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Grant of State Aid via an arbitral award? The Aluminium case

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I. Introduction

In an interesting decision dated 25.03.2015 following a complaint[1], the European Commission ("EC") dealt with an alleged State Aid in the form of electricity tariffs applicable to the Greek company "Aluminium of Greece S.A." The tariff was set by an arbitral tribunal in Greece to be applied by the complainant to Aluminium for a specific period.

The EC assessed the complaint in order to decide whether the award of the arbitral tribunal ("Arbitral Award") for the set of the electricity tariff grants a State aid to Aluminium and, thus, establishes an infringement of State aid rules, as the complainant was alleging.

The decision is important in several aspects as, beyond the interesting assessment for the existence of a State aid, it allows some useful additional conclusions. For example, could awards of arbitration tribunals or court judgments grant the involved parties an illegal State aid which breaches European Union ("EU") State aid rules?

Moreover, the above question relates also to another interesting recent decision of the EC in the Micula case[2], in which the EC ruled that Romania breached EU State aid rules when complied with an arbitral award rendered in an arbitration of the International Centre for Settlement of Investment Disputes (ICSID).

Last but not least, the EC's decision could significantly affect the Greek industry as it could pave the way for new arrangements on electricity tariffs in the Greek market.

[1] Case number SA.38101 "Alleged state aid to Aluminium S.A. in the form of electricity tariff below cost following Arbitration Decision".

[2] Case number SA.38517 "Micula v Romania (ICSID arbitration award)". See EC's press release IP-15-4725 (public version of the decision not yet available).

II. Background of the case

At the outset, it is necessary to set the scene of this long-lasting dispute. The complainant is the Greek incumbent electricity operator in which the Greek State controls 51% of the company (the "Complainant"). The Complainant and Aluminium are for a long-time at "loggerheads" over the electricity tariff the latter should pay for the electricity supplied to it by the Complainant. The dispute had arisen from an agreement signed in the 1960s which was defining a preferential tariff between the parties which expired in 2006. Then, the parties were unable to clinch a deal and agree on a new tariff for the electricity consumption profile of Aluminium

The negotiations between the parties mainly concerned the electricity tariff and the outstanding debts of Aluminium occurred during the time of their disagreement. Although the parties in August 2010 entered a Framework Agreement for the determination of the two said matters, then they reached a stalemate and the draft of the Supply and Settlement Agreement dated 05.10.2010 for the implementation of the Framework Agreement was never signed.

Thus, the Complainant and Aluminium decided to refer their long-lasting dispute to an arbitral tribunal in an arbitration organized by the Regulatory Energy Authority of Greece ("RAE") according to article 37 of the Greek Law 4001/2011 (permanent arbitration of RAE). It must be noted that the arbitration was organized from RAE only in procedural terms and RAE did not have any influence in the tribunal itself.

In a nutshell, the arbitration agreement between the parties provided that the subject matter of this arbitration was the update and the adaption of the pricing terms defined in the draft of the Supply and Settlement Agreement in order for the terms to be corresponded to the consumption profile of Aluminium and cover at least the costs of the Complainant. It should be noted that for this purpose, the arbitral tribunal ought to take into consideration the applicable Basic Principles for Pricing of Electricity to High Voltage Customers, as these have been previously determined by RAE. Afterwards, the arbitral tribunal rendered an award (No. 1/2013) and set the tariff that the Complainant ought to apply for Aluminium for a specific period.

On 23.12.2013 the Complainant lodged a complaint before the EC alleging in general that by complying with the Arbitral Award it is obliged to grant Aluminium an illegal State aid as it had to supply electricity to Aluminium below market prices, even below its costs and thus grants Aluminium an advantage.

The Complainant grounded the complaint on the following arguments: a) the Arbitral Award consists of a binding measure of the Greek State and thus is attributable to the State, b) the application of the tariff set by the award involves State resources as it regards to electricity supply from a State owned company below market prices, c) the tariff is applicable only to Aluminium, thereby grants Aluminium a selective advantage and d) the tariff threatens to distort competition and affects trade between member States.

