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Outlawing Compliance? - The Enforcement of intra-EU Investment Awards and EU State Aid Law Christian Tietje and Clemens Wackernagel

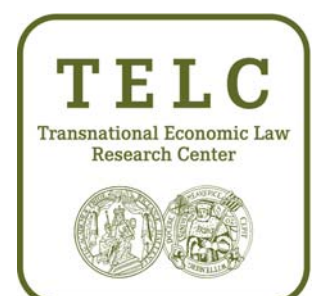
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The Enforcement of intra-EU Investment Awards and EU State Aid Law

Introduction

The relationship between intra-EU investment agreements and EU law is notoriously difficult, and much has been written on the subject (most recently: August Reinisch, “The EU on the Investment Path – Quo vadis Europe? The Future of EU BITs and other Investment Agreements”, 12 *Santa Clara Journal of International Law* (2014), 111 – 157, with further references). So far, the debate evolved mainly around the question whether and how EU law ought to influence an investment tribunal’s determination of its own jurisdiction. Since tribunals have generally upheld their jurisdiction, there is hardly any doubt that, notwithstanding academic discussion, intra-EU investment awards do indeed exist. As such, however, they are but a piece of paper. Only their recognition and enforcement by domestic courts in countries where the respondent state has seizable assets can make a wronged investor whole. Therefore, it does not come as a surprise that EU Member States in their role as respondents in investment arbitrations start opening up the enforcement stage of investment awards as an added line of defense against intra-EU investment arbitration.

In *Micula*, Romania, aided by the European Commission which intervened as *amicus curiae*, argued that “any payment of compensation arising out of

this Award would constitute illegal state aid under EU law and render the Award unenforceable within the EU.” (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. AR-B/05/20, Final Award of December 11, 2013, para. 330 et seq.). The Tribunal, however, did not find it “desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered, especially but not exclusively when it comes to enforcement matters” (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. AR-B/05/20, Final Award of December 11, 2013, para. 340 et seq.). Instead, the tribunal summarily referred to Articles 53 and 54 of the ICSID Convention, according to which any award rendered in ICSID proceedings shall be binding, recognized and enforced without review by domestic courts.

Disregarding whether the approach adopted by the *Micula* tribunal is persuasive or not, it is likely that Romania and the European Commission’s argumentation regarding state aid will be picked up in future intra-EU investment arbitrations. Because awards must ultimately be enforced within an EU Member State, it is of utmost importance both for investors and responding states to understand what role EU state aid law plays in this respect.

Our answer to this question is the proverbial lawyerly “it depends” – and here it depends on two notable factors. The kind of measure found by the investment tribunal to violate the rele-

vant investment agreement plays a role, as does the kind of arbitration proceeding initiated by the investor.

We will argue that enforcement of an intra-EU investment award does not, as a general rule, constitute illegal state aid under Article 107 of the Treaty on the Functioning of the European Union (TFEU), (I.). However, depending on the concrete circumstances of the case, enforcement can constitute illegal state aid if the measure found to violate the investment agreement consisted of repealing a legal regime that itself constituted illegal state aid, (II). Domestic courts may embark on scrutinizing an award with regard to these questions only if the award has not been rendered by an ICSID tribunal, (III.).

I. The General Rule: Enforcement of intra-EU awards does not constitute State Aid

Article 107 TFEU states that “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.” Applying the article, the Court of Justice of the European Union (CJEU) and the European Commission require that the “aid granted by a Member State or through State resources in any form whatsoever” be granted *voluntarily*. According to the CJEU and the European Commission, a contribution by a Member State is *involuntary*, and ac-

ordingly does not constitute state aid when the state repays charges that have been improperly levied, when the state is obliged to pay damages, and when the state pays compensation for expropriation.

Concerning the repayment of charges, the CJEU held in *Denkavit* (Case 61/79, ECR 1980):

„29 By referring in its questions to Article 92 of the Treaty [Art. 107 TFEU], the national court asks in substance whether the passing on by traders of national charges improperly levied in the conditions described by that court should not be considered to be an aid within the meaning of Article 92 of the Treaty and therefore incompatible with Community law. [...]

31 This provision [Art. 107 TFEU] thus refers to the decisions of Member States by which the latter, in pursuit of their own economic and social objectives, give, by unilateral and autonomous decisions, undertakings or other persons resources or procure for them advantages intended to encourage the attainment of the economic or social objectives sought. It does not apply to a duty to pay or repay sums which are caused by the fact that those sums were not payable by the person who paid them. It follows from this that a national tax system which enables the taxpayer to contest

or claim repayment of tax does not constitute an aid within the meaning of Article 92 of the Treaty. [...]

