

EU General Court Reaffirms Obligation of National Courts to Review Arbitral Awards' Compliance with EU Competition Law



On 2 February 2022, the EU General Court reaffirmed that EU national domestic courts were bound to annul arbitral awards that did not comply with European Union competition law (Case T-616/18, *Polskie Górnictwo Naftowe i Gazownictwo v Commission*). This judgment of the EU General Court is a confirmation of the well-established case-law of the Court of Justice of the European Union (the **CJEU**) in *Eco Swiss* (Case C-126/97, *Eco Swiss*).

Facts

The case at hand resulted from competition law proceedings initiated by the European Commission (the **EU Commission**) regarding alleged abuses of dominant position (in particular unfair pricing policy) by the Russian gas company *Gazprom* in certain Member States of the European Union.

In a Statement of Objections of 22 April 2015, the EU

Commission had come to the provisional conclusion that *Gazprom* was dominant on the markets for the upstream wholesale supply of natural gas in eight Central and Eastern European Member States (the CEE countries), namely in Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia and that *Gazprom* in particular had engaged in an overall strategy of fragmenting and isolating the CEE gas markets and restricting the free flow of gas across CEE in order to maintain higher prices in five of those CEE countries.

In order to address the shortcomings identified by the EU Commission and to bring the investigation to an end, *Gazprom* made a number of commitments which were rendered binding in a decision of the EU Commission (the ***EU Commission's Decision***) of 24 May 2018.

Among those commitments, *Gazprom* had agreed to allow customers in the five CEE countries which were affected by *Gazprom* unfair pricing policies to trigger a renegotiation of their gas prices if those prices diverged from certain benchmarks. If within 120 days of the request for price renegotiation, *Gazprom* had not agreed to revise prices in accordance with those benchmarks, the customers were entitled to refer the matter to binding arbitration. Importantly, in order to oblige the arbitral tribunals to respect and apply EU competition law as a matter of public policy irrespective of the private interest of the parties to the arbitration, the commitments required that the arbitration proceedings take place within the European Union. In addition, the EU Commission, as the guardian of EU law, could intervene as *amicus curiae* in the arbitration proceedings, especially if the arbitration concerned a matter covered by the EU Commission's Decision.

Legal proceedings and decision of the EU General Court

Following the adoption of the EU Commission's Decision, a Polish firm active in the oil and gas sector (the ***Claimant***),

brought an action for annulment before the EU General Court, arguing, among other things, that the EU Commission's Decision infringed the EU energy legislation and policy and that the commitments proposed by *Gazprom* were insufficient and incomplete.

Whilst the substantive issues in this case (which mainly relate to the application of EU competition law) will not be examined in this contribution, the decision at hand provides an interesting confirmation of the CJEU's case-law in *Eco-Swiss*.

More specifically, the Claimant argued that the EU Commission's Decision erroneously assumed that arbitral tribunals, were bound to apply EU competition law to a dispute pending before them just by virtue of being seated in the EU. According to the Claimant, such assumption was incorrect since arbitral tribunals themselves do not have a duty to apply and comply with substantive EU law. Only national courts seized of a request for annulment of an arbitral award must control the application of EU public policy provisions.

The EU General Court acknowledged that arbitral tribunals were not, as such, bound by EU competition law. However, the EU General Court recalled that, as the CJEU ruled in *Eco Swiss*, Articles 101 and 102 of the Treaty on the Functioning of the EU (the **TFEU**), which govern EU competition law, were public policy provisions within the meaning of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. Consequently, EU national domestic courts were bound to apply Articles 101 and 102 of the TFEU of their own motion and to uphold an application for annulment if they consider that an award is contrary to these provisions. This, according to the EU General Court, is likely to lead arbitral tribunals to ensure that their awards comply with Articles 101 and 102 of the TFEU.

Following the same reasoning, the EU General Court held that

EU national domestic courts were also entitled to annul an arbitration award where they find that the arbitral award violates a commitments decision adopted in order to implement Article 101 and 102 of the TFEU.

As a result, the EU General Court considered that, despite its rather poor wording, the EU Commission's Decision did not contain errors of law in stating that, if *Gazprom* did not comply with the binding commitments, a dispute could be referred to arbitration, which should take place within the EU in order to oblige "*arbitral tribunals to respect and apply EU competition law as a matter of public policy*".

The judgment of the EU General Court is available in French [here](#).

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