III. EC's assessment for the existence of State aid: an advantage for Aluminium?

The EC commenced the assessment by referring to the fundamentals, i.e. Article 107 of the Treaty on the Functioning of the European Union ("TFEU"). Article 107 (1) TFEU defines State aid as any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods in so far as it affects trade between Member States.

Moreover, in order to determine whether a measure of aid constitutes State aid within the meaning of Article 107(1) TFEU the following conditions have to be cumulatively met: the measure has to a) be granted through State resources, b) confer an economic advantage to an undertaking, c) be selective, d) distort or threaten to distort competition and affect trade between Member States. From the four conditions of Article 107 (1) TFEU the EC examined at first the criterion of advantage.

a. The agreement to arbitrate from a prudent private market operator's point of view

First and foremost, the EC assessed whether the decision of the parties to refer their dispute to arbitration conferred an advantage to Aluminium, as the Complainant alleged. From the outset, the EC made a reference to the benchmark for assessing whether a State-owned undertaking as the Complainant, has conferred an advantage on its counterpart (Aluminium) when determining its pricing policy. The said benchmark is the Market Economy Vendor Principle which reflects the general principle of the Market Economy Operator Principle.

Afterwards, the EC stressed that the pricing policy of the Complainant has been determined by the Arbitral Award which came up from the arbitration agreement into which the Complainant entered freely. By applying the Market Economy Operator Principle, the EC pointed out that it deemed appropriate to assess whether a prudent private market operator would have entered into such an arbitration agreement, defining similar parameters to be taken into account by the arbitral tribunal aiming at updating and adapting the pricing terms contained in the draft of the Supply and Settlement Agreement.

The EC noted that the Complainant was the sole supplier in Greece for Aluminium and in general for all high-voltage customers. As regards to the field of electricity production, the Complainant owned the 70% of all power plants in Greece and in the field of electricity supply enjoyed quasi-monopolistic position. The EC stressed that in reality there was no room for truly meaningful negotiations between the parties on the applicable pricing terms, as customers of high voltage as Aluminium were totally dependent on the Complainant for electricity supply.

The EC categorized Aluminium as a unique customer in the Greek market in the sense that it is by far the largest consumer in Greece. This element in conjunction with the dominance of the Complainant in the Greek market was hindering the benchmarking for finding an appropriate market price.

The parties were in strong disagreement at the time they were negotiating to

agree on pricing terms that would take into account Aluminium's consumption profile and the Complainant's underlying costs, as it would have been forced to do in a competitive market and also according to the Greek legislation. As the applicable tariff was hardly disputed by the parties, each party applied in fact a significantly diverging tariff, the "right" tariff from their point of view.

After long and not fruitful negotiations, there was no written offer and approval for a proper supply contract between the parties according to the requirements of the law. The Complainant decided to refer the dispute to arbitration by signing the arbitration agreement in a time that it confronted this "deadlock" negotiation with Aluminium and had the economically rational desire to settle the dispute and claim the outstanding debts within a reasonable timeframe.

The EC noted that by referring the dispute to arbitration the Complainant could indeed recover immediately a significant part of the outstanding debt of Aluminium (as this was a prerequisite for the agreement to arbitrate), secure payments for future invoices and simultaneously determine within an economically reasonable timeframe the long-lasting dispute with Aluminium which had arisen from the applicable tariff.

The EC concluded that indeed a prudent private market operator would also have agreed (as the Complainant) to refer the dispute with Aluminium to arbitration in order to achieve a punctual determination of their dispute and recover a part of the outstanding debts. To reach this conclusion, the EC relied also mainly on the grounds that it was not a realistic choice for the Complainant a) to continue trying the reach of a settlement with Aluminium, b) to terminate the supply of electricity to Aluminium since the Complainant could not have effectively and timely been able to claim the outstanding debts and c) it was clear, according to the EC, that in case the Complainant have terminated the electricity supply, RAE or Hellenic Competition Commission could have ordered it to refrain from terminating the electricity supply.

b. The content of the arbitration agreement from a prudent private market operator's point of view

Secondly, the EC examined whether such a prudent private market operator would have entered into an analogous arbitration agreement defining similar parameters for setting the applicable electricity tariff.

