

CPI EU News Presents:

The Effectiveness of European Competition Law After *Opinion 1/17*

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Introduction

On April 30, 2019, the Court of Justice of the European Union (“CJEU”) issued *Opinion 1/17*² on the Comprehensive Economic and Trade Agreement (“CETA”) which the EU and its Member States intend to conclude with Canada.³ The Opinion was requested by Belgium, one of the EU’s 28 Member States, as a condition to agreeing to sign CETA in 2016. Requests for Opinions are a special procedure before Europe’s supreme judicial authority aimed at avoiding future complications from the possible conflict between the European treaties and international agreements concluded by the EU.⁴

General description of *Opinion 1/17*

Opinion 1/17 concerns the Investor-State Dispute Settlement (“ISDS”) mechanism included in CETA. Among other things, CETA provides for non-discriminatory treatment and investment protection for Canadian citizens and businesses investing in the EU and for European citizens and businesses investing in Canada.⁵ In case a Canadian investor considers that the EU or its Member States breach these obligations (or an EU investor that Canada breaches these obligations), it can bring proceedings before an arbitral tribunal and the latter can award monetary damages to the investor.⁶

The Belgian State had expressed doubts over the compatibility of the ISDS mechanism with EU law. First of all, Belgium wondered whether the existence of such a mechanism did not jeopardize the exclusive jurisdiction the CJEU has over the interpretation of EU law. Second, it questioned whether the right for a Canadian citizen investing in the EU to bring a claim before a tribunal while such a right was denied to an EU citizen investing in the EU, was in accordance with the general EU principle of equal treatment. Third, Belgium raised concerns about the right of access to an independent tribunal under CETA due to the financial costs of bringing proceedings before the arbitral tribunal and concerns over its independence.

The Court rejected all these concerns, just like its Advocate General had done in his advisory opinion in January 2019.⁷ The Court, first of all, pointed out that CETA is carefully drafted and provides that the arbitral tribunal under the ISDS mechanism may only consider the domestic law of the signatories as a matter of fact and will not have jurisdiction to determine the legality of a measure under domestic law.⁸ Contrary to other international treaties on which the CJEU issued an opinion in the past, the CETA arbitral tribunal would therefore not need to interpret EU law. Second, the CJEU rejected any doubts as regards a breach of the general principle of equal treatment since it considered that Canadian investors in the EU are not in the same situation as EU investors in the EU (since the former are international investors and the latter are not) and that therefore they do not need to be treated equally. Finally, the CJEU assessed the setup of the CETA arbitral tribunal and did not consider that it raised any concerns as regards accessibility and independence.

Opinion 1/17 on the effectiveness of EU competition law

In the context of its doubts as to the application of the general principle of equal treatment, the Belgian government also pointed to the risk that such different treatment might undermine the effectiveness of European competition law. This would be the case if the CETA arbitral tribunal would award damages to a Canadian investor (or a European business it owns) to compensate it for a fine imposed by the European Commission or a competition authority of an EU Member State for an infringement of competition law. Such damages compensating the fine would, of course, undermine the deterrent effect of such a fine.

Like its Advocate General, the Court of Justice dismissed these doubts summarily. It pointed out that both Canada and the EU explicitly “recognise the importance of free and undistorted competition in their trade relations” and “acknowledge that anti-competitive business conduct has the potential to distort the proper functioning of markets and undermine the benefits of trade liberalisation.”⁹ CETA even requires the parties to it to “take appropriate measures to proscribe anti-competitive business conduct.”¹⁰ The CJEU concluded that an arbitral award in favor of a Canadian investor in the EU is therefore “unimaginable where the competition rules have been correctly applied by the Commission or by a competition authority of a Member State.”¹¹

The CJEU pointed out that, under CETA, an arbitral award for a Canadian investor in the EU due to a fine imposed by the Commission or a competition authority of a Member State for infringement of competition law is only possible in case the decision to impose the fine did not constitute fair and equitable treatment or deprived the investor of one of the fundamental attributes of property in its investment. Also, an EU investor would have legal remedies available to ensure the annulment of such a fine, according to the Court. The CJEU concluded that:

while it is not inconceivable that, in exceptional circumstances, an award by the CETA Tribunal ... might have the consequence of canceling out the effects of a fine that has been imposed because of an infringement [of European competition law], the effect of that award will not, however, be to create a situation of unequal treatment to the disadvantage of an EU investor on which a fine vitiated by a similar defect has been imposed.¹²

Is the unimaginable not inconceivable?

