Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 22 April 2021 [1]

Case C-109/20

Republic of Poland
v
PL Holdings Sàrl

(Request for a preliminary ruling
from the Högsta domstol (Supreme Court, Sweden))

(Request for a preliminary ruling – Investment Treaty of 1987 between Poland, Luxembourg and Belgium – Provision enabling an investor from one contracting party to bring proceedings before an arbitration tribunal in the event of a dispute with the other contracting party – Inapplicability of that arbitration clause – Arbitration agreement – Entering of an appearance without raising an objection – Applicability – Compatibility with Articles 267 and 344 TFEU – Autonomy of EU law)

I. Introduction

1. In the judgment in *Achmea*,[2] the Court ruled that arbitration clauses in favour of investors in investment treaties between Member States are incompatible with Articles 267 and 344 TFEU and must therefore be disapplied. What are the consequences, however, if a Member State does not invoke the invalidity of the arbitration clause before the award is made? A Swedish court concluded from this, in the context of examining the validity of an arbitration award, that the Member State concerned had entered into an arbitration agreement for the dispute in question on an *ad hoc* basis by entering an appearance in the arbitration proceedings without raising an objection. However, the Högsta domstol (Supreme Court, Sweden) has doubts as to whether this approach is compatible with the abovementioned judgment and has therefore referred the matter to the Court.

[1] Original language: German.

[2] Judgment of 6 March 2018 (C-284/16, EU:C:2018:158; 'the judgment in *Achmea*').

II. Legal background

A. Investment treaty between Poland, Luxembourg and Belgium

2. On 19 May 1987, Poland, of the one part, and Luxembourg and Belgium, of the other, entered into an investment treaty ('the investment treaty'). The contract entered into force on 2 August 1991. In order to ensure that investors from those States are protected, it provides for the possibility to refer investment-related disputes with the other State to an arbitration tribunal, including the Stockholms Handelskammares Skiljedomsinstitut (Arbitration Institute of the Stockholm Chamber of Commerce, Sweden). In such cases, the arbitration tribunal is to apply, inter alia, the law of the State which is party to the dispute and in which the investment was made. Its decisions are to be final.

B. Swedish Law on arbitration proceedings

3. The request for a preliminary ruling sets out the relevant provisions of the lagen (1999:116) om skiljeförfarande (Law No 116 of 1999 on arbitration proceedings; 'the Law on arbitration proceedings') as follows.

4. Under Paragraph 1 of the Law on arbitration proceedings, disputes which the parties may be able to settle may be submitted by agreement to the decision of one or more arbitrators.

5. Arbitration proceedings are to be based on the arbitration agreement. The latter is based on the parties' entitlement to reach a settlement concerning the subject matter of the dispute. Paragraph 1 of the Law on arbitration proceedings provides that disputes in which public interest is more marked are to be excluded from arbitration. It may also follow from specific legislative provisions that a dispute on a particular issue may not be submitted to arbitration.

6. Under point 1 of the first subparagraph of Paragraph 34 of the Law on arbitration proceedings, an arbitration award on appeal by a party is to be annulled, in whole or in part, if it is not covered by a valid arbitration agreement between the parties.

7. In accordance with the second subparagraph of Paragraph 34 of the Law on arbitration proceedings, however, it follows that a party is not entitled to rely on a fact which he or she, by participating in the proceedings without objection, or by any other conduct, may be regarded as having refrained from raising.

8. In accordance with point 1 of the first subparagraph of Paragraph 33 of the Law on arbitration proceedings, an arbitration award is to be void if it involves the examination of a question which, under Swedish law, may not be decided by arbitrators. Under point 2 of the first subparagraph of Paragraph 33, an arbitration award is also to be void if it, or the manner in which it was arrived at, is manifestly incompatible with the Swedish legal order. The court must raise the grounds of invalidity of its own motion.

9. Under Swedish law, the conclusion of an arbitration agreement is not subject to any condition as to form. The question of whether or not a valid arbitration agreement has been concluded must be assessed in the light of the general rules of contract law. A valid arbitration agreement may result, for example, from the collusive conduct of the parties or the inertia of one of the parties.

III. The facts and the request for a preliminary ruling

A. The investment dispute

10. PL Holdings Sàrl is a limited company registered in Luxembourg and subject to Luxembourg law.

11. Between 2010 and 2013, PL Holdings acquired shares in two Polish banks which merged in 2013. PL Holdings eventually held more than 99% of the shares in the new bank.

12. In July 2013, the Komisja Nadzoru Finansowego (Financial Market Commission, Poland), an authority under Polish law which is responsible for supervising banks and credit institutions in Poland, decided to revoke PL Holdings' voting rights in that bank and ordered it to divest its shares in that bank. It took the view that PL Holdings exerted an adverse impact on the bank's sound and prudent management. [3]

B. The arbitration proceedings

13. PL Holdings subsequently brought arbitration proceedings against Poland before the Stockholms Handelskammares Skiljedomsinstitut (Arbitration Institute of the Stockholm Chamber of Commerce) on the basis of the investment treaty. Poland set out its position by written observations of 30 November 2014.

