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**Subject: State aid SA.38517(2014/C) (ex 2014/NN) – Romania  
Implementation of Arbitral award Micula v Romania of 11 December  
2013**

Sir,

The Commission wishes to inform Romania that, having examined the information supplied by your authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU).

## **1. PROCEDURE**

- (1) By Award of 11 December 2013 ('the Award'), the Arbitration Tribunal established under the auspices of the International Center for Settlement of Investment Disputes ('ICSID') decided in favour of the five claimants ('the claimants') in the case *Micula a.o. v Romania*<sup>1</sup> and ordered Romania to pay RON 367 433 229 (ca. EUR 82 million<sup>2</sup>) as damages for failing to ensure a fair and equitable treatment of the claimants' investments and thus violating Article 2(3) of the Romania – Sweden Bilateral Investment Treaty<sup>3</sup> ('the BIT'). In addition, the Tribunal ordered Romania to pay

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<sup>1</sup> ICSID Case No. ARB/05/20, *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRI, SC Multipack SRL v Romania*, Final Award of 11 December 2013.

<sup>2</sup> Exchange rate of the national bank of Romania on 11 December 2013 was RON 4.45 for one euro.

<sup>3</sup> The bilateral investment treaty entered into force on 1 April 2003.

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interest until full payment of the Award. By 11 December 2013, the total amount owed by Romania to the claimants amounted to RON 791 882 452 (ca. EUR 178 million<sup>4</sup>).

- (2) By letter of 31 January 2014 the Commission services informed the Romanian authorities that any implementation of the Award would constitute new aid and would have to be notified to the Commission.
- (3) On 20 February 2014, the Romanian authorities informed the Commission services that they had partially implemented the Award by offsetting the damages Romania had been ordered to pay against taxes owed by one of the claimants, namely European Food SA. The tax debt that was thus offset amounted to RON 337 492 864 (ca. EUR 76 million<sup>5</sup>). Romania further sought clarification from the Commission services as to the possibility of paying the outstanding amount to a natural person (the Micula brothers or any other natural person to whom the claim may be assigned).
- (4) On 12 March 2014, the Commission services requested further information from Romania regarding the envisaged further execution of the Award, which Romania provided by letter of 26 March 2014.
- (5) On 1 April 2014, the Commission services alerted the Romanian authorities as to the possibility of issuing a suspension injunction to ensure that no further incompatible State aid would be granted and sought Romania's comments thereon. By letter of 7 April 2014, Romania declared that it did not wish to comment on the possibility of the Commission issuing a suspension injunction.
- (6) By letter of 26 May 2014, the Commission informed Romania of its decision to issue a suspension injunction ('the suspension injunction') pursuant to Article 11(1) of Regulation (CE) No 659/1999 of 22 March 1999<sup>6</sup>, thereby obliging Romania to suspend any action which may lead to the execution or implementation of the part of the Award that had not yet been paid, as such execution would constitute unlawful State aid, until the Commission has taken a final decision on the compatibility of that State aid with the internal market.

## 2. BACKGROUND

### The Investment Incentive Scheme

- (7) On 2 October 1998, Romania enacted Emergency Government Ordinance 24/1998 (EGO 24), granting certain investors in disfavoured regions a series of incentives, *inter alia*:
  - a) an exemption from payment of custom duties and value added tax on machinery, tools, installations, equipment, means of transportation, other goods subject to depreciation which are imported or manufactured domestically with the purpose of making investments in that region;

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<sup>4</sup> See footnote 2.

<sup>5</sup> Exchange rate of the national bank of Romania on 15 January 2014 was RON 4.52 for one euro.

<sup>6</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, as last amended by Council Regulation (EU) No 734/2013 of 22 July 2013, OJ L 83, 27.3.1999, p. 1.

