

Award for Alleged Violation of State Aid Rules

March 12, 2015

On 11 December 2013, a tribunal of the International Centre for Settlement of Investment Disputes (“ICSID”) held that Romania had breached the fair and equitable treatment standard of the Sweden-Romania Bilateral Investment Treaty (“BIT”), when it repealed certain incentives introduced for the purpose of encouraging investment, including the investment of claimants.

Although Romania had argued that the cut of the incentives were contrary to EU state law, the ICSID tribunal held that because the state had reassured claimants that the incentives would be secured, Romania was liable under the BIT (Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20).

In the course of the ICSID arbitration, the EC had appeared as *amicus curiae*, informing the ICSID tribunal that rewarding damages for the termination of the incentives would be equivalent to reinstating an incompatible aid scheme in violation of state aid rules. According to the EC, this would constitute new state aid, which could only be granted if approved by the EC. The ICSID tribunal, nonetheless, proceeded with the rendering of the award in favour of claimants and ordering Romania to pay USD 116 million in damages. Following the ICSID tribunal’s award, Romania partially implemented the award by offsetting the damages Romania had been ordered to pay against taxes owed by claimants. The EC informed Romania that the execution of the ICSID award would constitute new aid and would have to be notified to the EC pursuant to Article 108(3) of the Treaty on the Functioning of the European Union (“TFEU”).

Accordingly, the EC issued an injunction to prevent Romania from fully complying with the award. Recently, the EC reinstated its position in an announcement of the EU’s official journal dated 7 November 2014 and the fact that it had already initiated a formal investigation procedure in relation to the measure as set out in Article 108(3) of the TFEU. Moreover, the EC invited interested parties to submit comments on the formal investigation procedure. EC’s “interference” with Romania’s obligation to enforce the ICSID award under international treaties may be considered by some to be contrary to the sovereign right of states, including EU states, to enter into BITs for the protection of foreign investments through the means of international arbitration. The fact remains, however, that such right needs to be assessed from the point of view that EU states have an obligation to comply with EU law, hence, the EC’s invitation for further comments on the matter.

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ADVOCATES - LEGAL CONSULTANTS

According to the EC, any interested parties have one month as of 7 November 2014 to submit their comments, which will be communicated to Romania. The ICSID Award and the EC's invitation of 7 November 2014 are available online.

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