

**Case C-333/19**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

24 April 2019

**Referring court:**

Cour d'appel de Bruxelles (Belgium)

**Date of the decision to refer:**

12 March 2019

**Appellants:**

DA

FC

S. C. European Food S.A.

S. C. Starmill S.R. L.

S. C. Multipack S.R. L.

**Respondents:**

Romanian Air Traffic Services Administration (Romatsa)

Romania

European Commission

European Organisation for the Safety of Air Navigation  
(Eurocontrol)

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**I. Subject matter and circumstances of the dispute**

- 1 On 11 December 2013, an arbitration tribunal established under the ICSID Convention (see below) made an award ordering Romania to pay to DA, to FC and to the trading companies European Food S.A, Starmill S.R. L. and Multipack

S.R.L. compensation of an overall principal sum of RON 376 433 229 (around EUR 178 000 000), plus interest.

- 2 Following the dismissal on 26 February 2016 of an application brought before the ad hoc committee of the International Centre for Settlement of Investment Disputes (ICSID) for the annulment of the award, no right of further appeal lay against the award.
- 3 The European Commission had intervened before the arbitration tribunal as *amicus curiae* and, on 26 May 2014, pursuant to Article 11(1) of Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 108 TFEU, had adopted Decision C (2014) 3192 ordering Romania to suspend any action which might lead to the implementation or execution of the part of the award that had not yet been paid, as that would constitute unlawful State aid, until the Commission had taken a final decision on the compatibility of that State aid with the internal market.
- 4 By Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award of 11 December 2013 (OJ 2015 L 232, p. 43), the Commission decided that the payment of compensation under the arbitral award of 11 December 2013 to the economic unit comprising DA, FC, and the companies European Food, Starmill and Multipack constituted State aid within the meaning of Article 107(1) of the Treaty which was incompatible with the internal market. That decision in essence prohibited Romania from paying any amount whatsoever under the award of 11 December 2013.
- 5 Actions were brought for the annulment of the Commission's decision and are currently pending before the General Court of the European Union (see, in particular, cases T-624/15 (OJ 2016 C 16, p. 45), T-694/15 (OJ 2016 C 38, p. 69) and T-704/15 (OJ 2016 C 68, p. 30)).
- 6 On 19 August 2015, DA served on Romania the arbitral award endorsed with an enforcement order issued by the registry of the Cour d'appel de Bruxelles (Court of Appeal, Brussels) pursuant to the ICSID Convention.
- 7 On 9 September 2015, DA served an attachment order in Belgium on Eurocontrol over all the sums that Eurocontrol owed or would in future owe to Romania or to Romatsa (the Romanian State undertaking for air traffic) in order to obtain payment of the sum of EUR 85 066 428.42.
- 8 On 23 and 24 September 2015, Romatsa and Romania applied to the Tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking)), to have the executive attachment order set aside. The Commission intervened voluntarily under Article 23a of Regulation (EC) No 659/1999 in support of the forms of order sought by Romatsa and Romania.

- 9 By judgment of 25 January 2016, the Tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking)) in essence ordered the lifting of the executive attachment order served on Eurocontrol against the Romanian State.
- 10 DA, FC and the creditor companies appealed against that judgment on 29 February 2016.

## II. Provisions at issue

### *EU law*

- 11 Article 288 TFEU reads as follows:

‘To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

...

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.’

*The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (signed in Washington under the auspices of the World Bank on 18 March 1965 and ratified in Belgium by the Law of 17 July 1970)*

- 12 Article 1 provides:

‘There is hereby established the International Centre for Settlement of Investment Disputes’ (abbreviated to ‘ICSID’).

- 13 Article 54 provides:

‘(1) Each Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought’.

### **III. Arguments of the parties**

- 14 DA, FC and the creditor companies are, in essence, asking the Cour d’appel de Bruxelles (Court of Appeal, Brussels) to order the restoration of the executive attachment order to guarantee an overall sum which is now fixed at EUR 281 718 067.10.
- 15 DA submits in particular that Commission Decision (EU) 2015/1470 of 10 March 2015 does not, as such, prohibit the enforcement of the award in Belgium.
- 16 According to DA, for advantages to be categorised as State aid, they must, first, be granted directly or indirectly through State resources and, second, be imputable to the State (judgment of 16 May 2002, *France v Commission*, C-482/99, EU:C:2002:294, paragraph 24). That judgment clearly establishes that the transfer of State resources alone is insufficient to allow aid to be categorised as State aid. The imputability criterion is a criterion in its own right.
- 17 DA also cites the judgment of 27 March 1980, *Denkavit italiana* (61/79, EU:C:1980:100, paragraph 31) according to which a State aid scheme ‘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’ (the appellant’s underlining).
- 18 DA also recalls that, in its case-law, the Court of Justice has emphasised not only the need for a transfer of State resources, or general control by the State of the undertaking, but also the actual involvement of the State in the adoption of the disputed measures: ‘It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures’ (judgment of 16 May 2002, *France v Commission*, C-482/99, EU:C:2002:294, paragraph 52).
- 19 In the present case, enforcement in Belgium is not imputable to Romania.
- 20 It is thus clear from the text of the Commission’s decision that execution of the arbitral award constitutes State only aid if such an action is imputable to Romania, that is to say, if Romania voluntarily complies with the arbitral award. According to DA, it is quite simply incorrect to claim that both the operative part of the Commission’s decision and the grounds on which it is based also apply to enforcement ordered by a non-Romanian court. If Romania is ordered and forced to implement the arbitral sentence, that action is not imputable to Romania and there is therefore no infringement by Romania of the Commission’s decision.