From the very beginning, the EC emphasized that a prudent private market operator would pay particular attention at agreeing on such parameters in order to minimize the risks related to the arbitration procedure and secure the set of the tariff on the basis of objective criteria. This means that such a market operator would agree to arbitrate this dispute if was secured that the arbitrators would have predetermined discretion and expertise in the field of the dispute i.e. the energy/electricity sector.

Concerning the arbitration proceedings, the EC noted that the arbitrators were chosen from RAE's catalogue according to article 37 of Law 4001/2011 and without any doubt could be considered as experts in the field of the dispute. Furthermore, RAE did not have any influence on the arbitral tribunal as the arbitration was organized by RAE only

in procedural terms. Therefore, the EC concluded that it can be considered that the tribunal has been constituted in a manner that secured its independence and the absence of influences from third parties.

As regards the parameters for the applicable tariff, it should be noted that the arbitration agreement stipulated that the arbitral tribunal ought to ground on the tariff on the pricing principles applying in general in the Greek market for high voltage customers, by securing in parallel that the consumption profile of Aluminium and the cost structure of the Complainant are duly taken into consideration. It is reasonable that those criteria which the parties could not particularize into real pricing terms during their negotiations are also used by the arbitrators when they are assigned with this task.

Thus, the EC was satisfied that the parameters for setting the tariff defined in the arbitration agreement were based on objective criteria that they limit arbitrators' discretion to determine an appropriate tariff on the basis of predefined and concrete criteria, which were based on the features of the Greek electricity market, the consumption profile of the customer (Aluminium and the cost structure of the supplier (the Complainant). In parallel, the EC commented that such parameters used by the arbitrators were similar to the ones that RAE would have applied as the regulator of the market concerning the pricing terms of electricity supply.

Consequently, the EC concluded that again a prudent private market operator placed in a similar situation with the Complainant would have entered into a similar arbitration agreement by acting in the same way and that the conduct of the Complainant was in line with the market conditions. In other words, the EC ruled that Aluminum has obtained no economic advantage within the meaning of Article 107(1) TFEU as alleged by the Complainant.

c. EC's further crucial remarks

Following the assessment of the two abovementioned elements of the case (III. a, b), the EC pointed out that in order to reach that conclusion it is not required to determine whether the specific level of the tariff, i.e. the final price deriving from the Arbitral Award, is in line with the market conditions-prices.

The crucial fact according to the EC, which is sufficient in order to exclude the possibility for the granting of an advantage to Aluminium, was firstly that the parameters agreed for the set of the tariff were determined on an objective criteria basis of the market and secondly that on the basis of such parameters and under that circumstances, a prudent private market operator would have agreed (as the Complainant) to refer the dispute to arbitration and be bound by its outcome.

In addition, although the EC reminded that the application of the Market Economy Operator Principle requires from the EC to make complex economic assessments, then it stressed that is not necessary to delve into every detail for the precise calculation of the defined tariff by retrospectively substituting the arbitral tribunal. This is due to the reason that the parameters for the set of the applicable tariff in the Arbitral Award were determined as a prudent private market operator would have done.

Apart from the above remark, the EC fittingly reached a reasonable conclusion by mentioning that the final tariff determined by the Arbitral Award is compatible with the market conditions as a logical consequence of the correctly defined parameters contained in the arbitration agreement of the parties. Otherwise, as the EC noted, if it had to assess (from an economic point of view) every aspect of the calculation of the applicable tariff in order to conclude that there is no advantage in cases such the Aluminium case, the EC would in essence become an appeal instance court for public entities which have already overruled in their case before the competent jurisdictional authority-forum from substantial point of view.