14. On 7 August 2015, PL Holdings filed an action. In its defence, which it lodged on 13 November 2015, Poland claimed that PL Holdings could not be regarded as an investor within the meaning of the investment treaty and that, consequently, the arbitration tribunal did not have jurisdiction to hear the case. By a submission of 27 May 2016, Poland also challenged the validity of the arbitration clause on the ground that the investment treaty did not comply with EU law.

15. In a separate arbitration award of 28 June 2017, that is to say, before the judgment in *Achmea* was delivered on 8 March 2018, the arbitration tribunal rejected, inter alia, the objection that the arbitration clause was invalid. It stated that that objection, although raised belatedly, is of fundamental importance for the arbitration proceedings. However, Poland's accession to the EU did not have the effect of rendering the investment treaty invalid under international law. [4]

16. Moreover, in the separate arbitration award, the arbitration tribunal had already found that Poland had breached the investment treaty by ordering the sale of the shares held by PL Holdings in the Polish bank. According to those findings, the supervisory authorities had behaved inconsistently [5] and prevented effective legal protection against the supervisory measures. [6] PL Holdings was therefore entitled to damages. [7]

3 Partial Award, *PL Holdings S.à.r.l.* v *Republic of Poland* (V 2014/163, paragraph 189).

4 Partial Award, *PL Holdings S.à.r.l.* v *Republic of Poland* (V 2014/163, paragraph 306 et seq.).

5 Partial Award, *PL Holdings S.à.r.l.* v *Republic of Poland* (V 2014/163, in particular paragraphs 229, 234 and 418 et seq.).

6 Partial Award, *PL Holdings S.à.r.l.* v *Republic of Poland* (V 2014/163, paragraphs 408 and 444).

7 Partial Award, *PL Holdings S.à.r.l.* v *Republic of Poland* (V 2014/163, paragraph 318 et seq.).

17. On 28 September 2017, the arbitration tribunal made a final award. The arbitration award ordered Poland to pay the sum of 653 639 384 zlotys (PLN) (approximately EUR 150 million), together with an amount of interest, to PL Holdings and to pay the company's costs of the arbitration proceedings. [8]

C. The judicial proceedings

18. Poland subsequently brought an action against PL Holdings before the Swedish courts in which it sought to have both the separate and final award annulled. Poland continued to claim, in particular, that the arbitration clause of the investment treaty was invalid owing to an infringement of EU law.

19. The Svea Hovrätt (Court of Appeal, Stockholm, Sweden) dismissed Poland's action. According to that court, although the arbitration clause of the investment treaty is invalid in accordance with the judgment in *Achmea*, that invalidity does not prevent a Member State and an investor from concluding an arbitration agreement in respect of the same dispute at a later stage. In such a case, that arbitration agreement is one which is based on the common intention of the parties and concluded in accordance with the same principles as commercial arbitration proceedings. The judgment in *Achmea* did not specifically preclude the permissibility of such agreements, however. In the present case, the agreement came about because Poland appeared in the proceedings without raising the objection that the arbitration clause was invalid in due time.

D. The request for a preliminary ruling

20. Poland's appeal has now been brought before the Högsta domstol (Supreme Court), which puts the following question to the Court of Justice:

'Do Articles 267 and 344 TFEU, as interpreted in [the judgment in] *Achmea*, [9] mean that – where an investment agreement contains an arbitration clause that is invalid as a result of the fact that the contract was concluded between two Member States – an arbitration agreement is invalid if it has been concluded between a Member State and an investor by virtue of the fact that the Member State, after arbitration proceedings were commenced by the investor, refrains, by the free will of the State, from raising objections as to jurisdiction?'

21. PL Holdings and the Republic of Poland, as parties to the main proceedings, and the Czech Republic, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, Hungary, the Kingdom of the Netherlands, Poland, as a Member State, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the European Commission submitted observations in the present proceedings, first in writing and then at the hearing on 15 March 2021.

[8] Final Award, *PL Holdings S.à.r.l.* v *Republic of Poland* (V 2014/163).

[9] Judgment of 6 March 2018 (C-284/16, EU:C:2018:158).

IV. Legal assessment

22. The Högsta domstol (Supreme Court) wishes to ascertain whether the findings in the judgment in *Achmea* also preclude an individual arbitration agreement (see Section A). In that context, it is necessary to consider the importance of the case-law on the compatibility of commercial arbitration with EU law (see Section B) and the principle of equal treatment (see Section C). In addition, I will examine, by way of an alternative view, the influence of the form of the presumed agreement, namely the Member State's waiver of the right to assert the arbitration tribunal's lack of jurisdiction by means of an objection, or, in other words, the entering of an appearance without raising an objection (see Section D). Finally, it is necessary to consider whether the temporal effect of the proposed decision should be limited (see Section E).