- b) refunds of customs duties on raw materials, spare parts and / or components necessary for achieving the investor's own production in that region ('Raw Materials Facility');
  - c) exemption from payment of profit tax during the designation of the relevant area as a disadvantaged region ('Profit Tax Facility').
- (8) The Romanian Government determined which regions should be designated as disfavoured and for how long, up to a maximum of 10 years. By decision of 25 March 1999, the Government declared the mining area of Ştei-Nucet, Bihor county, to be a disfavoured region for 10 years.
- (9) The claimants made certain investments in area of Ştei-Nucet, Bihor county, Romania, in the course of the 1990s and early 2000s. Companies owned by the claimants obtained in 2000 and 2002 certificates recognising their status as permanent investors in the region and their entitlement to receive the incentives envisaged in EGO 24.
- (10) On 1 February 1995, the Europe Agreement ('EA') between the European Community and its Member States, on the one hand, and Romania, on the other hand (EA), entered into force.<sup>7</sup> The EA was conceived as helping Romania achieve accession to the Union. Article 64(1)(iii) EA declared incompatible with the proper function of the Agreement any public aid which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods in so far as they may affect trade between the Community and Romania. According to Article 64 (2) EA, any practices contrary to this Article had to be assessed "on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Economic Community" (now Articles 101, 102 and 107 of the Treaty). This dynamic reference included equally all Union rules governing the granting of regional aid.
- (11) In 1996, Romania established the Romanian Competition Council. In 1999, Romania passed law no 143/1999 on a state aid (state aid law), which granted the Competition Council the powers to authorise or forbid the granting of state aid. The state aid law included the same definition of state aid as the relevant Union rules. In February 2000, Romania began accession talks to the Union. Competition policy, including compliance with Union State aid rules, formed part of those negotiations.
- (12) On 15 May 2000, the Romanian Competition Council adopted Decision No. 244/2000, in which it found that several of the incentives offered under EGO 24 distorted competition. It considered that "[e]xemption from customs duty on raw materials are deemed State aid for operating purposes ... leading to distortion of competition" and decided that "the reimbursement of customs duties on imported raw materials, spare parts and / or components necessary for own production purposes within an area ... shall be deleted".
- (13) On 1 July 2000, Emergency Government Ordinance 75/2000 (EGO 75) entered into force. It amended EGO 24 by replacing the refund on customs duties under the Raw Materials Facility with an exemption on customs duties on imported raw materials. EGO 75 did not implement the Competition Council's decision to delete the Raw Materials Facility. The Competition Council challenged the failure to implement its decision before the Bucharest Court of Appeal, which however dismissed the

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<sup>7</sup> OJ 1994, L 357, p. 2.

application on 26 January 2001.<sup>8</sup> The High Court of Cassation of Justice of Romania rejected the Competition Council's appeal against the Court of Appeal's decision on 19 February 2002 as inadmissible.<sup>9</sup>

- (14) The Union Common Position of 21 November 2001 noted that "there are a number of existing as well as new incompatible aid schemes which have not been brought into line with the *aquis*", including "facilities provided under [EGO 24 and EGO 75]".<sup>10</sup>
- (15) On 31 August 2004, Romania repealed all the incentives provided under EGO 24, as amended by EGO 75, except the Profit Tax Facility. The revocation of the EGO 24 incentives took effect on 22 February 2005. The report accompanying the act repealing EGO 24, as amended by EGO 75, explained:

*In order to meet the criteria in the Community rules on state aid, and also to complete the negotiations under Chapter No. 6 – Policy it is necessary to eliminate all forms of State aid in national legislation incompatible with the *aquis communautaire* in this area and, in this respect, it is proposed to repeal [...] the provisions of Article 6 paragraph (1), letter (b), letter (d) and letter (e) of the Emergency Government Ordinance no. 24/1998 on the disadvantaged areas [...].*<sup>11</sup>

#### The Arbitration Proceedings

- (16) On 28 July 2005, the claimants requested the establishment of an arbitration tribunal pursuant to the dispute settlement provisions of the BIT. By decision of 24 September 2008, the Arbitration Tribunal found that the claimant's claims were admissible. The claimants had initially requested the re-establishment of the EGO 24 investment incentives that had been revoked as of 22 February 2005. However, during the proceedings, the claimants partially withdrew their claim in 2009 and instead requested damage compensation. The claimants alleged that by revoking the incentives, Romania had infringed the legitimate expectations of the investors that those incentives would be available, in substance, until 1 April 2009. Thus, according to the claimants, Romania had violated its obligation of fair and equitable treatment owed to Swedish investors under the BIT.
- (17) In the course of the arbitration proceedings, the Commission intervened as an *amicus curiae*. In its intervention, the Commission explained that the EGO 24 incentives were

*incompatible with the Community rules on regional aid. In particular, the incentives did not respect the requirements of Community law as regards eligible costs and aid intensities. Moreover, the facilities constituted operating aid, which is proscribed under regional aid rules.*

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<sup>8</sup> Civil Decision No. 26; see Award, paragraph 219.