32 It is therefore necessary to reply to the questions on the interpretation of Article 92 of the Treaty that the duty of the authorities of a Member State to repay to taxpayers who apply for such repayment, in accordance with national law, charges or dues which were not payable because they were incompatible with Community law does not constitute an aid within the meaning of Article 92 of the EEC Treaty.” (Case 61/79, ECR 1980, 1205).

On the payment of damages, the CJEU held in *Asteris* (Joint Cases 106 to 120/87, ECR 1988):

„21 In its third question the national court asks in substance whether any damages which the Greek State might be ordered to pay to the undertakings concerned in compensation for damage resulting from the technical error in the Community legislation should be regarded as aid within the meaning of Articles 92 and 93 of the EEC Treaty, and whether Regulation No 381/86 precludes an action for damages by the undertakings concerned against the Hellenic State.

22 With regard to the first part of the third question, it should be noted that the prohibition of State aid laid down in the first paragraph of Article 92

of the EEC Treaty covers all aid granted by a Member State or through State resources to undertakings (judgment of 22 March 1977 in Case 78/76 *Steinike und Weinlig v Federal Republic of Germany* [1977] ECR 595) and therefore concerns State interventions which might have the effect of distorting the normal conditions of trade between Member States (judgment of 10 October 1978 in Case 148/77 *Hansen v Hauptzollamt Flensburg* [1978] ECR 1787).

23 It follows that State aid, that is to say measures of the public authorities favouring certain undertakings or certain products, is fundamentally different in its legal nature from damages which the competent national authorities may be ordered to pay to individuals in compensation for the damage they have caused to those individuals.

24 It must therefore be stated in reply to the first part of the third question that damages which the national authorities may be ordered to pay to individuals in compensation for damage they have caused to those individuals do not constitute aid within the meaning of Articles 92 and 93 of the EEC Treaty. (Joint Cases 106 to 120/87, ECR 1988, 5539 et seq.).

Regarding compensation for expropriation the European Commission decided in *ThyssenKrupp*:

„Compensation granted by the State for an expropriation of assets does not normally qualify as State aid. In the assessment of this measure, it is therefore necessary to ascertain first of all whether the transfer of Società Terni’s hydropower assets to ENEL gave rise to an obligation to provide compensation, or whether it should be construed as a mere reorganisation of public assets. If the answer is that compensation was justified, the Commission must then determine until what date and/or what amount the Terni preferential tariff can be considered a commensurate compensatory measure.” (Commission Decision of 20 November 2007 on the State aid C 36/A/06 (ex NN 38/06) implemented by Italy in favour of ThyssenKrupp, Cementir and Nuova Terni Industrie Chimiche, OJ EC No. L 144/37, para. 70).

The enforcement of an intra-EU investment awards is comparable to the legal situation in *Denkavit*, *Asteris* and *ThyssenKrupp*. Accordingly, it should be treated the same. All of these cases concerned a Member State’s domestic provision according to which the state was obliged to make payments to a wronged company for otherwise illegal state action. In *Denkavit*, the state levied charges that were illegal under EU law. Under its domestic law, the state was obliged to repay illegal charges. The CJEU found the domestic obligation to repay such charges in conformity with EU law. The same is true for

the law of state liability for damages in *Asteris*. The expropriation in *ThyssenKrupp* was not as such illegal, but compensation constituted a necessary requirement for its legality.

Accordingly, the situation in all of these cases involved a domestic obligation to compensate private actors in case the state acted illegally or potentially illegally. The overarching principle of these decisions is that EU law does not prevent Member States from adopting domestic provisions under which the state shall make compensation, if it infringes upon otherwise legally protected interests of private actors. In such cases, the payment is not voluntary and accordingly does not constitute state aid under Article 107 TFEU.

The legal situation in case of an investment award is comparable to the legal situation in the instances cited above. The sole difference is that the obligation to pay compensation does not stem from domestic law but from international law. This fact, however, does not justify treating the situations differently. If an EU Member State is allowed to oblige itself to pay compensation under certain circumstances in domestic law, then it must be able to do so as well by international law. Moreover, a Member State is free to incorporate into or adopt as domestic law every obligation usually found in investment agreements. In that case, the principles of *Denkavit*, *Asteris* and *ThyssenKrupp* would be directly applicable. Thus, there is no reason to apply different principles on obligations to compensate based in international law.

