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## Is there Room to Hope for Non-Treaty-Based ISDS in the EU? Remarks on AG Kokott's Opinion in Case C-109/20 Poland v. PL Holdings

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Many have long [feared that](#) the end of intra-EU BIT arbitration brought about by Achmea would soon be followed by the end of contract-based intra-EU ISDS. Although Advocate General (AG) Kokott's recent [Opinion in Case C-109/20 Poland v. PL Holdings](#) allows for a glimmer of hope for non-treaty-based investment disputes, a closer reading of the Opinion reveals that this fear may in fact be justified.

### Background

On 4 February 2020, the Supreme Court of Sweden [requested a preliminary ruling](#) from the CJEU on whether Articles 267 and 344 TFEU require it to set aside an arbitral award rendered in a dispute between an EU Member State and an EU investor where the Member State was found to have consented to the arbitration proceeding through its conduct, due to its belated objection to jurisdiction (Case No. T 1569-19, see [here](#) and on this blog [here](#)). This question arose in the setting aside proceedings commenced by Poland in Sweden against the PL Holdings awards ([here](#) and [here](#)) that had been rendered on the basis of the BLEU-Poland BIT in the summer of 2017 and awarded close to 180 million EUR in compensation for the forced sale of the investor's shareholding in a Polish bank.

The Stockholm Court of Appeal accepted that [Achmea](#) rendered Poland's consent to arbitration contained in the BLEU-Poland BIT invalid but found that Poland's belated EU law objection to the tribunal's jurisdiction in the arbitration (raised for the first time some 1.5 years after the proceedings had begun) could be understood as new and valid consent to arbitrate. The Stockholm Court therefore [refused to set aside](#) the challenged awards (Svea Court of Appeal, Cases T 8538-17 and T 12033-17, 22 February 2019). Poland appealed these findings to the Supreme Court of Sweden, which sent a reference for a preliminary ruling to Luxembourg.

### The Kokott Opinion

In answering the Swedish Supreme Court's question, AG Kokott begins by recalling the CJEU's

finding in *Achmea* – that investor–State arbitration provisions in a BIT between Member States is incompatible with EU law – and applies the three-prong test developed by the CJEU:

First, the AG points out that although the PL Holdings tribunal did not apply EU law, the dispute was nevertheless an “EU law dispute” because EU law applied to the case as part of Polish law. In such cases, there is a risk that the arbitral award will fail to have regard to EU law and will result in an infringement of EU law.

Second, the AG notes that arbitral tribunals are not part of the EU judicial system and are not entitled to make a reference for preliminary ruling. Individual arbitration agreements therefore allow EU law disputes to be removed from the EU judicial system in the same way as arbitration agreements formed on the basis of an offer to arbitrate contained in intra-EU BITs.

Third, according to the AG, the risk that arbitral awards will infringe EU law can be countered only if Member State courts can “comprehensively verify compliance with EU law and refer the matter to the Court if necessary”. Although the AG accepts that only the Swedish courts can assess whether Swedish law allows for such “comprehensive” review of arbitral awards, she finds it “doubtful” that Swedish law does. In this regard, the AG notes that if an award infringes EU law, the full effectiveness of EU law cannot be ensured by infringement proceedings or claims for compensation because they are “relatively cumbersome” proceedings.

The AG then discusses the CJEU’s case law on commercial arbitration, which accepts the limited review of commercial awards for their compliance with EU law, and the distinction drawn by the CJEU in *Achmea* between commercial arbitration, which is permissible under EU law, and intra-EU BIT arbitration, which is not. She recalls that, according to *Achmea*, commercial arbitration between private parties “originates in the freely expressed wishes of the parties”, adding that in commercial arbitration, not only the “arbitration agreement but also the disputed legal relationship itself ... is based on the autonomous will of the parties” who “operate on an equal footing”.

Applying these criteria to the case at hand, the AG finds that the PL Holdings dispute is not a commercial dispute between parties on an equal footing, but one where “there can be no question of free will” because it relates to the exercise of “sovereign measures for enforcing EU law” by the Polish authorities. Therefore, the exemption allowed for commercial arbitration in *Achmea* is inapplicable to the PL Holdings case.