<sup>9</sup> See Award, paragraph 224.

<sup>10</sup> European Union Common Position of 21 November 2001, CONF-RO 43/01, p. 4. During the accession process of an applicant country, the Commission regularly proposes and the Council adopts so-called common positions, in which the progress of the candidate country towards compliance with the accession criteria is evaluated.

<sup>11</sup> Substantiation Report accompanying EGO 94/2004, 26 August 2004, pp. 12-13.

- (18) The Commission also observed that "[a]ny ruling reinstating the privileges abolished by Romania, or compensating the claimants for the loss of these privileges, would lead to the granting of new aid which would not be compatible with the EC Treaty". It also advised the Arbitration Tribunal that the "execution of [any award requiring Romania to re-establish investment schemes which have been found incompatible with the internal market during accession negotiations] can thus not take place if it would contradict the rules of EU State aid policy".
- (19) In the Award of 11 December 2013, the Arbitration Tribunal found that by revoking the incentives, Romania violated the fair and equitable treatment clause (Article 2(3) of the BIT) by denying the claimants' legitimate expectations with respect to the availability of the EGO 24 incentives until 1 April 2009 and thereby violated the BIT.
- (20) The Tribunal further decided that Romania had to pay the claimants damages. It found that Romania had to pay the claimants RON 85.1 million<sup>12</sup> in damages for the increased cost of sugar (for the import of which the claimants had to pay customs duties after the revocation of the Raw Materials Facility), RON 17.5 million<sup>13</sup> in damages for the increased cost of raw materials other than sugar and PET<sup>14</sup>, RON 18.1 million<sup>15</sup> in damages for the loss of the ability to stockpile sugar at lower prices, and RON 255.7 million<sup>16</sup> in damages for lost profit deriving from lost sales of finished goods. In addition, the Tribunal ordered Romania to pay interest (ROBOR plus 5%), calculated from 1 March 2007 with respect to the increased cost of sugar and other raw materials, from 1 November 2009 with respect to loss of ability to stockpile sugar, and from 1 May 2008 with respect to lost profits.

*The Claimants' Actions for Recognition and Execution of the Award in Romanian and US Courts*

- (21) The Romanian authorities informed the Commission services that four of the claimants (SC European Food SA, SC Starmill SRL, SC Multipack SRL and Mr Ion Micula) initiated court proceedings in Romania with a view to enforcing the Award pursuant to Article 54 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 ('ICSID Convention') requesting the payment of 80% of the outstanding amount (i.e. RON 301 146 583) and the correspond interest. On 24 March 2014, the Bucharest Tribunal allowed the execution of the Award considering that on the basis of Article 54 of ICSID the Award is a directly enforceable act and must be treated as a final domestic judgment excluding thus the procedure to recognise the award on the basis of the Romanian Procedural Civil Code (Art 1123-1132)<sup>17</sup>. Thereafter, on 30 March 2014 an executor started the enforcement procedure of

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<sup>12</sup> This amount is calculated for imports made during 22 February 2005 and 31 March 2009.

<sup>13</sup> See footnote 12.

<sup>14</sup> The claimants asked for compensation for the increased cost of PET. However, the Tribunal rejected this claims on the basis that the claimants had never in fact benefited from the Raw Materials Facility with respect to PET imports.

<sup>15</sup> This amount is calculated on the basis of custom duties charged on imported sugar and that would have been avoided, if the claimant had had the opportunity to stockpile sugar before the envisaged expiry of the EGO (i.e. 1 April 2009). The benchmark is based on stockpiles in 2004/2005.

<sup>16</sup> Lost profits are calculated over the period 2004-2008 for loss of market shares of soft drinks and other products that did contain sugar. The claim is that after the revocation of the EGO incentives, the costs increased leading to higher prices and thus to lower market shares.

<sup>17</sup> Order issued by Bucharest Tribunal in Case no 9261/3/2014, Section IV Civil.

the Award by setting the Romanian Ministry of Finance a deadline of 6 months to pay to the four claimants 80% of the award plus the interests and other costs.

