Investment arbitration under intra-EU BITs: Recent developments in Eureko v. Slovakia

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Investment arbitration under intra-EU investment treaties has been a controversial topic for years. The European Commission has repeatedly expressed the view that arbitration clauses in bilateral investment treaties between EU Member States are in conflict with EU law and therefore inoperative, while arbitral tribunals have, on several occasions, assumed jurisdiction on the basis of such treaties. The question has now been addressed – apparently for the first time – by a state court of an EU Member State: on 10 May 2012, the Frankfurt Court of Appeals handed down its decision in *Eureko v. Slovakia* (case no. 26 SchH 11/10; the decision is available (in its original German version) online at www.italaw.com). The Frankfurt court held that arbitration provisions contained in intra-EU bilateral investment treaties do not conflict with EU law and that investors can therefore continue to bring claims against the host state on the basis of such provisions.

In the past, the European Commission had adopted the position that investment arbitration contravened EU law and that arbitration provisions in intra-EU investment treaties were superseded by the accession of new Member States to the EU (see Christophe von Krause's post on this subject here). As a result, there were some doubts as to the jurisdiction of arbitral tribunals acting under investment treaties between EU Member States. In particular, the Commission argued that investment arbitration under bilateral investment treaties would lead to unjustified discrimination and thus breach art.18 TFEU: in fact, only investors from one of the treaty states would benefit from investment protection, while investors from other EU Member States would not. Moreover, the Commission feared that investment arbitration may hinder enforcement of EU law: in particular, it could prevent relevant questions of EU law being submitted to the ECJ under art.267 TFEU because arbitral tribunals cannot make references to the ECJ for preliminary rulings. The position of the European Commission is explained more fully in two communications, extracts of which are cited in *Eastern Sugar v. Czech Republic*, Partial Award, 27 March 2007, paras 119, 126 (the award is available online at www.italaw.com).

So far, the Commission's concerns have met with little sympathy in the arbitration world. The arbitral tribunals in *Eastern Sugar* and *Eureko* have held that BIT arbitration clauses are neither superseded or otherwise restricted by EU law (*e.g., Eastern Sugar v. Czech Republic*, Partial Award, 27 March 2007; *Eureko v. Slovakia,* Award on Jurisdiction, 26 October 2010) or assumed jurisdiction without even addressing the compatibility of intra-EU investment arbitration with EU law (*Eureko v. Poland*, Partial Award, 19 August 2005; *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction of 24 September 2008). This approach has now been confirmed by the Frankfurt Court of Appeals. In that case, the government of Slovakia had challenged the jurisdiction of the arbitral

tribunal in the investment arbitration brought by Eureko. The tribunal had dismissed the challenge by a separate award. Under the German provision corresponding to art.16(3) of the UNCITRAL Model Law (§ 1040(3) of the German Code of Civil Procedure), Slovakia applied to the Frankfurt court as the court at the seat of the arbitration to decide on the arbitral tribunal's jurisdiction.

The Frankfurt Court of Appeals held that Slovakia's challenge was unfounded. In the view of the court art.344 TFEU only applies to EU Member States. It therefore does not prohibit investment arbitration between a private investor and an EU Member State. In particular, the need to apply and interpret EU law does not require replacing BIT arbitration with litigation before national courts. In fact, the ECJ has no "monopoly" on the application of EU law: all courts in the Member States are tasked with applying and implementing EU law, and even where they refer a question of EU law to the ECJ under art.267 TFEU, the ECJ only interprets EU law while it remains the task of the national courts to apply and implement the ECJ's ruling. The decision of the ECJ in *Eco Swiss* (Case C-126/97 *Eco Swiss China Time Ltd. v. Benetton International NV* [1999] E.C.R. I-3055) also shows that arbitral proceedings and arbitral awards are not exempt from review with regard to compliance with EU law: in fact, Member State courts may review awards in setting aside proceedings and, in that context, they may refer questions of EU law to the ECJ under art.267 TFEU. Moreover, arbitral tribunals may already in the course of the arbitral proceedings request courts of the Member States to refer issues to the ECJ.

The Frankfurt Court of Appeals also saw no violation of art.18 TFEU which prohibits discrimination of EU citizens by Member States. According to the court it may well be that a situation where an EU Member State agrees to arbitrate investment disputes only in favour of investors from certain EU Member States (i.e. the states with which it has a bilateral investment treaty) is a breach of art.18 TFEU because this would discriminate against the investors from those EU Member States which have not entered into an investment treaty with the host state. However, in the view of the court, a potential breach of art.18 TFEU would not render arbitration provisions in investment treaties invalid: in fact, invalidity of the arbitration provisions would frustrate the legitimate expectations investors had when making their investment decision on the basis of the assumption that investment arbitration would be available. Rather, art.18 TFEU would oblige the host state to make investment arbitration available to investors from all EU Member States, whether a BIT is in place or not.

As the Frankfurt Court of Appeals saw no conflict with the EU treaties, it held that art.30(3) VCLT did not invalidate the BIT arbitration clause either (the government of Slovakia had dropped a previous argument based on art.59 VCLT, but the conclusion would arguably remain the same). The court also held that the award did not violate the principle of "mutual trust" between the Member States because arbitration was a widely recognised mechanism for dispute resolution and therefore implied no disrespect for state courts.

The decision is certainly to be welcomed as it confirms the availability of investment arbitration and protects investors and their legitimate expectations. It will be interesting to see whether investors will test the suggestion of the Frankfurt Court of Appeals that art.18 TFEU requires an EU Member State that has a bilateral investment treaty with another EU Member State to make investment protection available to investors from all other EU Member States as well. For the time being, much will depend on the outcome of the appeal to the German Supreme Court (*Bundesgerichtshof*): an appeal is pending (case no. III ZB 37/12), as a court of last instance the *Bundesgerichtshof* is bound to refer the matter to the ECJ.