (ii) call into question the level of protection of public interests established by the EU (e.g. by finding that upholding such level of protection amounts to unfair treatment of a foreign investor).

This test is also relevant to assess the EU-law compatibility of an ISDS mechanism in an extra-EU BIT concluded by Member States (MS): EU law may be part of the applicable law and domestic measures challenged might be implementing EU law. This is illustrated by recent arbitration claims targeting the implementation of EU law (PCA Case 2019-17, ICSID ARB/21/51, ARB/23/48 and ARB/23/49, Petrogas v Netherlands) and sanctions (Fridman v Luxembourg; Euroclear/ Belgium) [Annex 2, p. 200]. This does not contradict the Court's finding in C-741/19 (§ 65) that, in principle, extra-EU ISDS is not incompatible with EU law – as opposed to intra-EU ISDS. It also finds support in Opinion 1/17 (§ 150), academic work and the Commission's practice under Regulation 1219/2012, requiring extra-EU BITs to include Opinion-1/17-type safeguards (§§ 120-161) [Annex 2, pp. 22-23, 32-33, 61-62, 76-77, 115, 123-124 and 126 ff].

Yet, none of the BITs assessed in Annex 1 contain such provisions:

(a) None expressly exclude the arbitral tribunals' jurisdiction to interpret or apply EU law, while

most BITs provide that domestic law (which extends to EU law) is part of applicable law or refer to arbitration rules that foresee the application of domestic law.
(b) None include Opinion-1/17-type provisions preventing tribunals from treating implementation of EU public-interest measures as unfair investor treatment; instead, they contain unqualified protections leaving broad discretion on tribunals.

The lack of such safeguards creates a material risk of adversely affecting the autonomy of the EU legal order, which means that the ISDS mechanisms under those BITs are incompatible with EU law.

2. Incompatibility with EU sanction powers

All the BITs analysed in Annex 1 guarantee free transfer of funds linked to an investment. Yet, 39 of those BITs do not contain clauses enabling Austria to fulfil its EU obligations regarding restrictive measures decided by the Council under Art. 215 TFEU. This violates EU law, as per CJEU case law (C-118/07, C-205/06 and C-249/06).

In C-205/06, Austria was already found in breach of (now) Art. 351 TFEU for failing to address these incompatibilities in relation to BITs concluded before its EU accession: the CJEU deemed free-transfer provisions contained in these BITs incompatible with Council powers to unilaterally restrict movements of capital between MS and third countries, in the absence of a provision allowing Austria to fulfil its obligations as an EU member (see also C-249/06 and C-118/07).

The current geopolitical context magnifies the risks arising from these incompatibilities. Sanctioned investors are invoking free-transfer provisions against MS implementing EU sanctions (Fridman v Luxembourg) or are likely to do so (Euroclear/Belgium).

The conflict between unconditional BIT free-transfer obligations and EU sanction powers – acknowledged by the Commission itself [Annex 2, p. 115] – is illustrated by Regulation 2025/1494 (seeking to neutralise arbitration claims brought against MS in connection with EU sanctions) and Art. 2 of Regulation 2025/2600, which prohibits any transfer of assets or reserves to the Central Bank of Russia.

Consequences
Austria is under an obligation to take all appropriate steps to eliminate these incompatibilities. This duty flows from Art. 351 TFEU (in relation to BITs concluded prior to EU accession) and Art. 4(3) TEU (sincere cooperation) as regards posterior BITs (EU:C:2008:391, §§ 33-43; Annex 2, p. 77) – as well as Regulation 1219/2012 (Recital 11 and Art. 3), which recalls that MS are required to “eliminate incompatibilities” in BITs.
Despite this, Austria has continuingly failed to take such steps. It still has not taken sufficient steps to comply with the 2009 ruling so that it remains in violation of EU law.

For these reasons, Attac Austria respectfully requests the Commission to initiate an infringement procedure against Austria under Art. 258

Your complaint will be assessed on the information that you provide in this form. You should be as concise and as specific as possible.

You must make an entry in all the data fields that have an (*) and fill in as many of the other fields as possible.

Before submitting your complaint, you should read about how the Commission handles complaints about EU countries' breaches of EU law.

Complaints that are insulting or fanciful and that do not require a substantive response will not be answered.

If the correspondence becomes repetitive (for example, successive letters on the same topic that does not introduce new information) or that is abusive, pointless and/or improper, we reserve the right to discontinue the correspondence.

All complaints must be submitted in one of the EU's official languages: Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish or Swedish. Complaints submitted in any other language will not be answered.

Do not include in your complaint any personal data belonging to third parties or personal data that is sensitive, unless it is strictly necessary for the handling of your complaint. By submitting any special categories of personal data in the meaning of Article 10(1) of Regulation 2018/1725, you provide your explicit consent to the processing of such personal data.

Privacy statement

☑ I have read and understood all the above.