The Court considers that it is “not inconceivable” that an arbitral award would compensate an investor for a fine for an infringement of European competition law, but that such an award is nevertheless “unimaginable” if European competition law has been correctly applied. How likely is it that such a situation arises?

In the related field of State aid, it already happened. The European State aid rules provide that EU Member States cannot grant selective advantages to undertakings which may distort competition and affect trade between the Member States.¹³ In 1998, prior to its accession to the EU in 2007, Romania granted certain investors in disfavored regions a series of incentives. These incentives were repealed in 2004 in the lead-up to

Romania's accession to the EU as being contrary to the EU's State aid rules. A few Swedish investors which, in the meantime, had made investments in Romania subsequently brought proceedings under a bilateral investment treaty concluded between Sweden and Romania and an arbitral tribunal at the end of 2013 awarded damages to the tune of close to 800 million Romanian leu. However, the European Commission considered that the payment of these damages by the Romanian State to the investors would constitute new State aid and therefore prohibited the payment of the award and required the State to obtain reimbursement of the amounts already paid.¹⁴ Meanwhile, the Commission has announced that it will bring proceedings before the CJEU because of Romania's failure to fully recover the aid amount.¹⁵

In the meantime, the CJEU has ruled that EU law precludes bilateral investment treaties between EU Member States which allow citizens from one Member State to bring proceedings against the Member State in which they invest before arbitral tribunals.¹⁶ And CETA also specifically provides that the CETA arbitral tribunal cannot require the compensation of an investor for the EU (or Canada) "discontinuing the grant of a subsidy or requesting its reimbursement,"¹⁷ such that the State aid rules may be outside of the investor protection envisaged by CETA.

The competition rules are not. In those circumstances, it is possible, for example, that the CETA tribunal comes to a different conclusion as to the fair and equitable treatment of an investor in a competition investigation handled by the European Commission or a competition authority in an EU Member State (or by the Canadian authorities for that matter). While the CJEU's "unimaginable" may be used by the EU and its Member States to contest a claim for unfair or inequitable treatment in a competition investigation which has been upheld by all judicial authorities in the EU, it will be the CETA arbitral tribunal which will ultimately decide on this.

The CETA ISDS mechanism has become the model for other investment treaties the EU is concluding, including with Mexico, Singapore, and Vietnam. Indeed, it is the stated ambition of CETA to establish a multilateral investment tribunal which could adjudicate claims between investors and states. A claim for damages compensating for a fine for a competition infringement may therefore arise sooner rather than later.

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² Opinion 1/17, *Request for an opinion by the Kingdom of Belgium*, ECLI:EU:C:2019:341.

³ OJ L 11, 14.01.2017, p. 23.

⁴ The legal basis for such requests for opinion can be found in Article 218(11) of the Treaty on the Functioning of the European Union (“TFEU”).

⁵ CETA, Chapter Eight, Sections C and D.

⁶ CETA, Articles 8.18.1 and 8.39.

⁷ Opinion of AG Bot in case Opinion 1/17, *Request for an opinion by the Kingdom of Belgium*, ECLI:EU:C:2019:72.

⁸ CETA, Article 8.31.

⁹ CETA, Article 17.2.1, quoted in Opinion 1/17, *Request for an opinion by the Kingdom of Belgium*, ECLI:EU:C:2019:341, para. 185. See also the Opinion of AG Bot in case Opinion 1/17, *Request for an opinion by the Kingdom of Belgium*, ECLI:EU:C:2019:72, para. 216.

¹⁰ CETA, Article 17.2.2, quoted in the Opinion of AG Bot in case Opinion 1/17, *Request for an opinion by the Kingdom of Belgium*, ECLI:EU:C:2019:72, para. 216, but not by the CJEU itself.

¹¹ Opinion 1/17, *Request for an opinion by the Kingdom of Belgium*, ECLI:EU:C:2019:341, para. 185.

¹² Opinion 1/17, *Request for an opinion by the Kingdom of Belgium*, ECLI:EU:C:2019:341, para. 186.

¹³ Article 107 TFEU.

¹⁴ Commission decision of March 30, 2015 in case SA.38517 (2014/C) (ex 2014/NN) implemented by Romania - Arbitral award Micula v. Romania of December 11, 2013.

¹⁵ Commission press release of December 7, 2018, “State aid: Commission refers Romania to Court for failure to recover illegal aid worth up to €92 million” (IP/18/6723).

¹⁶ C-284/16, *Slovak Republic v. Achmea*, ECLI:EU:C:2018:158.

¹⁷ CETA, Article 8.9.4.