A. EU law and arbitration agreements between Member States and investors

23. In the judgment in *Achmea*, the Court held that Articles 267 and 344 TFEU preclude a provision in an international agreement concluded between Member States under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitration tribunal whose jurisdiction that Member State has undertaken to accept. [10]

24. The judgment in *Achmea* concerned a general provision that permitted recourse to an arbitration tribunal in certain cases. In contrast, the question to be decided in the present case is whether Articles 267 and 344 TFEU preclude an individual arbitration agreement between a Member State and an investor.

25. Article 267 TFEU regulates the preliminary-ruling procedure and does not contain explicit rules on arbitration proceedings. In such proceedings, however, the Court would ensure the uniform application of EU law in disputes between Member States and investors before national courts by interpreting that law in an ultimately binding manner.

26. This is because the Treaties established the EU judicial system in order to ensure that the specific characteristics and autonomy of the EU legal order are preserved. In that context, in accordance with Article 19(1) TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law. In particular, the judicial system as thus conceived has as its keystone the preliminary-ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law. That procedure thereby serves to ensure the consistency, full effect and autonomy as well as, ultimately, the particular nature of the law established by the Treaties. [11]

27. Article 344 TFEU guarantees this allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the EU legal system, compliance with which is ensured by the Court. [12] This is because, under that provision, the Member States undertake not to submit a

[10] The judgment in *Achmea* (paragraph 60).

[11] The judgment in *Achmea* (paragraphs 35 to37, with further references).

[12] See judgment of 30 May 2006, *Commission* v *Ireland* (C-459/03, EU:C:2006:345, paragraph 123), and the judgment in *Achmea* (paragraph 32).

dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties. In that context, the interpretation or application of the Treaties covers EU law in its entirety. [13]

28. The Treaties do not provide for any arbitration procedures other than in Article 272 and 273 TFEU. Those provisions establish the Court's competences as an arbitration body, but do not allow for recourse to other arbitration tribunals.

29. Moreover, Article 344 TFEU covers not only the abstract settlement of disputes in general, but also individual disputes. Accordingly, the judgment in *Commission* v *Ireland* concerned Ireland's individual recourse to arbitration in a dispute with the United Kingdom. [14]

30. Accordingly, in the judgment in *Achmea*, the Court took objection to the agreement between two Member States that was the subject matter of those proceedings on the ground that, by virtue of that agreement, they agreed to remove from the system of judicial remedies, which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law. [15] In so far as arbitration tribunals are not entitled to make a reference, they are not part of that system.

31. An individual arbitration agreement between a Member State and an investor can remove disputes concerning the application and interpretation of EU law from the EU judicial system in the same way as a general investment treaty between Member States that provides for the settlement of disputes between a Member State and an investor by way of arbitration. Whether an individual case is removed from the judicial system depends on the specific dispute and not on whether the dispute is brought before an arbitration tribunal under a general investment treaty between Member States or under an individual arbitration agreement between an investor and a Member State.

32. In the present case, the parties, according to their own submissions, are in dispute as to the application of banking supervision rules that arise from EU law, in particular from Article 21(2) of the Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions. [16] PL Holdings also invokes freedom of establishment. Although the Swedish courts would have to examine whether that plausible argument is well founded, it appears, at least according thereto, that the arbitration agreement did in fact concern an EU-law dispute.

33. The arbitration award does not apply the provisions of EU law on banking supervision, [17] but is based on the rules of the investment treaty. Nevertheless, it proceeds on the basis of standards which, in the view taken by the arbitration tribunal, Poland should have observed when

[13] See judgment of 30 May 2006, *Commission* v *Ireland* (C-459/03, EU:C:2006:345, paragraphs 127 and 128).

[14] Judgment of 30 May 2006 (C-459/03, EU:C:2006:345).

[15] The judgment in *Achmea* (paragraph 55). See also Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011 (EU:C:2011:123, paragraph 80).

[16] (OJ 2006 L 177, p. 1), as amended by the Treaty between [the Member States] and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union (OJ 2012 L 112, p. 10). That directive was replaced by Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338), Article 21(2) of Directive 2006/48 becoming Article 26(2) of Directive 2013/36.

[17] Partial Award, *PL Holdings S.à.r.l.* v *Republic of Poland* (V 2014/163, paragraphs 87, 88 and 248), does refer to the framework of EU law, however.

exercising the banking supervision provided for under EU law, for example with regard to proportionality [18] or effective legal protection. [19] While the arbitration tribunal assumes that those standards are in line with EU law, [20] it does not comprehensively examine this question.

34. According to the judgment in *Achmea*, the removal of such a dispute from the EU judicial system by means of an individual arbitration agreement between a Member State and an investor from another Member State would in fact be incompatible with Articles 267 and 344 TFEU. At the very least, it would constitute a circumvention of that judgment, as rightly emphasised by Spain, in particular, but also by Poland, Germany, Hungary, Slovakia and the Commission.

35. The Court has recognised certain arbitration tribunals as courts or tribunals of the Member States within the meaning of Article 267 TFEU and thus as part of the EU judicial system. Those arbitration tribunals have a number of features, such as whether they are established by law, whether they are permanent, whether their jurisdiction is compulsory, whether their procedure is *inter partes*, whether they apply rules of law and whether they are independent. [21] Such arbitration tribunals are therefore entitled to make a reference. The Court has recognised this, for example, in the case of a Danish arbitration tribunal in respect of the interpretation of collective agreements [22] and in the case of Portuguese arbitration tribunals in respect of tax matters [23] or intellectual property. [24] For that reason, their jurisdiction in respect of EU-law disputes does not run counter to Articles 267 and 344 TFEU.