- (22) Romania challenged the execution before the Bucharest Tribunal and asked for interim measures, i.e. a temporary suspension of the execution until the case has been decided on the merits. On 14 May 2014, the Bucharest Court suspended temporarily the execution of the Award until a decision on the merits of Romania's challenge and request to suspend the execution had been taken. On 23 September 2014, the Bucharest Tribunal rejected the suspension claim regarding the execution of the award. The case on the merits of Romania's challenge is pending. The Commission has intervened into those proceedings pursuant to Article 23a(2) of Regulation (CE) No 659/1999 of 22 March 1999<sup>18</sup>.
- (23) Romania has since sought the annulment of the award on the basis of Article 52 ICSID Convention. That proceeding is ongoing.
- (24) The Commission furthermore learned that the fifth claimant (Mr Viorel Micula) also initiated enforcement action against Romania before the United States District Court for the District of Columbia.<sup>19</sup> The case is pending. The Commission has decided to apply for leave to file an *amicus curiae* brief in those proceedings.

### **3. DESCRIPTION OF THE MEASURE**

- (25) The measure here under assessment is the implementation of the Award, i.e. payment of the compensation awarded to the claimants by the Arbitration Tribunal plus interest that has accrued since the Award was issued.
- (26) That measure has been awarded as compensation for the fact that Romania has stopped granting investment incentives provided for by EGO 24 as of 22 February 2005. In other words, it is compensation for the fact that State aid that had been promised has ultimately not been granted.

### **4. ASSESSMENT OF THE MEASURE**

#### **4.1. EXISTENCE OF AID**

- (27) Article 107 (1) of the Treaty provides that "*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*". Accordingly, a measure constitutes State aid if the following four cumulative conditions are met:
  - a) The measure must confer a selective economic advantage upon an undertaking.
  - b) The measure must be imputable to the State and financed through State resources.
  - c) The measure must distort or threaten to distort competition.

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<sup>18</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, as last amended by Council Regulation (EU) No 734/2013 of 22 July 2013, OJ L 83, 27.3.1999, p. 1.

<sup>19</sup> Case No.1-14-cv-600 Viorel Micula v. Government of Romania in the United States District Court for the District of Columbia – Petition to confirm ICSID award and enter judgment.

- d) The measure must have the potential to affect trade between Member States.
- (28) The Commission stresses that the notion of State aid is an objective and legal concept defined directly by the Treaty. To establish the existence of State aid one should look at the effects and not at the intentions or justifications of the Member States when granting it.

### Undertaking

- (29) The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.<sup>20</sup> The classification of a particular entity thus depends entirely on the nature of its activities.
- (30) Separate legal entities may be considered to form one economic unit for the purpose of the application of State aid rules. That economic unit is then considered to be the relevant undertaking. As the Court of Justice held, "[i]n competition law, the term 'undertaking' must be understood as designating an economic unit ... even if in law that economic unit consists of several persons, natural or legal."<sup>21</sup> To determine whether several entities form an economic unit, the Court of Justice looks at the existence of a controlling share or functional, economic or organic links.<sup>22</sup>
- (31) The claimants are Mr Ioan Micula and Mr Viorel Micula ('the Micula brothers') and three companies owned by them (European Food SA; Starmill SRL; Multipack SRL). Those three companies are engaged in economic activities, as they specialise in industrial manufacturing of food products, milling products, and plastic packaging, respectively. The three companies therefore constitute undertakings. The Micula brothers are the sole shareholders of all three companies, as well as of several others. Based on the close links between the Micula brothers and the three companies, the Commission is of the opinion that the group of companies owned by the Micula brothers, as well as the Micula brothers themselves, form one economic unit for the purpose of the application of State aid rules. This economic unit is therefore considered the relevant undertaking.
- (32) The characterization of the Micula brothers and their companies as one economic unit is reinforced by the Award, which awarded the damages "collectively" on the basis of a "common entitlement". Declining to award damages only to the three companies, the Arbitration Tribunal reasoned that it "cannot award the entirety of the damages to the [three companies], for the simple reason that a portion of the damages are associated with other companies that the [Micula brothers] own". The very fact that also the three companies requested that all damages are awarded to the Micula brothers as natural persons shows that those companies have no autonomy vis-à-vis the Micula brothers. Indeed, paragraphs 156 and 166 of the Award underline that the Micula brothers are the majority shareholders of a highly integrated group of companies engaged in food and beverage production. The Arbitration Tribunal further allowed each claimant to recover the entire amount of damages awarded, and then to allocate the damages among the

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<sup>20</sup> Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 74.