- 21 For its part, the Romanian State is, in essence, asking the Cour d'appel de Bruxelles (Court of Appeal, Brussels) to declare the appeals inadmissible and unfounded and, in the alternative, to stay proceedings pending judgment of the EU Courts in the actions brought against the Commission's decision of 30 March 2015.
- 22 The Commission is asking for the appeals to be declared unfounded.

**IV. Assessment by the Cour d'appel de Bruxelles (Court of Appeal, Brussels)**

- 23 The Cour d'appel de Bruxelles (Court of Appeal, Brussels) first of all rejects various grounds of inadmissibility together with the Romanian State's claim that it is immune from jurisdiction. Having accepted the arbitration proceedings and having brought third party proceedings against the attachment order, Romania agreed to submit the dispute to the Belgian court responsible for attachment proceedings, and to the Cour d'appel de Bruxelles (Court of Appeal, Brussels), waiving its immunity from jurisdiction.
- 24 The Cour d'appel de Bruxelles (Court of Appeal, Brussels) then notes that the arbitral award is definitive and that no right of further appeal lies against it. It is a lawful writ of execution in itself. The basis for service of the attachment order was an award endorsed with an enforcement order which, under Article 54 of the ICSID Convention, is to be recognised and enforced by all Contracting States, of which the Kingdom of Belgium is one.
- 25 The Cour d'appel de Bruxelles (Court of Appeal, Brussels) notes, however, that Commission Decision (EU) 2015/1470 of 10 March 2015 presents a major obstacle to execution of the arbitral award by the Romanian State. The Cour d'appel de Bruxelles recalls that a *fait du prince* is, in effect, an external cause which acts as a discharge and which can justify non-payment by an ordinarily prudent and reasonable debtor to a creditor who is in possession of a writ of execution.
- 26 In that decision, the Commission prohibited Romania from paying the sums due under the arbitral award as such a payment would represent State aid incompatible with the internal market.
- 27 According to Article 288 TFEU, decisions are binding in all Member States. However, that decision did not exist at the time when the arbitration tribunal made the award which constitutes the writ of execution. Furthermore, Commission Decision (EU) 2015/1470 of 30 March 2015 is the subject of actions before the EU courts.
- 28 There is at present a genuine risk of conflict between a decision of the court responsible for attachment proceedings and the court ruling on appeals in attachment proceedings and a decision of the European Union, namely the

decision of the Commission which is relied on as a *fait du prince* in the dispute over the enforcement of an ICSID arbitral award.

- 29 The question of whether execution of the award by Romania amounts to voluntary compliance and State aid is a matter of serious dispute.

**V. Questions referred for a preliminary ruling**

- 30 It is therefore appropriate to stay the proceedings, in order to ensure legal certainty and to avoid the risk of inconsistent decisions, pending a decision by the EU Courts on the actions for annulment of the decision of 30 March 2015 and pending a response from the Court of Justice of the European Union to the following questions:

1. Is Decision (EU) 2015/1470 of the European Commission of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) to be understood as referring to payments due from Romania even in a case where payments are recovered against Romania as a result of proceedings to enforce the ICSID arbitral award of 11 December 2013 brought before the courts of a Member State other than Romania?

2. Does EU law itself automatically require a court of a Member State (other than Romania), before which an action is brought to oppose proceedings for the enforcement of an ICSID arbitral award which has the force of *res judicata* according to the national procedural rules of that Member State, to reject that award, for the sole reason that a non-definitive decision of the European Commission adopted after the date of the award considers enforcement of that award to be contrary to the EU State aid regime?

3. Does EU law, in particular the principle of cooperation in good faith and the principle of *res judicata*, allow the national court of a Member State (other than Romania) not to comply with its international obligations under the ICSID Convention in a situation where the European Commission has adopted a decision after the date of that award, under which enforcement of the award is regarded as contrary to the EU State aid regime, even when the European Commission participated in the arbitration proceedings (including the action for annulment of the award) and put forward its case in relation to the EU State aid regime?