36. The Swedish courts, on the other hand, proceed on the assumption that the jurisdiction of the arbitration tribunal at issue is based on the agreement between the parties, namely an arbitration agreement. There is therefore at least a lack of compulsory jurisdiction. [25] Moreover, the arbitration tribunal, like that at issue in the judgment in *Achmea*, is not part of the judicial system of a Member State and was seised for precisely that reason. [26] The arbitration tribunal in the main proceedings is therefore not part of the EU judicial system either and, in particular, cannot refer doubts concerning EU law to the Court. [27]

37. It is true that the Court regularly derives a threat to the autonomy of EU law from situations in which a body outside the EU system interprets provisions of EU law. [28] That risk would be low if the arbitration tribunal – as appears to be the case here [29] – primarily applies the provisions of an

18 Partial Award, *PL Holdings S.à.r.l.* v *Republic of Poland* (V 2014/163, in particular paragraphs 229, 234 and 418 et seq.).

19 Partial Award, *PL Holdings S.à.r.l.* v *Republic of Poland* (V 2014/163, paragraphs 408 and 444).

20 Partial Award, *PL Holdings S.à.r.l.* v *Republic of Poland* (V 2014/163, paragraph 339).

21 See judgment of 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754, paragraph 23).

22 Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark* (109/88, EU:C:1989:383, paragraphs 7 to 9).

23 See judgment of 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754, paragraphs 28 to 34).

24 Order of 13 February 2014, *Merck Canada* (C-555/13, EU:C:2014:92, paragraphs 19 to 25).

25 See judgments of 23 March 1982, *Nordsee* (102/81, EU:C:1982:107, paragraph 11), and of 27 January 2005, *Denuit and Cordenier* (C-125/04, EU:C:2005:69, paragraph 13).

26 The judgment in *Achmea* (paragraph 45).

27 Judgments of 23 March 1982, *Nordsee* (102/81, EU:C:1982:107, paragraphs 11 to 13), and of 1 June 1999, *Eco Swiss* (C-126/97, EU:C:1999:269, paragraph 34).

28 Opinions 1/91 (EEA agreement – I) of 14 December 1991 (EU:C:1991:490, paragraphs 34 and 35); 2/13 (Accession of the Union to the ECHR) of 18 December 2014 (EU:C:2014:2454, paragraphs 184 and 223 to 231); and 1/17 (EU-Canada CETA) of 30 April 2019 (EU:C:2019:341, paragraphs 123 to 126); and the judgment in *Achmea* (paragraphs 40 to 42).

29 However, Spain rightly points out that, in connection with the determination of its jurisdiction, the arbitration tribunal interpreted Article 344 TFEU in contradiction with the later judgment in *Achmea* (Partial Award, *PL Holdings S.à.r.l.* v *Republic of Poland* (V 2014/163, paragraphs 314 and 315)).

investment protection agreement of Member States under international law. [30] Moreover, contrary to the view taken by Poland, despite the fundamental importance of the principle of proportionality in EU law, the arbitration tribunal also applied that principle not as part of EU law, but because it also applies in other legal systems and in particular in the area of investment protection under international law. [31]

38. Nevertheless, Germany and France rightly state that, under the investment treaty, the arbitration tribunal was required to consider EU law as being, in principle, part of domestic law. In particular, however, there is a risk that the arbitration tribunal will take decisions that will *ultimately* result in an infringement of EU law.

39. Accordingly, in the present case, it cannot be ruled out that the arbitration tribunal misconceived the obligations of the Polish banking supervisory authority under the relevant directive. Moreover, there would be a risk that not only the Polish banking supervisory authority, but also bodies of other Member States, would take the decision of an arbitration tribunal into account in the future application of that EU legislation, especially if the Court has not yet taken a position on that question. This is because the arbitration award could set a precedent and lead to other investors in similar cases being awarded compensation.

40. It is true that both the risk of an infringement of EU law and the risk of divergent interpretation could be limited or even eliminated if compliance with EU law by arbitration awards were comprehensively reviewed by the national courts – where appropriate, after having conducted a preliminary-ruling procedure.

41. In Sweden, point 1 of the first subparagraph of Paragraph 33 of the Law on arbitration proceedings provides that an arbitration award is to be void if it involves the examination of a question which, under Swedish law, may not be decided by arbitrators. Under point 2 of the first subparagraph of Paragraph 33, an arbitration award is also to be void if the manner or manners in which it was arrived at are manifestly incompatible with the Swedish legal order. The court must raise the grounds of invalidity of its own motion. Only the Swedish courts can assess the extent to which those provisions allow for comprehensive enforcement of EU law. This *prima facie* constitutes only a very limited review in the sense of *ordre public*, however, which also corresponds to the standard of review applied by the court of appeal in the main proceedings. [32]

42. The recognition of individual arbitration agreements between Member States and investors from other Member States would therefore create the risk of an infringement of EU law by the arbitration tribunals in so far as the national courts could not ensure that arbitration awards comply with EU law.