<sup>21</sup> Case C-170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11. See also Case T-137/02 *Pollmeier Malchow v Commission* [2004] ECR II-3541, paragraph 50.

<sup>22</sup> Case C-480/09 P *Acea Electrabel Produzione SpA v Commission* [2010] ECR I-13355 paragraphs 47 to 55; Case C-222/04 *Cassa di Risparmio di Firenze SpA and Others* [2006] ECR I-289, paragraph 112.

claimants however they deem fit, regardless of the damages actually sustained by each individual claimant.

Economic Advantage

- (33) An advantage, as required by Article 107(1) of the Treaty, is any economic benefit which an undertaking would not have obtained under normal market conditions, i.e. in the absence of the State intervention.<sup>23</sup> The precise form of the measure is irrelevant for establishing whether it confers an economic advantage on the undertaking. The notion of advantage includes, for example, all situations where undertakings are relieved of inherent costs of their economic activities.
- (34) By implementing the Award, Romania has (for the part of the Award that has already been executed) and would (for the remainder) in reality grant to the claimants an amount corresponding to the advantages foreseen under the abolished EGO 24 scheme from the moment it was repealed (22 February 2005) until the scheduled expiry (1 April 2009). In addition, to ensure that the claimants would fully benefit from an amount corresponding to that of the abolished scheme, interest and compensation for the allegedly lost opportunity and lost profit would be granted.<sup>24</sup> In effect, the implementation of the Award would re-establish the situation the claimants would have, in all likelihood, found themselves in if the EGO 24 scheme had never been repealed (which is the idea behind the compensation award by the Arbitration Tribunal).
- (35) The compensation provided for in the award is based on an amount corresponding to the customs duties charged on imported sugar and other raw materials between 22 February 2005 and 31 March 2009, as well as the customs duties charged on imported sugar that the claimants would have avoided if they had had the opportunity to stockpile sugar before the schedule expiration of the EGO 24 facilities on 31 March 2009. In addition, Romania would compensate the claimants for lost profits, i.e. profits they would have generated if the EGO 24 facilities had not been revoked before their scheduled expiration. Finally, Romania would pay substantive interest on the total sum of damages awarded.
- (36) The costs of raw materials, as inputs for final products, constitute ordinary operating expenses of undertakings, and relieving them of a part of their ordinary operating expenses would grant them a distinct advantage. Granting the complainants compensation for lost profits because they had to bear their own operating expenses themselves would likewise constitute an economic advantage not available under normal market conditions and in absence of the Award; under normal market conditions, the undertaking would have had to bear itself the costs inherent in its economic activity and would therefore not have generated these profits. Finally, paying interest to the claimants on payments that were allegedly due in the past, but which themselves must be qualified as conferring an advantage, confers a separate and additional advantage. Again, under normal market conditions and in absence of the Award, the undertaking would have had to bear its ordinary operating expenses, would have not generated the allegedly lost profits, and would therefore not have been able to draw an interest on this capital. In fact, by repealing the EGO 24 scheme and thereby eliminating what was considered an incompatible State aid scheme, Romania

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<sup>23</sup> Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 60; Case C-342/96 *Spain v Commission* [1999] ECR I-2459, paragraph 41.

<sup>24</sup> See paragraph 19 for the description of the amounts due under the arbitration award.

established normal conditions, and any attempt to re-establish the EGO 24 incentives and reimburse lost profits as well as award interest would thus grant an advantage not available under those normal market conditions and in absence of the Award.

