Op-Ed

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"The protection of Intra-EU investment after *PL Holdings. C'est la vie*?"

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Dániel Dózsa

The judges at the Court of Justice must have had a difficult end of October. The choice they had to make was not pretty – protect EU citizens from falling into a 'legal black hole' or let them fall and protect their own constitutional prerogatives. As judges of the highest court in a 'self-contained regime' in international law, their choice was almost a foregone conclusion.

Thus, on 27 October, the Court held Poland in contempt for violating the Court's standstill order regarding Poland's latest judicial 'reforms' and for causing, thereby, 'serious and irreparable harm' to the fundamental rights of EU citizens (*Commission v Poland*, C-204/21 R, paragraph 58). Only the day before, the Court told an EU citizen (an investor from a Member State) that it had no way out of the 'lacuna' of the Polish legal order, because in the EU's constitutional structure only Polish courts (if necessary, with the assistance of the Court of Justice through the preliminary reference procedure), and not independent arbitral tribunals, may decide disputes regarding alleged breaches by Poland of fundamental rights of EU citizens (*PL Holdings*, C-109/20, paragraph 68).

Through its ruling in *PL Holdings*, the Court therefore re-confirmed its position as the ultimate arbiter of the interpretation and application of EU law and closed the door shut on 'ad hoc' arbitration agreements, whose fundamental purpose was to allow the continuation of international arbitration proceedings between EU Member States and investors under Bilateral Investment Treaties (BITs), outside the EU's constitutional structure.

However, the Court's ruling is as important for what it did not hold as for what it did – and despite being another nail in the coffin of traditional Intra-EU ISDS, the ruling may mark another step by the Court towards a fuller protection of fundamental rights within the EU legal order.

What the Court held in *PL Holdings*

As has been previously explained, *PL Holdings* originates from a preliminary reference from a Swedish court dealing with an action for the annulment of an arbitral award rendered under an Intra-EU BIT.

While we know, since *Achmea* (C-284/16), that Intra-EU BITs may not serve as the jurisdictional basis for arbitration proceedings between EU Member States and investors, the arbitration proceedings in *PL Holdings* were different, because the respondent (Poland) did not raise a timely objection against the arbitral tribunal's jurisdiction based on the alleged incompatibility of the Intra-EU BIT's arbitration clause with EU law.

There was thus an arguable case that by entering an appearance before the arbitral tribunal, Poland consented to the jurisdiction of the arbitral tribunal and an ('ad hoc') arbitration agreement was formed between Poland and the claimant (an EU investor), independently of the arbitration clause contained in the applicable Intra-EU BIT. Indeed, under EU law, a defendant entering an appearance before a Member State court, without objecting to its jurisdiction, is generally considered to have acquiesced to such court's jurisdiction.

However, the Court of Justice rejected such approach by looking at the 'fundamental reason' for the 'ad hoc' arbitration agreement that had allegedly been entered between Poland and the EU investor and finding that the only reason for such arbitration agreement was to replicate the effects of an arbitration clause in an Intra-EU BIT that was precluded by EU law, per the Court's *Achmea* ruling (*PL Holdings*, paragraph 48).

This is the fundamental premise of the Court's reasoning in *PL Holdings* and every other explanation given by the Court flows from such premise. An arbitration agreement that is invalid under *Achmea* remains invalid regardless of the form in which it manifests itself, and regardless of whether such invalidity benefits a Member State who had breached EU law not only by maintaining in force Intra-EU BITs, but also by failing to raise EU law as a defence when it had the opportunity of doing so in the arbitration proceedings (*PL Holdings*, paragraphs 51-52).

Thus, the thousand-year principle *nemo auditur propriam turpitudinem allegans* (no one may benefit from her wrong) must heed to the constitutional principles of mutual trust, sincere cooperation and autonomy of EU law, even when they are invoked by an EU-law breaching Member State against a private party whose fundamental rights are in jeopardy (*PL Holdings*, paragraph 46).

What the Court did not hold in *PL Holdings*

The Court did not follow the Advocate General's opinion and neither did it hold that *all* arbitration agreements between EU Member States and investors are invalid. The Court thereby avoided the over-extension of its *Achmea* jurisprudence to investor-state arbitration agreements unrelated to Intra-EU BITs.

To briefly recap, in her Opinion, AG Kokott had proposed that individual arbitration agreements between EU investors and Member States

concerning the 'sovereign application of EU law' were compatible with EU law only if Member States could 'comprehensively' review the resulting investor-state arbitral awards for their compatibility with EU law. However, the AG's approach would have been unworkable for several reasons.

First, the AG's distinction between the 'sovereign' and non-sovereign application of EU law appears nebulous and potentially debatable in every agreement that is entered between an EU investor and a Member State. Second, with the possible exception of a single Member State, EU Member States' legal systems do not appear to allow the 'comprehensive' review of arbitral awards, making it even less clear under precisely what conditions the AG's approach would have been applicable. And third, even if there were Member States allowing the comprehensive review of arbitral awards, the AG's approach would have required the courts of those Member States to potentially decide (in the context of their comprehensive EU law review of Intra-EU arbitral awards rendered against other Member States) whether other Member States had breached EU law. Aside from the obvious political implications, this could have interfered with the Court's exclusive competence to decide applications against Member States for breach of EU law (Article 259 TFEU). In sum, the AG's approach would have decreased legal certainty regarding the scope of the Court's *Achmea* jurisprudence.

Instead of following the AG's opinion, the Court took a focused approach and made it clear that its ruling only applied to arbitration agreements that had been specifically entered into to replace arbitration clauses in Intra-EU BITs that were precluded by EU law (*PL Holdings*, paragraphs 37, 47, 65 and 67). The Court thereby confirmed that it was not extending *Achmea* to arbitration agreements between EU Member States and investors made outside the context of Intra-EU BITs.

This is a welcome development, as there are tens of thousands of such agreements (including, for example, in concession and licensing contracts), which are essential for the development and proper functioning of the internal market.

What next in the protection of Intra-EU investment?

While the Court of Justice avoided over-extending *Achmea* and protected its autonomy, it admittedly left an EU investor in a 'lacuna' only with a promise to 'cooperate' in the settlement of any future litigation that the investor may bring before Polish courts, after the investor's 180 million US dollars arbitral award had been annulled at the direction of the Court (*PL Holdings*, paragraphs 55 and 68).

However, the Court's promise may appear of dubious value to an investor in a Member State that is seeking to curtail uncomfortable preliminary references, and which is currently accruing 1.5 million euros in penalties *per day*, for failing to comply with binding rulings of the Court.

Although it is not only upon the Court to remedy the rule of law situation in recalcitrant Member States, the Court must make full use of its powers to assist all EU citizens, including investors, in

obtaining redress before Member State courts for the violation of their fundamental rights. Otherwise, the 'full effectiveness of Community rules would be impaired' (*Francovich*, paragraph 33).

As investment rights may be expressed in terms of EU internal market and fundamental rights law, it would be in keeping with the Court's best traditions to strengthen the protection of those rights within the EU's constitutional structure and thereby enable EU citizens, including investors, to exercise the 'vigilance' required to uphold the rule of law in the Member States (*van Gend & Loos*, page 13). At the very least, this would allow the Court to live up to its promise in *PL Holdings*, to 'cooperate' with EU citizens and investors in finding their way out of legal black holes. Better than just telling them '*C'est la vie*', before the last station. Right?

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