B. The case-law on commercial arbitration

43. However, the Court has at least implicitly recognised that the settlement of certain disputes by arbitration is permissible, and has thereby accepted a limited review of compliance with EU law. This related to what is referred to as commercial arbitration.

[30] See Opinion 1/17 (EU-Canada CETA) of 30 April 2019 (EU:C:2019:341, paragraphs 121 to 123).

[31] See, for instance, De Brabandere, E. and da Cruz, P.B.M., 'The Role of Proportionality in International Investment Law and Arbitration: A System-Specific Perspective', *Nordic Journal of International Law*,89(3-4), 2020, pp. 471-491.

[32] See the judgment of the Svea Hovrätt (Court of Appeal, Stockholm) of 22 February 2019, *Poland* v *PL Holdings* (T 8538-17 and T 12033-17, pp. 48 and 49 of the English translation).

44. First, in the judgment of 23 March 1982, *Nordsee* (102/81, EU:C:1982:107), concerning an arbitration procedure, the Court held that the parties to a contract are not free to create exceptions to EU law, because the latter had to be observed in its entirety throughout the territory of the Member States. In that judgment, it emphasised that the national courts may be called upon to examine questions of EU law raised in connection with the arbitration procedure, with the result that they may refer those questions to the Court. [33] Those statements could have been understood to mean that the national courts must comprehensively review compliance with EU law in arbitration proceedings.

45. However, the Court subsequently recognised, in its judgment of 1 June 1999, *Eco Swiss* (C-126/97, EU:C:1999:269), that it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances. The national courts would however have to ensure compliance with fundamental provisions which are essential for the accomplishment of the tasks entrusted to the European Union and, in particular, for the functioning of the internal market. [34]

46. Both approaches therefore allow disputes to be referred to arbitration tribunals for a ruling, although they are unable to ensure the correct and uniform application of EU law through requests for a preliminary ruling under Article 267 TFEU. The more recent ruling even accepts an infringement of EU law by arbitration awards if the provisions concerned are not fundamental in nature.

47. The judgment in *Achmea* distinguishes commercial arbitration between private parties, which is permissible in accordance with that case-law, from the impermissible arbitration between a private party and a Member State on the basis of investment treaties, in that the former originate in the freely expressed wishes of the parties, whereas the latter derive from a treaty between the Member States. [35]

48. As stated by PL Holdings, Luxembourg, Finland and Sweden, an individual arbitration agreement between an investor and a Member State would be permissible on the basis of that distinction. This is because such an agreement also originates in the freely expressed wishes of the parties to the arbitration proceedings. In such a case, it would be permissible to limit the national courts' review of the arbitration award in cases concerning investment protection to compliance with the fundamental rules of EU law.

49. However, Italy is to be agreed with in that the demarcation is not conclusively defined by merely referring to the will of the parties.

50. On the contrary, Advocate General Szpunar recently understood the distinction of commercial arbitration in the judgment in *Achmea* to mean that that judgment only precludes Member States from systematically removing EU-law disputes from the EU judicial system by means of a prior obligation. [36] Such an understanding would also allow the present arbitration agreement.

[33] Judgment of 23 March 1982, *Nordsee* (102/81, EU:C:1982:107, paragraphs 14 and 15).

[34] Judgment of 1 June 1999, *Eco Swiss* (C-126/97, EU:C:1999:269, paragraph 35 et seq.). See also judgment of 26 October 2006, *Mostaza Claro* (C-168/05, EU:C:2006:675, paragraph 35), and the judgment in *Achmea* (paragraph 54).

[35] The judgment in *Achmea* (paragraph 55).

[36] Opinion in *Komstroy* (C-741/19, EU:C:2021:164, points 61 and 62).

51. I am not convinced by this view, nor are a number of the parties concerned. Why should Member States be allowed to remove EU-law disputes from the EU judicial system in individual cases if they are not allowed to enter into a foreseeable general obligation of this kind? In addition to the risks to the uniform application of EU law, there would also be the risk of unequal treatment of different investors. [37]

52. Rather, it is expressly only in relation to *commercial arbitration* that the Court has advanced the argument regarding the autonomy or freely expressed wishes of the parties. Such arbitration relates to disputes between parties operating on an equal footing. In such disputes, it is not only the arbitration agreement but also the disputed legal relationship itself that is based on the autonomous will of the parties.

53. Even in arbitration proceedings in consumer cases, which, at least in practice, are no longer characterised by a level playing field, the Court requires a strict review, conducted of the court's own motion, as to whether the arbitration agreement is effective in the first place. [38]

54. As pointed out by Poland, Italy, Hungary, the Netherlands, Slovakia and the Commission, however, the case in the main proceedings is not a commercial dispute between parties on an equal footing, but relates to the exercise of sovereign powers by Polish authorities. If a private party is subjected to a sovereign measure – *in casu*, banking supervision – there can be no question of free will, at least on the part of that party. For that reason alone, it seems unlikely that a Member State would subsequently enter into an arbitration agreement with the private party in relation to such a measure of its own free will.