- (37) The presence of an advantage is furthermore not precluded by the fact that the Award obliges Romania to pay "damages", rather than granting State aid. According to the case-law, State aid control is applicable to the payment of damages that are awarded by an arbitration award.<sup>25</sup>
- (38) In its judgment in *Asteris*, the Court has set out that State aid "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."<sup>26</sup> In the present case, however, and contrary to *Asteris*, the damages are awarded on the basis of an intra-EU BIT which the Commission considers incompatible with the Treaty<sup>27</sup> and in order to re-instate the State aid which Romania had abolished. Advocate General Ruiz-Jarabo Colomer has explained that the award of damages equal to the sum of the amounts of aid that were envisaged to be granted would constitute an indirect grant of the aid found to be illegal and incompatible with the common market.<sup>28</sup> Following that line, the General Court has considered that indemnification clauses for the recovery of State aid constitute State aid.<sup>29</sup> The principle underlying the *Asteris* judgment is, therefore, not applicable in the particular circumstances here present.
- (39) In this context, the Commission also recalls that in the judgment in *Lucchini*, the Court held that a national court was prevented from applying national law where the application of that law would have the effect to "frustrate the application of Community law in so far as it would make it impossible to recover State aid that was granted in breach of Community law".<sup>30</sup> The principle underlying this pronouncement is that a rule of national law cannot be applied where such application would frustrate the proper application of Union law.<sup>31</sup> The Commission considers that the same principle also applies where the rule the application of which would frustrate the application of State aid rules stems from an intra-EU BIT. Where giving effect to an intra-EU BIT by a Member State would frustrate the application of Union law, that Member State must uphold Union law.
- (40) For the foregoing reasons, it must be concluded, at this stage, that the execution of the Award constitutes an economic advantage in favour of the claimants that they would not have obtained under normal market conditions.

### Selectivity

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<sup>25</sup> Case C-369/07 *Commission v Greece* ECLI:EU:C:2009:428, paragraph 72

<sup>26</sup> Joined Cases 106/87 to 120/87 *Asteris* [1988] ECR 5515, paragraph 23.

<sup>27</sup> See the response of Commissioner De Gucht to Parliamentary oral Question O-000043/2013/rev.1 in which he stated "The Commission agrees that bilateral and investment treaties (BITS) between EU Member States do not comply with EU law", debate of the plenary of 22 May 2013.

<sup>28</sup> Opinion of 28 April 2005 in Joined Cases C-346/03 and C-529/03 *Atzori* ECLI:EU:C:2005:256, paragraph 198.

<sup>29</sup> Case T-384/08 *Elliniki Nafpigokataskevastiki AE Chartofylakeiou v Commission* ECLI:EU:T:2011:650, and Case T-565/08 *Corsica Ferries v Commission* ECLI:EU:T:2012:415, paragraphs 23, 114 and 120 to 131. See also, by analogy, Case C-111/10 *Commission v Council* [2013] not yet reported, paragraph 44.

<sup>30</sup> Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 59.

<sup>31</sup> See *ibid*, paragraph 61.

- (41) Not all measures which grant an undertaking an economic advantage fall under the notion of State Aid, but only those which confer an economic advantage in a selective way upon certain undertakings or categories of undertakings or to certain economic sectors.
- (42) In the Award of 11 December 2013, Romania is ordered to pay damage only to the claimants in that case. If it were to fully execute this Award, Romania would therefore grant an advantage exclusively (and thereby selectively) to the claimants.
- (43) In addition, it must be recalled that the investment incentives offered under EGO 24 were themselves selective, in that they were only available to undertakings holding an investor certificate and investing in certain regions.

#### State Resources

- (44) Only advantages granted directly or indirectly through State resources can constitute State aid within the meaning of Article 107(1) of the Treaty. In the present case, Romania has partially executed the Award by setting it off against taxes owed by the claimants, and intends to settle the remainder by paying the sum ordered directly from the State budget. Both direct payments from the State budget and foregoing State income by writing off taxes owed are measures financed through State resources.
- (45) The Commission further observes that it makes no difference whether Romania voluntarily decides to execute the award or is ordered to do so by a domestic court in Romania. Since domestic courts in Romania are organs of the Romanian State, their decisions are imputable to Romania.

#### Distortion of Competition and Effect on Trade

- (46) A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes.<sup>32</sup> For all practical purposes, a distortion of competition within the meaning of Article 107 TFEU is thus assumed as soon as the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.
- (47) The undertaking in question is active on a liberalised market, competing with other undertakings. The three companies that appeared as claimants in the arbitration proceedings are engaged in manufacturing food products, milling products, and plastic packaging. A liberalised market exists for all these products, so that any advantage granted to the claimants is liable to distort competition.
- (48) An advantage granted to an undertaking that distorts competition will normally also be liable to affect trade between Member States. Trade between Member States is affected where a measure strengthens the competitive position of the beneficiary undertaking as compared with other undertakings competing in intra-Community trade.<sup>33</sup>

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<sup>32</sup> Case 730/79 *Phillip Morris* [1980] ECR 267, paragraph 11. Joined Cases T-298/07, T-312/97 etc. *Alzetta* [2000] ECR II-2325, paragraph 80.

