# Kluwer Arbitration Blog

## State Aid Unravels Everything: The ??t (Quite) Binding Effect of Energy Arbitration in Greece

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In a recent judgment of the General Court (the "GC") in joined cases – T-639/14 RENV, T-352/15 and T-740/17, the question of the clash between EU law (in this case, state aid legislation) and arbitration was discussed. Not surprisingly, from an EU law standpoint, the EU Courts once again found that in case of such clash, EU law shall prevail.

**The Background**

The specific cases reached the GC following a complaint of «??????? ?????????? ???????????» – DEI (the Greek, at the time State-owned, energy production enterprise) to the European Commission ("the Commission"), according to which the fixing of energy prices by the "permanent arbitration of RAE" (RAE stands for «?????????? ???? ?????????» – Regulatory Authority of Energy) was violating state aid legislation of the EU.

A type of cases that reach the permanent arbitration of RAE is about setting prices of invoices of power production in Greece, following a joint request of the parties involved. The relevant process essentially involves two steps: (a) under its decision 692/2011, RAE, acting as an administrative body, has set the general principles for the setting of such prices, which (b) are further specified by RAE arbitral tribunals that are provided for under art. 37 of law 4001/2011, following a request of the parties involved to this effect. In this instance, the RAE tribunal operates as a judicial body. This means that the arbitral tribunal will have the final say in the fixing of such prices, despite the fact that the aforementioned functions (administrative on the one hand, and judicial on the other) are considered (and should be) separate, independent and unaffected by each other.

The GC addressed the matter under the spectrum of the EU law on state aid. The related question was whether the arbitral tribunal of RAE, when fixing electricity tariff in the above sense, must be classified as a body exercising a power coming within the scope of public authority rights and powers. In its core, the question is whether this *particular* arbitral tribunal should be treated as an ordinary state court within the meaning of art 267 TFEU, given that in that case its decision would be revisited under the state aid legislation of the EU by the Commission which has the general power to this effect and eventually by the GC. In order for the GC to address this issue, it considered the nature, the context in which the tribunal's activity takes place, its objective and the rules to which it is subject, according to which its decisions may be challenged before the State

courts, have the force of *res judicata* and are enforceable. The GC found that this arbitration tribunal could be treated in the same way as an ordinary State court.

As described in the GC's press release on the case:

> "… in view of the division of powers between national courts and the Commission in the monitoring of State aid, national courts are themselves liable to disregard their obligations under Articles 107(1) and 108(3) TFEU and, in so doing, to make possible or perpetuate the granting of unlawful aid, or even to become the instrument of such aid, this being a matter which comes within the scope of the Commission's supervisory power."

In this respect, the GC found that the Commission failed to carry out a review as to whether a state measure which was not notified but which was challenged by a complainant, such as the fixing of that price, came within the definition of State aid. Essentially such a review requires complex economic assessments, relating, in particular, to how consistent this price is with normal market conditions. However, the GC found that the Commission delegated those assessments to the Greek courts (RAE arbitration tribunal), while disregarding its own supervisory duty.

**Discussion of the Judgment**

Obviously, for the GC, the issue at stake is an EU law one. However, as it was very eloquently said some twenty years ago by L. Idot (2001 Revue Critique de droit international privé, 115-116, comments on C-381/98, Ingmar/ Eaton) sometimes the EU courts —much like M. Jourdain, the Bourgeois Gentilomme, who was speaking prose for forty years without being aware of it— touch upon points of law that are not necessarily, and strictly speaking, EU law ones. This can be explained given the special "political" role of EU Courts regarding the interpretation and uniform application of EU law. However, this way it ends up mingling with other fields of law, in a way that the legal reasoning of certain judgments seems insufficient, or even wrong. The counter (or even reverse) argument on this would be that the various fields of law are not "leakproof" and for that reason the EU courts need to ensure that EU law's effectiveness is not undermined in favour of non-EU law considerations.

From an arbitration perspective though, it is clear that the judgment does raise eyebrows. The specific issue that it addresses is whether the RAE arbitral tribunal should be treated as a state court and not as an independent arbitral body. The General Court concluded that the RAE arbitral tribunal has, in this instance, the status of a state court. To reach this conclusion, it actually used two criteria. The first is the organizational criterion, according to which the RAE arbitration is a public body in the sense that it does not operate completely independently but (i) it replaces the state courts; (ii) the arbitrators are chosen among the persons listed in a special catalogue of RAE; (iii) the relevant provisions of the Code of Civil Procedure ("CCP") of Greece apply in this respect; (iv) the decisions of the tribunal are legally binding and have enforcing effect; and (v) its decisions

can be appealed before the competent Court of Appeal of the territory of the place of arbitration (points 150-158 of the judgment). The second is the functional criterion, according to which the RAE arbitration is the one that actually fixes the prices of energy sold to the client by the state-owned energy enterprise (point 229).

While the second "functional" argument seems rather convincing, given that the fixing of the prices in a specific contractual agreement presupposes the intervention of the tribunal which finalizes the fixing of prices process, and under the circumstances (joint request of the parties to RAE to have prices fixed) is an absolutely necessary step to this effect, the first ("organizational") is less convincing. This is so, since the points 150-158 of the judgment essentially apply to any type of institutional arbitration. The arbitral tribunal replaces the court ones, special catalogues exist under most institutional arbitrations (albeit not under all of them), in particular in Greece, the relevant provisions of CCP (arts 867-903) apply in all domestic arbitrations (Greece still has the dual system in arbitration), all awards are subject to appeal for formal reasons under the CCP – comparable to the ones of the law on international arbitration (law 2735/1999) based on the 1985 UNCITRAL model law. Evidently, if this enumeration of criteria were to be followed in the future, we should be navigating in unchartered waters. The organic criterion should not therefore be construed as decisive in the labeling of the RAE arbitral tribunal as "state court".

Going back to state aid law, it is more than evident that the Commission has the general competence in relation to state aid cases. However, to the extent that the Commission has the final saying in the above sense, this will practically mean that any arbitral award touching upon state aid questions can be indirectly "appealed" before the Commission. This clearly undermines the effectiveness of arbitration in this specific filed of law. Of course, in our case, the RAE arbitration tribunal was construed by the General Court as a state court. On the basis of this argumentation, the General Court has not intervened with the independence of an arbitral tribunal as such, given that, in the General Court's appraisal, this is not one…

This judgment is not a standalone one, when it comes to arbitration in the EU. The emblematic *Achmea (C-284/16)* (see for Blog's coverage here) needs no discussion, other than it has literally displaced investment arbitration from intra EU member states cases. In the past, EU courts have on more occasions limited the effectiveness of arbitration in the EU. This was, for example, the case done in the *Dorsch Consult (C-54/96)*, case where the, then called, European Court of Justice ( ECJ) found that in case that an arbitral tribunal has a binding jurisdiction, and the award issued is also binding (although the distinction between the two was not elaborated in the judgment), such tribunal should be treated as state court. Furthermore, and in the *Ascendi* (C-377/13) case, where a Portuguese fiscal arbitral tribunal was again treated as a state court in the context of a request to the ECJ, for a preliminary ruling to the ECJ, since it operates as a direct alternative to the state courts under the Portuguese Constitution and the related award is equally binding. The legal basis for these judgments is art. 267 of the Treaty for the Functioning of the EU, whereby the title granted to a court/ tribunal by national law is irrelevant and the important criteria for labelling them under an EU law perspective, are organizational and functional.

In this sense, the discussion about the clash of EU law and arbitration is ongoing, with the EU courts seemingly willing to pursue a clear pro-EU law approach.

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