55. Above all, however, Member States may not remove disputes relating to the sovereign application of EU law from the EU judicial system. [39]

56. This is because, in accordance with the principle of sincere cooperation enshrined in Article 4(3) TEU, it is the task of all bodies of the Member States to ensure compliance with EU law within the scope of their respective competences. [40] Article 344 TFEU gives concrete expression to that obligation of the Member States. [41] It is not limited to compliance with fundamental rules, but concerns *all* rules of EU law.

57. As a consequence, a structured network of principles, rules and mutually interdependent legal relations which justifies the autonomy of EU law with respect both to the law of the Member States and to international law binds the EU and its Member States reciprocally and binds its Member States to each other. [42]

[37] See also, in this respect, point 66 et seq. below.

[38] Judgments of 26 October 2006, *Mostaza Claro* (C-168/05, EU:C:2006:675, paragraph 39); and of 6 October 2009, *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 59); and order of 16 November 2010, *Pohotovosť* (C-76/10, EU:C:2010:685, paragraph 54).

[39] The Commission also argues that, under Swedish law, sovereign acts by Swedish authorities cannot be removed from the jurisdiction of the national courts. In accordance with the principle of equivalence, Swedish courts would also have to apply that rule to the sovereign acts of other Member States in so far as they are based on EU law.

[40] Judgments of 12 June 1990, *Germany* v *Commission* (C-8/88, EU:C:1990:241, paragraph 13); of 13 January 2004, *Kühne & Heitz* (C-453/00, EU:C:2004:17, paragraph 20); and of 4 October 2012, *Byankov* (C-249/11, EU:C:2012:608, paragraph 64). See also the judgment in *Achmea* (paragraphs 34 and 58).

[41] Judgment of 30 May 2006, *Commission* v *Ireland* (C-459/03, EU:C:2006:345, paragraph 169).

[42] The judgment in *Achmea* (paragraph 33), and judgment of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 45).

58. Private parties who freely submit to commercial arbitration are not subject to those obligations. In particular, Article 344 TFEU does not apply to disputes between private parties. [43] Therefore, despite the risk of an infringement of EU law, it is consistent to permit arbitration proceedings concerning disputes between private parties.

59. In contrast, it is problematic when authorities of the Member States in EU law disputes use an arbitration tribunal which is neither part of the EU system nor subject to comprehensive review by national courts with regard to compliance with EU law. This is because it cannot be ruled out in such cases that the arbitration award will fail to have regard to EU law and will thereby impair its effectiveness. [44]

60. It is true that infringements of EU law resulting from an individual arbitration agreement could give rise to claims for compensation against the Member State concerned or be the subject of infringement proceedings. [45] These forms of enforcement of EU law are relatively cumbersome, however, and therefore cannot ensure its full effectiveness.

61. The Court accepts the risk of an infringement of EU law if the arbitration is based on an agreement between the EU and non-Member States [46] or on old agreements concluded by Member States with *non-Member States* before their accession to the Union, which continue to be effective under Article 351 TFEU. [47] By contrast, EU law takes precedence over international agreements concluded between the Member States. [48] Similarly, it is not compatible with the effectiveness of EU law for Member States to conclude with certain investors individual arbitration agreements in relation to sovereign measures for enforcing EU law, where such agreements create a risk that the arbitration award will infringe EU law.

62. However, the risk of an infringement of EU law can be countered if the courts of the Member States not only review the arbitration award with regard to whether it complies with fundamental provisions of EU law, but comprehensively verify compliance with EU law and refer the matter to the Court if necessary.

63. As already explained, it is doubtful whether Swedish law guarantees such verification. [49] In any event, contrary to the submissions of PL Holdings, the Swedish court of appeal did *not* comprehensively examine the compatibility of the arbitration award with EU law, but only ruled out the existence of a breach of fundamental obligations. In so doing, it confined itself to the question of whether the arbitration agreement was compatible with EU law, without, however, taking a view on the relevant requirements of EU law for banking supervision. [50]

[43] Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011 (EU:C:2011:123, paragraph 63).

[44] See above, point 39.

[45] This differs from the situation in Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011 (EU:C:2011:123, paragraphs 86 and 87).

[46] Opinion 1/17 (EU-Canada CETA) of 30 April 2019 (EU:C:2019:341, paragraph 117).

[47] Judgment of 15 September 2011, *Commission* v *Slovakia* (C-264/09, EU:C:2011:580, paragraph 32).

[48] Judgment of 27 February 1962, *Commission* v *Italy* (10/61, EU:C:1962:2, paragraph 22); of 27 September 1988, *Matteucci* (235/87, EU:C:1988:460, paragraphs 21 and 22); and of 20 May 2003, *Ravil* (C-469/00, EU:C:2003:295, paragraph 37); and also, to that effect, the judgment in *Achmea* (paragraph 58).

[49] See above, point 41.