Moreover, the EC stressed also that at the time of the signing of the arbitration agreement when the parameters were defined and on the basis of which the arbitral tribunal would issue its award, the Complainant did not express any concern that such parameters were not compatible with market conditions.

Finally, the EC concluded that the arbitration agreement, by setting ex ante objective parameters for setting the tariff in a manner that would be acceptable also by a prudent private market operator, ensured that no advantage was granted to Aluminium.

IV. Conclusions

To begin with, it is notable that from the four cumulative conditions of Article 107 (1) TFEU, the EC examined in priority the condition related to the criterion of advantage. The fact that the EC premised and examined the advantage criterion could mean that for the requirement of the existence of State resources and the qualification of the measure as aid, the EC did not a priori exclude the possibility to qualify as state measure a judgement of an arbitral award. To put it another way, it cannot be accepted that the measure does not constitute State aid merely because the alleged mean of granting the illegal State aid is the Arbitral Award.

Consequently, it seems that both the awards of arbitral tribunals or court judgments could in essence involve State measures granting an illegal State aid. This assumption is in line with the overall orientation created by the EU case law, mainly established in the Köbler case[3], which implies that even courts are equally considered as state organs responsible for assuring in the frame of their competences the correct implementation of EU law.

In view of the above and as a consequence of the commented decision it could be valuably argued that of course an arbitral award or a court judgment could constitute the mean for granting an illegal State aid and thus eventually breach the EU State aid rules.

Likewise, a recent precedent from the EC has come into play to confirm such approach. More specifically, on 30.03.2015 the EC issued a decision ordering Romania to recover incompatible state aid granted in compensation for abolished investment aid scheme[4].

[3] Judgment of the Court of 30 September 2003, Case C-224/01, Gerhard Köbler v Republik Österreich, European Court Reports 2003 I-10239.

[4] As noted above the public version of the decision is not available. For the purposes hereof, the Commentary is based on the IP-15-4725 of the EC.

Briefly, an ICSID arbitral award of December 2013 found that by revoking an investment incentive scheme in 2005, four years prior to its scheduled expiry in 2009, Romania had infringed a bilateral investment treaty between Romania and Sweden. The arbitral tribunal ordered Romania to compensate the claimants, two investors with Swedish citizenship, for not having benefitted in full from the scheme. The EC found that the revoked investment incentive scheme selectively favored certain investors and was therefore deemed to be incompatible with EU state aid rules. By paying the compensation awarded to the claimants, Romania actually granted them advantages equivalent to those provided for by the abolished aid scheme. The EC has therefore concluded that this compensation amounted to incompatible state aid and had to be paid back by the beneficiaries.

EC's decisions both in Micula and the present case - even though in the latter implicitly - are in line with the above approach, that such arbitral awards could establish or grant an illegal State aid and thus breach the EU State aid rules, if the other conditions as above described are met. Additionally, it should be highlighted that in Aluminium case the EC made also another notable remark when referred to the fact that is not necessary to delve into every detail for the calculation of the tariff set by the arbitral tribunal and substitute in this way the tribunal.

The EC noted that in the numerous commercial disputes between public and private entities that take place every year before national courts or arbitral tribunals in the Member States, the EC cannot be required to review all calculations of compensations/tariffs awarded whenever the public entity loses the trial and then complains to the EC alleging the presence of State aid. In principle, the EC stated that in such cases it should suffice for the EC to assess whether the parameters for setting the applicable tariff were agreed in the arbitration agreement by the public entity in a manner similar to what also a prudent private market operator would have agreed to.

Furthermore, the EC's decision illuminates and specifies the criteria of the EU case law in its assessment related to the implementation of the Market Economy Operator Principle. Apart from that, the decision clarifies State aid issues in the pricing of electricity supply.

Last but not least, the decision could be landmark for the Greek industry and electricity market and could offer a precedent also to other businesses such Aluminium to negotiate a better tariff for electricity supply.

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