

## **EUROPEAN COMMISSION BLOCKS EXECUTION OF AN ICSID ARBITRATION AWARD ON STATE AID GROUNDS**

*Micula & Ors v Romania*, ICSID Case No.ARB/05/20 (Commission decision 26/5/14)

### **Introduction**

Where actions by a Member State are thought to be in breach of the European Union’s rules on State aid, the European Commission (“the Commission”) is empowered to undertake a formal investigation, as set out in Article 108 of the Treaty on the Functioning of the European Union (“TFEU”). The Commission is now undertaking such an investigation regarding tax incentive measures concerning Swedish investments in Romania that were the subject of an arbitration award in *Micula & Ors v Romania*, ICSID Case No.ARB/05/20.

### **Legal Framework**

Article 107(1) TFEU prohibits measures of Member States that constitute State aid. A measure will constitute State aid where:

- (a) the measure confers a selective economic advantage;
- (b) the measure is imputable to the State and financed through State resources;
- (c) the measure distorts or threatens to distort competition;
- (d) the measure has the potential to affect trade between Member States.

### **Background**

Prior to 2004, Romania operated a series of tax incentives for certain Swedish investors in economically challenged regions. On 31 August 2004, Romania repealed these tax incentives following complaints from the Romanian Competition Council that these incentives distorted competition and amounted to incompatible State aid schemes. Furthermore, Romania was under an obligation to remove schemes that infringed the European Union’s State aid rules in line with the terms of the European Union’s Common Position that regulated Romania’s compliance with the European Union’s accession criteria. Some Swedish investors (“the Claimants”) were thus deprived of their incentives, which included:

- (a) exemptions from payment of customs duties and VAT on equipment, tools and other goods used for the purpose of making investments in the relevant region;
- (b) refunds of customs duties paid on raw materials and other components necessary for achieving the investor’s own production in the relevant region; and
- (c) exemptions from payment of profit tax during the period of time when the relevant region was designated as being economically challenged.

## **The Arbitration**

In July 2005, the Claimants submitted a request for ICSID arbitration to decide disputes relating to breach of their legitimate expectations that the incentives would run until at least 2009, and violation of the obligation of fair and equitable treatment owed to Swedish investors under the Romania-Sweden Bilateral Investment Treaty (“BIT”).

On 19 June 2009, the Commission was given permission to intervene in the arbitration proceedings. The Commission submitted that the incentives were incompatible with the European Union’s rule on regional aid and that any ruling by the Tribunal that reinstated those privileges would lead to the granting of new aid which would also be incompatible.

On 11 December 2013, the Tribunal (Dr Laurent Levy, President, Dr Stanimir Alexandrov and Professor Georges Abi-Saab) gave its Award by which it ordered Romania to pay €82 million as damages for its failure to ensure a fair and equitable treatment of the claimants’ investments in violating of the Romania-Sweden BIT.

Romania has sought the annulment of the Award pursuant to Article 52 of the ICSID Convention. Those proceedings are ongoing.

## **The Commission’s Actions following the Award**

By way of a letter dated 31 January 2014, the Commission services informed Romania that any implementation of the Award would constitute new State aid and would have to be notified to the Commission.

By way of a letter dated 20 February 2014, Romania informed the Commission that the award had already been partially implemented by offsetting the awarded damages against the claimants’ tax debts.

By way of a letter dated 26 May 2014, the Commission informed Romania of its decision to issue a suspension injunction obliging Romania to suspend any action which may lead to the implementation of the outstanding parts of the Award as such implementation would constitute unlawful State aid.

By way of a letter dated 1 October 2014 (as reported in the Official Journal of the European Union), the Commission notified Romania that that a formal investigation would be commenced. In relation to the Award, it concluded:

- (a) the five claimants form one economic unit, which is engaged in economic activities and constitutes an undertaking for the purpose of Article 107 TFEU;
- (b) the execution of the Award would grant the claimants an economic advantage not otherwise available on the market, in particular by relieving the claimants of some of their ordinary operating expenses;
- (c) the presence of an advantage is not precluded by the fact that the Award obliges Romania to pay “damages” because compliance with obligations arising out of an intra-EU BIT cannot frustrate the primacy of EU law;
- (d) the implementation of the Award would constitute “new aid”;
- (e) there are serious doubts that the implementation of the Award can be declared compatible with the internal market pursuant to the Regional Aid Guidelines for 2007-2013 and to the

Regional Aid Guidelines for 2014-2020 or on the basis of any other ground of compatibility.

The claimants have initiated court proceedings in Romania and the United States of America for the enforcement of the Award.

On 2 September 2014, the claimants brought an action for annulment of the Commission's decision before the General Court of the European Union, on the grounds that the Commission did not have the competence to make its decision, and made manifest errors of law and assessment in coming to its decision.

### **Concluding Remarks**

This is the first time the Commission has intervened to restrain the enforcement of an Arbitration Award on the grounds that its implementation would breach the EU's rules on State aid.

It remains to be seen whether the eventual enforcement of the Award (within and outside the EU) is impaired or prevented by this measure.

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