Court of Justice of the European Union
PRESS RELEASE No 118/21
Luxembourg, 1 July 2021

Press and Information

Advocate General's Opinion in Case C-638/19 P
Commission v European Food and Others

According to Advocate General Szpunar, the General Court erred in law in concluding that the Commission was not competent to examine, in the light of the law on State aid, compensation paid by Romania following an arbitral award

Arbitration proceedings initiated on the basis of a bilateral investment treaty concluded between a Member State and a third State before the accession to the European Union of that third State, party to the arbitration, are not capable of adversely affecting the autonomy of EU law

In 1998, the Romanian authorities adopted an emergency government ordinance (EGO), which granted investors in disfavoured regions certain tax incentives for a period of ten years.

In the process of preparing for accession to the European Union, Romania terminated that incentive scheme in 2005, that is to say, three years earlier than laid down in legislation.

The Micula parties, Swedish investors residing in Romania, are majority shareholders of the European Food and Drinks Group, a recipient of those incentives. In accordance with the provisions of a bilateral investment treaty concluded in 2002 between Sweden and Romania on the Promotion and Reciprocal Protection of Investments (BIT), Ioan and Viorel Micula and other applicants requested the establishment of an arbitral tribunal in order to obtain compensation for the damage resulting from the revocation of the incentives laid down in the ordinance. In 2013, the arbitral tribunal concluded that Romania failed to ensure fair and equitable treatment of the investments and awarded the applicants approximately € 180 million in compensation.

In 2015, the European Commission adopted a decision declaring that the payment of compensation constituted State aid and requested Romania to recover the amounts already paid and to refrain from any further payment.

In 2019, the General Court of the European Union, before which that case was brought, annulled [1] the decision of the European Commission holding that it was not competent to examine, in the light of the law on State aid, compensation intended to remedy the damage sustained as a result of the premature withdrawal of an incentive scheme before Romania's accession to the European Union and that that compensation did not constitute State aid.

The European Commission brought an appeal and requested that the Court of Justice set aside the judgment of the General Court.

In his Opinion delivered today, Advocate General Maciej Szpunar **first of all rejects the arguments that the arbitration proceedings at issue and the ensuing arbitral award breach the principle of mutual trust and the autonomy of EU law,** in the light of the principles established by the Court in the judgment in Achmea. [2] In accordance with that judgment, EU law precludes a dispute resolution mechanism provided for by a BIT concluded between two Member States and implying that an arbitral tribunal, which is outside the judicial system of the European Union and not subject to review by a court of a Member State, be capable of interpreting and applying EU law.

[1] Judgment of the General Court of 18 June 2019, European Food and Others v Commission, T-624/15, T-694/15 and T-704/15
[2] Judgment of the Court of Justice of 6 March 2018, Achmea, C-284/16 (see also PR no 26/18)

In that regard, the Advocate General observes that even though the Achmea case-law has applied in Romania from the time of its accession, he must, however, analyse the extent to which the principles arising from that judgment apply to arbitration proceedings initiated before Romania's accession to the European Union and still pending at the time of that accession. He states that, in such a case, the application of EU law cannot cause those arbitration proceedings, initiated validly at that time, relating to a dispute that preceded accession, to lose their distinctive nature.

Thereby, unlike the arbitration proceedings at issue in Achmea, **arbitration proceedings initiated on the basis of a BIT concluded between a Member State and a third State before the accession to the European Union of that third State, party to the arbitration, are not capable of adversely affecting the autonomy of EU law, even after accession;** therefore it cannot be concluded that there has been an infringement of Articles 267 and 344 TFEU and that the principles resulting from the judgment in Achmea cannot consequently be applied in such arbitration proceedings.

The Advocate General then goes on to determine the time when State aid must be considered to have been granted by the Member State, in order to establish whether the law on State aid was applicable at that time, and whether the Commission was competent to adopt that decision.

In this respect, he notes that the time when aid is granted does not coincide with the time when it is actually paid. The decisive factor for the purpose of establishing the time when alleged aid was granted is the acquisition, by the recipient of the aid measure at issue, of a definitive right to receive it, and the corresponding commitment, by the State, to grant the aid.

Thus, the Advocate General does not subscribe to the General Court's analysis that the right of European Food and Others to receive the alleged aid consisting in the compensation awarded by the arbitral award arose at the time when Romania infringed the provisions of the BIT. It was only after the dispute was settled that Romania was required to award the compensation at issue and that the right to receive it was conferred.

Accordingly, he is of the view that the General Court erred in law and in the legal classification of the facts in deciding that the aid at issue had been granted at the time of Romania's infringement of the BIT because the alleged aid measure was granted at the time when the right to receive compensation was recognised and when, accordingly, Romania was required to pay that compensation, or after the adoption of the arbitral award, at the time of its implementation by Romania. That time post-dated Romania's accession to the European Union. It follows that **EU law was applicable to that measure and that the Commission was competent under Article 108 TFEU to examine the compensation in question in the light of the law on State aid.**

Lastly, the Advocate General examines whether the General Court misinterpreted the concept of "advantage" within the meaning of Article 107 TFEU. In that regard, he finds an error of law and a certain contradiction in the General Court's reasoning in so far as it concluded, on the one hand, that there was no advantage because EU law was inapplicable to the compensation at issue, while accepting, on the other hand, that EU law was in fact applicable in that the compensation covered the withdrawal of the EGO for the period postdating accession.

First, the General Court's reasoning that the Commission could not validly conclude that there was such an advantage is based exclusively on a false premiss according to which it was not competent to examine the compensation at issue in the light of the law on State aid.

Second, as regards the argument that the part of the compensation corresponding to the period before accession was covered by the case-law arising from the judgment in Asteris and Others, [3] as the Commission contends, the application of that case-law in the circumstances of the present case does not depend solely on whether the compensation leads to the reinstatement of a measure that could or could not be classified as State aid within the meaning of Article 107 TFEU

[3] Judgment of the Court of 27 September 1988, Asteris and Others v Hellenic Republic and European Economic Community, Joined Cases C-106 to 120/87

before accession. In fact, in its decision, the Commission excluded the application of that case-law to arbitration proceedings by also relying on the fact that the incentives granted under the EGO had been classified as ‘aid’ on the basis of the 1995 Agreement by the Romanian Competition Council.

Irrespective of whether those two elements were well founded, the Advocate General observes that the General Court assessed the legality of only one of the grounds that led the Commission to reject the Asteris and Others case-law. He thus takes the view that **the General Court could not, without making an error of law, conclude that the Commission’s decision was vitiated by illegality with respect to the classification of an advantage without at the same time ascertaining that the Commission had wrongly excluded the application of the Asteris and Others case-law.**

The Advocate General therefore proposes that the Court **set aside the judgment under appeal and refer the case back to the General Court.**

NOTE: The Advocate General’s Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355