<sup>33</sup> Case T-288/07 *Friulia Venezia Giulia*, [2001] ECR II-1619, paragraph 41.

- (49) Considering that the products primarily produced by the claimants can and indeed are widely traded between Member States, it is clear that any advantage granted to the claimants is liable to affect trade between Member States.

### Conclusion

- (50) For the foregoing reasons and based on the available information, the Commission considers that execution, in part or in full, of the Award of 11 December 2013 would amount to granting of State aid.

## **4.2. THE APPLICATION OF STATE AID RULES DOES NOT AFFECT RIGHTS AND OBLIGATIONS PROTECTED BY ARTICLE 351 TFEU**

- (51) Article 351 of the Treaty provides that "[t]he rights and obligations arising from agreements concluded [...] for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties."
- (52) Considering that the BIT on which the Award is based was concluded between Romania and Sweden, i.e. two Member States, it is clear that the Romania-Sweden BIT is not covered by Article 351 of the Treaty.
- (53) Romania is also a party to the multilateral ICSID Convention, to which it has acceded prior to its accession to the Union. However, because no third country Contracting Party to the ICSID Convention is party to the BIT involved in the present proceedings, Article 351 is not relevant in this case.
- (54) For those reasons, no rights and obligations protected by Article 351 TFEU are affected in the present case.
- (55) In accordance with Article 344 TFEU, Member States have agreed not to submit disputes involving the application or interpretation of Union law to any other method of dispute settlement than that set out in the Treaties.<sup>34</sup>

## **4.3 NEW AID**

- (56) Article 107(1) of the Treaty provides that State aid is, in principle, incompatible with the internal market. Unless an aid measure is declared to be compatible with the internal market by the Commission, the Member States are prohibited from putting State aid measures into effect. Under Article 108(3) TFEU, a Member State must notify any plans to alter or grant aid to the Commission and shall not put its proposed measure into effect until the Commission has taken a final decision on that measure's compatibility with the internal market.
- (57) The obligation not to put into effect any aid measure without a final decision from the Commission on the compatibility of that aid measure only applies, of course, to aid measures put into effect after the entry into force of the Treaty for the Member State concerned. For Romania, the Treaty entered into force on 1 January 2007.

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<sup>34</sup> See case C-459/03 *Commission v Ireland* ("MOX plant") ECLI:EU:C:2006:345, paragraph 177.

- (58) The Commission considers that executing the Award would amount to "new aid" in the sense of Article 1(c) of Regulation (CE) No 659/1999 of 22 March 1999<sup>35</sup>, as the decision to execute the Award would take place after the entry into force of the Treaty for Romania.
- (59) It does not matter that the revocation of the EGO 24 facilities occurred before the entry into force of the Treaty for Romania or that the amount granted or to be granted would correspond, at least partially, to the operating expenses incurred by the claimants before the entry into force of the Treaty for Romania. For the purposes of State aid law it does not matter at which time these expenses were incurred; rather, the decisive point in time is the moment at which the State decides to relieve the undertaking of the economic burden that those expenses constitute.
- (60) The Commission also observes that an execution of the Award could not be considered "existing aid" in the sense of Article 1(b) of the Regulation No. 659/1999 simply because the EGO 24 incentive scheme was originally put in place before Romania's accession to the EU. Annex V, chapter 2, n.1 of the Act of Accession of Romania to the EU exhaustively listed the State aid measures which would be considered "existing aid" upon Romania's accession to the EU. The three mentioned categories are:
- aid measures put into effect before 10 December 1994;
  - aid measures listed in the Appendix to this Annex;
  - aid measures which prior to the date of accession were assessed by the State aid monitoring authority of the new Member State and found to be compatible with the *acquis*, and to which the Commission did not raise an objection on the ground of serious doubts as to the compatibility of the measure with the common market, pursuant to the procedure set out in paragraph 2.
- (61) Any decision to execute the Award would not be covered by any of these three categories. Even if it were considered that enforcement of the Award would merely reinstate the claimant's rights pursuant to EGO 24 as if the relevant incentives thereunder had not been repealed before their scheduled expiration, that retroactive reinstatement would still need to be considered as "new aid" as of the accession of Romania to the Union.<sup>36</sup>
- (62) The Commission therefore reiterates its position, already communicated to the Romanian authorities in the Commission services' letter of 31 January 2014 and in the suspension injunction, that executing the Award would constitute "new aid" and that the Romania authorities could only execute the Award once the Commission has authorised it under State aid rules.