The Kokott Opinion further states that individual arbitration agreements between Member States and investors must be compatible with the principle of equal treatment and confirms that the temporal effect of *Achmea* is not limited.

AG Kokott concludes that individual arbitration agreements between investors and Member States concerning the “sovereign application of EU law” are compatible with Articles 267 and 344 TFEU only if national courts can comprehensively verify the award’s compliance with EU law and refer the matter to the CJEU if necessary.

## Remarks

Against the need for greater clarity and certainty on the contours of permissible intra-EU investment arbitration following *Achmea*, the Kokott Opinion may perhaps come as a

disappointment. While identifying the precise implications and consequences of the Opinion will require more time, the following preliminary remarks can be made.

First, any dispute involving a Member State is an “EU law dispute”, and a non-treaty-based arbitration agreement (whatever its form) concluded with the Member State to settle that dispute will have to comply with Articles 267 and 344 TFEU. Recent attempts by the arbitration community to limit the reach of *Achmea* to intra-EU BIT disputes in which EU law was part of the applicable law or the tribunal in fact applied EU law may therefore be futile.

Second, arbitrations involving Member States do not automatically qualify as “commercial” merely because they arise on the basis of an individual arbitration agreement rather than a treaty. Therefore, they do not automatically come under the commercial arbitration exemption confirmed in *Achmea*. In order to qualify as commercial, they must arise from the “free will” of the parties operating on an “equal footing”. It is regrettable that the AG hangs on to the – rather unconvincing – distinction drawn by the CJEU between commercial and investment arbitration based on the parties’ “free will”. Not only is “free will” a philosophical concept rather than a legal criterion, but contrary to the CJEU’s and AG Kokott’s finding, Member States do exercise “free will” both when they conclude BITs containing offers to arbitrate and when they enter into non-treaty-based arbitration agreements. The AG’s new “equal footing” criterion is equally unconvincing (and surprisingly naïve). Furthermore, it is also unclear why the alleged risk of undermining the uniform application of EU law is acceptable if it is based on the “free will” of “equal parties” but unacceptable otherwise. It is perhaps for these reasons that the AG adds that arbitrations involving “sovereign measures for enforcing EU law” are in any event not “commercial”. By defining such “sovereign measures” very broadly, the Opinion may be seen as casting doubt over the Member States’ ability to enter into arbitration agreements that will automatically qualify as “commercial” and thus as compatible with EU law.

Third, for such non-treaty-based arbitrations over “sovereign measures for enforcing EU law” to comply with Articles 267 and 344 TFEU, the resulting award must be open to “comprehensive” review by the Member State courts as to its compatibility with EU law. This is so, *inter alia*, because infringement proceedings are ineffective and cumbersome and cannot ensure compliance with EU law, according to the AG. It is noteworthy that in the aftermath of *Achmea*, the [Commission attempted to reassure EU investors](#) that in the absence of intra-EU BITs their cross-border investments will be protected by EU law which will be enforced via such infringement proceedings. It is unclear what the AG means by “comprehensive” review of arbitral awards, although she seems to suggest that the Swedish courts should have comprehensively examined the compatibility of the PL Holdings awards with EU law of their own accord, including by reviewing the correctness of the tribunal’s application of the Polish banking supervision rules derived from EU law. The limited review of non-ICSID awards under Member States’ arbitration laws excludes the review of awards on their substance, and ICSID awards are exempt from review by Member State courts altogether. The AG has left it to the Swedish Supreme Court to decide whether the review of awards allowed for under Swedish law is comprehensive enough to ensure their compliance with EU law (rather than deciding that it is not, as the CJEU did in *Achmea* in respect to German law). Therefore, if the CJEU follows the Kokott Opinion in this regard, and the Swedish Supreme Court answers the question in the affirmative, there may be grounds to hope that at least a narrow category of intra-EU ISDS proceedings will survive *Achmea*.

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