[50] See the judgment of the Svea Hovrätt (Court of Appeal, Stockholm) of 22 February 2019, *Poland* v *PL Holdings* (T 8538-17 and T 12033-17, pp. 48 and 49 of the English translation).

64. The immunity of the Member States under international law, as emphasised by France, does not preclude a comprehensive review either. It is true that, in principle, State immunity precludes the sovereign acts of one State from being reviewed by the courts of other States. [51] However, the State submitting to arbitration has already waived that immunity where the national law at the seat of arbitration provides for a review of the arbitration award and the sovereign acts at issue.

65. Consequently, individual arbitration agreements between Member States and investors from other Member States concerning the sovereign application of EU law are compatible with the duty of sincere cooperation under Article 4(3) TEU and the autonomy of EU law under Articles 267 and 344 TFEU only if courts of the Member States can comprehensively review the arbitration award for its compatibility with EU law, if necessary after requesting a preliminary ruling under Article 267 TFEU.

C. Equal treatment

66. The Commission also rightly emphasises the right of all investors to equal treatment in the implementation of EU law.

67. The principle of equal treatment is a general principle of EU law which is enshrined in Article 20 of the Charter of Fundamental Rights of the European Union ('the Charter'). It requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment. [52]

68. If some investors were referred to national courts for disputes with the Member State, but others could have recourse to an arbitration tribunal, there would be unequal treatment.

69. If such unequal treatment were based on an investment treaty – *unlike* in the present case – it might be justified by the fact that the contract embodies a balance between the legitimate interests of both sides. [53] Similar considerations could also justify arbitration clauses agreed between a Member State and an international investor as a precondition for the investment or by a Member State in the context of a legal relationship in which the parties are on an equal footing.

70. On the other hand, it is difficult to conceive of a legitimate objective with which a Member State could justify entering into an arbitration agreement with some investors in relation to a dispute that has already arisen, while referring others to the national courts.

[51] See judgment of the International Court of Justice of 3 February 2012, Immunités juridictionnelles de l'Etat (Allemagne c. Italie; Grèce (intervenant)), C.I.J. Recueil 2012, p. 99, paragraphs 55 to 61).

[52] Judgments of 17 October 2013, *Schaible* (C-101/12, EU:C:2013:661, paragraphs 76 and 77), and of 3 February 2021, *Fussl Modestraße Mayr* (C-555/19, EU:C:2021:89, paragraph 95).

[53] Judgment of 5 July 2005, *D.* (C-376/03, EU:C:2005:424, paragraph 62). See also Opinion 1/17 (EU-Canada CETA) of 30 April 2019 (EU:C:2019:341, paragraph 169). See also, however, judgment of 27 September 1988, *Matteucci* (235/87, EU:C:1988:460, paragraph 23).

71. It is ultimately for the national court to examine whether there is any such justification, however.[54] For the purposes of the present proceedings, it is sufficient to note that individual arbitration agreements between Member States and investors from other Member States concerning the sovereign application of EU law must also be compatible with the principle of equal treatment under Article 20 of the Charter.

D. The form of the arbitration agreement

72. Based on the considerations made up to this point, the incompatibility of the arbitration agreement with EU law does not depend upon whether it was concluded in the form of an entering of an appearance in the arbitration proceedings without raising an objection. I will therefore consider the significance of that form only for the event that the Court takes a different view on the points already examined.

73. First, it should be emphasised that recognition of such arbitration agreements can be of considerable practical importance on a temporary basis. This is because it can be assumed that this issue affects many still-pending arbitration proceedings and disputed arbitration awards between Member States and investors from other Member States in which the respective Member States, before the judgment in *Achmea*, did not raise the objection of incompatibility of the arbitration clause of the respective investment treaty with EU law in due time.[55]

74. In the medium term, however, it is to be expected that Member States concerned will raise that objection in good time,[56] if investors initiate such arbitration proceedings in the first place.

75. This practical aspect demonstrates that the recognition of such arbitration agreements concluded by way of an entering of an appearance without raising an objection would temporally limit the effectiveness of the judgment in *Achmea* to a certain extent, namely with regard to certain arbitration proceedings already pending at that time, even though the Court did not address such a limitation in that judgment. However, if the previous considerations do not convince the Court that the compatibility of the present arbitration agreement with EU law is doubtful, the effectiveness of the judgment in *Achmea* will also not be of any decisive importance for the assessment of the form of the arbitration agreement.

76. More generally, contrary to the view taken by Germany and France, EU law does not contain any rule that would prohibit Member States from entering into an arbitration agreement in the form of an entering of an appearance without raising an objection.

[54] Judgment of 3 February 2021, *Fussl Modestraße Mayr* (C-555/19, EU:C:2021:89, paragraph 97).

[55] See, for instance, *Vattenfall AB and Others v. Federal Republic Germany*, Decision on the *Achmea* Issue of 31 August 2018 (ICSID Case No ARB/12/12, paragraph 18). The parties appear to have recently settled that case, however (Federal Government, Government Press Conference of 5 March 2021, and Vattenfall, Press Release of 5 March 2021).

