

Arbitral award vacated for violation of EU competition law



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Arbitration & ADR, Poland

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Introduction

The issue of arbitral tribunals' application of EU law is not new. In the 1990s the European Court of Justice (ECJ) established that a national court which receives an application to annul an arbitration award must grant such application if it considers that the award in question is contrary to EU law (*Eco Swiss*). In recent years, this issue was revived in investment arbitration and the ECJ's famous (or for many, infamous) *Achmea* judgment, which found that intra-EU bilateral investment treaties' investor-state dispute resolution mechanisms violate EU law. A landmark decision of the Warsaw Court of Appeals is yet another chapter in this story. In this notable case, the Polish court vacated an *ad hoc* United Nations Commission on International Trade Law (UNCITRAL) award on the basis that it violated EU competition law. **(1)**

Facts

In 1997 a concession was granted for the development and operation of a motorway in Poland. The agreement was amended seven times, including by means of Annex 6, and contained an arbitration clause providing for *ad hoc* UNCITRAL arbitration.

After Poland joined the European Union, Polish law regarding toll collection changed. The parties to the agreement intended to regulate the issue of tolls paid by trucks (which were previously paid separately for all roads and separately for paid sections of motorways) and compensate Autostrada Wielkopolska SA for any loss due to the law change. On 14 October 2005 the parties agreed Annex 6, which provided for compensation for income lost due to the change of Polish law in 2005. In 2008 the minister of infrastructure avoided Annex 6 based on a mistake as to the truthfulness of the data provided by Autostrada Wielkopolska; such data had been provided based on an outdated estimate of road traffic from 1999 when newer data from 2004 was available.

Autostrada Wielkopolska initiated arbitration. In its 20 March 2013 award, the tribunal found that Annex 6 was valid and binding and that its avoidance was without legal effect. It also dismissed the State Treasury's counterclaim that, among other things, sums paid on the basis of Annex 6 had been paid unduly and were subject to restitution (the award). One arbitrator dissented, finding that Annex 6 was invalid.

The State Treasury sought to vacate the award, alleging that the tribunal had violated Polish public policy because, among other things, Annex 6 was invalid.

European Commission decision

During the proceedings, the European Commission issued EU Decision 2018/556 of 25 August 2017, in which it found that the Zł894,956,888.88 in overcompensation granted by Poland to Autostrada Wielkopolska between 1 September 2005 and 30 June 2011 on the basis of the Amendment Act constituted 'state aid' within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (TFEU). It further established that said state aid was unlawful as it had been granted in breach of the notification and standstill obligations stemming from Article 108(3) of the TFEU.

Warsaw Regional Court decision

In its 26 January 2018 judgment, the Warsaw Regional Court dismissed Poland's recourse. It found that setting aside an award due to a violation of public policy is exceptional and, in the case at hand, found no such violation. The court noted that the tribunal had examined the issue of Annex 6's validity in detail, and that Poland had failed to prove its arguments. It also found that even if the tribunal had erred in law, it could not reassess the interpretation of the law presented in the award as such an error would not amount to a violation of public policy.

As to EU law, the court noted that during the proceedings, both parties had agreed that the issue of state aid should have no influence on the tribunal's award. In post-arbitral proceedings, Poland argued that EU law forms part of public policy. However, the Warsaw Regional Court found that the European Commission's decision was not final and that, in any case:

- Polish law prescribes for a separate legal basis for restitution of unduly granted state aid; and
- Poland had already initiated proceedings before the Polish courts.

The State Treasury appealed the Warsaw Regional Court's judgment, invoking, among other things:

- the dispute's lack of arbitrability; and
- the fact that the judgment violated EU law as the award contravened EU law and thus Polish public policy.

During the appeal proceedings, the European Commission motioned for the award to be set aside. Further, at this stage of the case, Autostrada Wielkopolska unsuccessfully attacked the European Commission's decision. The ECJ, in its judgment of 24 October 2019, dismissed this action (Case T-778/18). The appeal against this judgment is pending (C-933/19 P).

Warsaw Court of Appeals decision

The Warsaw Court of Appeals allowed the appeal, reversed the Warsaw Regional Court's judgment and set aside the award.

First, the court explained that the dispute heard by the tribunal was arbitrable, taking into account Polish law as it stood when the parties had entered into the arbitration agreement, which allowed for arbitration in cases where the parties could enter into an agreement. The court went further and established that this criterion is a general one and encompasses disputes over an agreement's invalidity.

However, the court found that the award violated Articles 107 and 108 of the TFEU and thus violated Polish public policy. The Warsaw Regional Court had erred in finding that the TFEU's provisions on state aid did not form part of Polish public policy. The Warsaw Court of Appeals was of the opposite opinion, noting that EU law must be applied coherently, which requires courts and tribunals deciding competition cases to respect the basic principles of EU law. In this respect, the court relied on ECJ case law (*Claro* and *Eco Swiss*) which requires EU law to be taken into account when assessing tribunal awards' compliance with public policy.

The Warsaw Court of Appeals found that the award contradicted the European Commission's decision that state aid had been granted to Autostrada Wielkopolska in an unlawful manner. The fact that the European Commission's decision did not concern the validity of Annex 6 was irrelevant, as the commission had not resolved a private law dispute. This dispute and the question of Annex 6's validity fell within the scope of the jurisdiction of the tribunal, which – in the Warsaw Court of Appeal's view – had completely disregarded Articles 107 and 108 of the TFEU (which constitute mandatory EU law) and thus erred in the decision-making process. Further, the European Commission's decision was binding on the Polish courts when deciding whether to set aside the award. As the decision had resolved the issue of unlawful state aid, the courts needed to follow this approach.

Finally, the Warsaw Court of Appeals found that the fact that a case for the restitution of state aid was pending before the Polish courts was irrelevant to the decision on the setting aside of the award. The Polish litigation pertained to the restitution of state aid, whereas the matter at issue in the arbitration was the validity of Annex 6. Dismissing the recourse for setting the award aside would amount to accepting a violation of the basic principles of EU law, which – for obvious reasons – was prohibited.

The Warsaw Court of Appeals' judgment is subject to a cassation complaint, which is already pending before the Supreme Court (File Ref I CSK 462/20).

Comment

The Warsaw Court of Appeals was undoubtedly right in confirming that the basic principles of EU law form part of national public policy. The issue of whether Articles 107 and 108 of the TFEU constitute mandatory EU law also seems to have been decided.

What seems to be less obvious is whether the Warsaw Court of Appeals, in deciding on the motion to set aside the award, should have considered the fact that the award does not deprive the State Treasury of its rights to recover unlawful state aid in Polish litigation. As correctly noted in the judgment in question, the award (and setting aside proceedings) have limited to no effect on the case for the recovery of state aid.

However, the Warsaw Court of Appeals relied heavily on the issue of inconsistent decisions and explained that the fact that the award disregarded EU law and contravened the European Commission's decision was sufficient grounds to set it aside.

Thus, the Warsaw Court of Appeals judgment not only considers whether EU law forms part of national public policy – it also provides an important caveat to parties and tribunals that the mere fact of disregarding EU law is enough to endanger an award's enforceability.

It remains to be seen whether the Supreme Court will uphold this reasoning.

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Endnotes

(1) Warsaw Court of Appeals, 26 November 2019, File Ref I Aca 457/18, unpublished.

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