In sum, and save for the exceptions discussed below, enforcement of an investment award does not constitute illegal state aid under Article 107 TFEU because the payment of compensation is involuntary.

Article 107 TFEU further requires that the payment is a government measure and attributable to the state. The CJEU held in *Deutsche Bahn AG v. Commission* (Case T-351/02, ECR II - 1047) that:

„99 Article 87(1) EC states that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall be incompatible with the common market, in so far as it affects trade between Member States.

100 That provision thus refers to the decisions of Member States by which, in pursuit of their own economic and social objectives, they give, by unilateral and autonomous decisions, resources to undertakings or other persons or procure for them advantages intended to encourage the attainment of the economic or social objectives sought (Case 61/79 *Amministrazione delle finanze dello Stato v. Denkavit italiana* [1980] ECR 1205, paragraph 31).

101 Therefore, for advantages to be capable of being

categorised as aid within the meaning of Article 87(1) EC, they must, inter alia, be imputable to the State (see *France v. Commission*, cited above in paragraph 92, paragraph 24, and the case-law cited).

102 That is not the case here. Paragraph 4(1)(3)(a) of the *MinöStG* implements Article 8(1)(b) of Directive 92/81. The Court of Justice has held that the latter provision imposes on Member States a clear and precise obligation not to levy the harmonised excise duty on fuel used for the purpose of commercial air navigation (*Braathens*, cited in paragraph 69 above, paragraphs 30 to 32). In transposing the exemption into national law, Member States are only implementing Community provisions in accordance with their obligations stemming from the Treaty. Therefore, the provision at issue is not imputable to the German State, but in actual fact stems from an act of the Community legislature.” (Case T-351/02, ECR II— 1047).

Accordingly, attribution is excluded insofar as EU Member States have no autonomy regarding implementation of a supranational measure. This principle should also apply to ICSID awards, because by virtue of Article 53 and 54 of the ICSID Convention, no ICSID Member State has any autonomy regarding the recognition and enforcement of ICSID awards. It certainly could be argued that the decisive criterion in *Deutsche Bahn* was the consistency of EU law: A directive must

not impose measures on EU Member States that are themselves illegal state aid under the EU treaties. This entirely valid consideration, however, would not need any reference to the issue of state attribution. Moreover, the CJEU could have opined that from the perspective of EU law any issue of internal inconsistency would be absent, if EU Member States extended the benefits accruing under the directive to other economic actors. While the CJEU could certainly have referred to these considerations, it referred to the issue of attribution. The rationale of *Deutsche Bahn* was – and this is decisive for present purposes – that EU Member States had no “wobble room” in deciding whether and how to implement the directive. This is comparable to the situation faced by ICSID Member States when it comes to recognizing and enforcing ICSID awards.

Regarding UNCITRAL awards, recognition and enforcement is governed by Articles III and V of New York Convention of 1958. Article V contains exceptions to the general obligation to recognize and enforce awards, for reasons of, for example, the domestic *ordre public*. Considering this, the question becomes, whether this possibility is sufficient to establish state attribution regarding the recognition and enforcement of investment awards. One could make a good point arguing that the obligation to recognize and enforce international arbitral awards as laid down in the New York Convention has such a fundamental importance in the international legal order that states do not act as a sovereign but rather as an agent of the international community while recognizing and enforcing an international arbitral award.

II. Exceptions to the General Rule

The foregoing shows that enforcement of investment awards within the EU legal order does not generally constitute illegal state aid. However, there are circumstances in which enforcement of said awards could violate Article 107 TFEU. This could be the case if the action leading to an obligation to compensate consists of repealing benefits that are themselves illegal state aid under Article 107 TFEU. The factual situation at stake in the Joined Cases C-346/03 and C-529/03 illustrates this possibility. In those cases, an EU Member State granted state aid without notifying the European Commission. Under EU law, the state aid had to be repaid. The company concerned sued the state for compensation and invoked the responsibility of EU Member States under the Factortame principles. Advocate General Ruiz-Jarabo Colomer opined in his closing statements that “if an entitlement to compensation is recognized, the damage cannot be regarded as being equal to the sum of amounts to be repaid, since this would constitute an indirect grant of the aid found to be illegal and incompatible with the common market.” (Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-346/03 and C-529/03, para. 198)

The rationale behind the Advocate General’s opinion can be transferred to investment arbitration. If an investment arbitration gave the investor the possibility to recover the benefits of a domestic regime that is inconsistent with Article 107 TFEU, enforcement of the investment award would amount to granting new illegal state aid. Enforcement of the award would mean reestablishing the original, EU law in-

consistent situation. In fact, this has been the situation in *Micula*, where the European Commission argued that “any award requiring Romania to reestablish investment schemes which have been found incompatible with the internal market during accession negotiations, is subject to EU State aid rules”, and “[t]he execution of such award can thus not take place if it would contradict the rules of EU State aid policy.” (Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Star-mill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. AR-B/05/20, Final Award of December 11, 2013, para. 335).