[56] In that regard, 23 Member States signed the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union on 5 May 2020 (OJ 2020 L 169, p. 1).

77. On the contrary, as PL Holdings points out, EU law recognises the concept of an entering of an appearance without raising an objection in various rules that are not applicable in the present case. [57] It is true that France refers to the fact that, in consumer cases, the Court requires courts to examine the validity of an arbitration clause of their own motion even if no objections have been raised. [58] However, there is no need to protect Member States in arbitration proceedings in this manner. Rather, it can be assumed that they are represented in them in a highly professional manner and therefore have sufficient opportunity to raise objections in good time.

78. Since EU law therefore does not regulate this question in respect of the present case, the form of the arbitration agreement has no relevance for its compatibility with EU law.

79. On the other hand, the rules of arbitration organisations highlighted by Sweden are likely to assume a much greater importance before the national courts. However, both the United Nations Commission on International Trade Law (UNCITRAL) [59] and the International Centre for Settlement of Investment Disputes (ICSID) [60] provide that parties may no longer rely on objections that they did not raise without undue delay. Nevertheless, Hungary emphasises that during the negotiations for the ICSID Convention, the Contracting States assumed that the jurisdiction of the arbitration tribunal has to be established at the time of its constitution and cannot be established subsequently. [61]

E. Limitation of the temporal effect

80. PL Holdings requests, lastly, that the temporal effect of the judgment in the present case be limited in the event that the Court declares individual arbitration agreements to be incompatible with EU law. At the very least, arbitration proceedings that are already pending and thus, *a fortiori*, those that have been concluded should not be affected.

81. The interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the date of its entry into force. [62] It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict the opportunity, open to any person concerned, of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties. [63]

[57] See, for instance, Article 5 of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ 2009 L 7, p. 1) or Article 26 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1). See also judgments of 14 December 1995, *van Schijndel and van Veen* (C-430/93 and C-431/93, EU:C:1995:441, paragraph 21), and of 27 February 2014, *Cartier parfums-lunettes and Axa Corporate Solutions assurances* (C-1/13, EU:C:2014:109, paragraphs 34 and 36 and the case-law cited).

[58] See judgment of 26 October 2006, *Mostaza Claro* (C-168/05, EU:C:2006:675, paragraphs 36 to 39).

[59] Article 4 of the Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.

[60] ICSID Convention – Articles 27 and 41 Rules of Procedure for Arbitration Proceedings.

[61] To that end, Hungary cites Schreuer, C.H. et al., *The ICSID Convention – A Commentary*, Cambridge University Press, 2nd Edition, 2009, Article 25, paragraph 481. However, see also paragraph 498.

[62] Judgments of 6 March 2007, *Meilicke and Others* (C-292/04, EU:C:2007:132, paragraph 34), and of 23 April 2020, *Herst* (C-401/18, EU:C:2020:295, paragraph 54).

[63] Judgments of 6 March 2007, *Meilicke and Others* (C-292/04, EU:C:2007:132, paragraph 35), and of 23 April 2020, *Herst* (C-401/18, EU:C:2020:295, paragraph 56).

82. However, the answer to the request for a preliminary ruling proposed here merely requires that the compliance of the arbitration award with EU law be subject to comprehensive judicial review. The good faith of those concerned cannot be based on the expectation that EU law is not fully enforced, however. For that reason alone, a limitation of the temporal effect is precluded.

83. In addition, a limitation of the temporal effect may be allowed only in the actual judgment ruling upon the interpretation sought. There must necessarily be a single occasion when a decision is made on the temporal effects of the requested interpretation, which the Court gives of a provision of EU law. In that regard, the principle that a restriction may be allowed only in the actual judgment ruling upon that interpretation guarantees the equal treatment of the Member States and of other persons subject to EU law, under that law, fulfilling, at the same time, the requirements arising from the principle of legal certainty. [64]

84. In the present case, the essential requirements already follow from the judgment in *Achmea*, the temporal effect of which was not limited by the Court. Moreover, the unrestricted permissibility of arbitration agreements on the basis of late objections regarding the competence of the arbitration tribunal would temporarily deprive that judgment of its practical effect. [65] This is another reason why it is not possible to limit the temporal effect of the judgment to be delivered in the present proceedings.

V. Conclusion

85. I therefore propose that the Court give the following ruling:

Individual arbitration agreements between Member States and investors from other Member States concerning the sovereign application of EU law are compatible with the duty of sincere cooperation under Article 4(3) TEU and the autonomy of EU law under Articles 267 and 344 TFEU only if courts of the Member States can comprehensively review the arbitration award for its compatibility with EU law, if necessary after requesting a preliminary ruling under Article 267 TFEU. Such arbitration agreements must furthermore be compatible with the principle of equal treatment under Article 20 of the Charter of Fundamental Rights of the European Union.

[64] Judgments of 6 March 2007, *Meilicke and Others* (C-292/04, EU:C:2007:132, paragraphs 36 and 37), and of 23 April 2020, *Herst* (C-401/18, EU:C:2020:295, paragraph 57).

[65] See above, point 73.