These considerations must not be confounded with the reasoning of other CJEU decisions that, on first glance, might seem relevant for the present context. An example of a case that explicitly grapples with EU state aid law and arbitration awards can be found in *Commission v. Greece* (Case C-369/07, ECR I-5703). However, in this case the CJEU did not hold that state aid control is generally applicable to the payment of damages that are awarded by an arbitration award. Rather, the CJEU held that the repayment of illegal state aid may be conducted by setting the amount to be reclaimed off against a claim of the company against the state arising from an arbitration award. The relevant parts of the judgment read:

“86 It is apparent from the wording of that memorandum that ‘the debt of EUR 41 085 840 which has been certified in accordance with the Code on the recovery of public revenue and arises from the obligation to reimburse the capital inject

tion paid to the company on 9 October 1998 was repaid in full (both capital and interest) on 31 August 2007 and itemised in the accounts under No 2922 as deemed to have paid by way of set-off against an amount which would otherwise have had to be paid by the tax authorities to Olympic Airways on account of a State debt to that company, which is identified in Payment Order No 2516/31 August 2007’, issued by the Hellenic Republic in favour of Olympic Airways in the sum of EUR 601 289 003 on the basis of the arbitration award of 6 December 2006.

87 Moreover, with regard to its obligation to Olympic Airways arising under that arbitration award, the Hellenic Republic confirmed that the national authorities were under a legal obligation to offset that company’s debts against the sum which was to have been paid to it.

88 The Court considers that, with that document, the defendant has proven that there was repayment of the amount of aid paid in the form of a capital injection.” (ECJ, Case C-369/07, ECR I-5703).

Further examples might include the Cases *Nafpigokataskevastiki AE Chartofylakeiou v Commission* (Case T-384/08, ECR II-00380) and *Corsica Ferries v Commission* (Case T-565/08). However, while these cases certainly concerned indemnification clauses benefiting private actors, their rationale does not automatically apply to every

indemnification clause, for example, clauses in investment agreements.

Elliniki Nafpigokataskevastiki AE Chartofylakeiou v Commission concerned an indemnification clause that would have allowed to “hold the Purchaser harmless and indemnify the Purchaser in case any refund obligation and/or penalties are imposed [...] in respect to such state aid” (Case T-384/08 ECR II-00380, para. 13).

Corsica Ferries v. Commission concerned a clause that guaranteed certain yields and that, according to the CJEU, the Commission found not to be state aid. Accordingly, these clauses either constituted themselves state aid or would clearly have led to a circumvention of the EU prohibition of state aid.

In sum, none of these cases has any bearing on the general rule that the enforcement of investment awards does not constitute illegal state aid. They concern only the narrow group of cases described by Advocate General Ruiz-Jarabo Colomer in Joined Cases C-346/03 and C-529/03 (see above, page 7). If, however, the EU Member State measure that has been found to violate an investment agreement did not consist in repealing illegal state aid, there is no danger that enforcing an investment award would result in “an indirect grant of the aid found to be illegal and incompatible with the common market.” (Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-346/03 and C-529/03 Atzori, para. 198).

III. Necessity to Differentiate and its Obstacles

As a result, it is necessary for domestic courts seized with recognition and enforcement to scrutinize investment awards as to their underlying factual situation. In case of non-ICSID awards, domestic courts would have to hold the award up to the *ordre public* exception under Article V of the New York Convention. According to the EcoSwiss jurisprudence of the CJEU (Case C 126/97, ECR I-3055), domestic courts are obliged to apply the European *ordre public* that comprises the EU principles on state aid.

In case of ICSID awards, Articles 53 and 54 ICSID apply and domestic courts are prevented from even scrutinizing awards. This leads of course to a situation in which conflicts between investment awards and EU law may arise. In this case, domestic courts will be faced with the complicated relationship between EU law, the ICSID Convention and international investment agreements.

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