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<sup>35</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, as last amended by Council Regulation (EU) No 734/2013 of 22 July 2013, OJ L 83, 27.3.1999, p. 1.

<sup>36</sup> See in this connection Joint Cases T-80/06 and T-182/09 *Budapesti Erömi* [2012] not yet reported, paragraph 54.

#### 4.4. ILLEGALITY UNDER ARTICLE 108(3) OF THE TREATY

- (63) The partial execution of the Award of 11 December 2013 that has already taken place in the form of partially offsetting the awarded damages against tax debts of the claimants was not notified to the Commission by Romania and was therefore unlawfully put into effect, in violation of Article 108(3) of the Treaty.

#### 4.5. COMPATIBILITY WITH THE INTERNAL MARKET

- (64) At the outset, the Commission recalls that when assessing the compatibility of a measure with the internal market according to Articles 107(2) and 107(3) of the Treaty, the burden of proof is the responsibility of the Member State.<sup>37</sup> In this context, the Commission also recalls that a State aid measure cannot be declared compatible with the internal market, if it entails a non-severable violation of other specific provisions of the Treaty<sup>38</sup> In the present case, it seems that the repayment of duties may violate other provisions of the Treaty. At present, Romania has presented no arguments that could justify the measure under Articles 107(2) and 107(3) of the Treaty. Nevertheless, the Commission considers it appropriate to undertake a preliminary compatibility assessment.

##### Regional aid

- (65) On the basis of Article 107(3)(a) and 107(3)(c) of the Treaty, the Commission may consider compatible with the internal market State aid to promote the economic development of certain disadvantaged areas within the European Union. The conditions under which aid to promote regional development can be considered compatible with the internal market are set out in the Guidelines on regional State aid for 2007-2013 for aid granted – subject to prior Commission approval – before 1 July 2014 and in the Guidelines on regional aid for 2014 – 2020 for aid granted after 30 June 2014.
- (66) In these guidelines, the Commission sets-out that regional aid aimed at reducing the current expenses of an undertaking constitutes operating aid and will not be regarded as compatible with the internal market, unless it is awarded in exceptional circumstances to tackle specific handicaps faced by undertakings in disadvantaged regions falling within the scope of Article 107(3)(a) of the TFEU.
- (67) In the present case, the current expenses and lost profits to be reimbursed to the claimants pursuant to the Award of 11 December 2013 refer to an economic activity which is located in an area falling within the scope of Article 107(3)(a) of the TFEU, as established by the Commission in the decision of the regional aid map for Romania for 2007-2013<sup>39</sup> and for 2014-2020<sup>40</sup>. However, the beneficiaries of the potential unlawful aid do not seem to be a SME in the meaning of the Commission Recommendation of 6 May 2003. Therefore, it is doubtful that the operating aid resulting from the implementation of the Award of 11 December 2013 and which seems to benefitting a large company is tackling specific handicaps faced by undertakings in the area concerned.

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<sup>37</sup> Case T-68/03 *Olympiaki Aeroporia Ypiresies AE v Commission* [2007] ECR II-2911, paragraph 34.

<sup>38</sup> Case C-225/91 *Matra v Commission* [1993] ECR I-3203, paragraph 41.

<sup>39</sup> Commission decision N 2/2007, OJ C 73 of 30.3.2007.

<sup>40</sup> Commission decision SA.38364, OJ C 233 of 18.7.2014.

(68) In addition to the foregoing, and as established in the 2014 Regional Aid Guidelines, the Commission will consider an aid measure compatible with the internal market only if it satisfies each of the following criteria:

- a) contribution to a well-defined objective of common interest: a State aid measure must aim at an objective of common interest in accordance with Article 107(3) of the Treaty;
- b) need for State intervention: a State aid measure must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing an equity or cohesion concern;
- c) appropriateness of the aid measure: the proposed measure must be an appropriate policy instrument to address the objective of common interest;
- d) incentive effect: the aid must change the behaviour of the undertaking(s) concerned in such a way that it engages in additional activity which it would not carry out without the aid or it would carry out in a restricted or different manner or location;
- e) proportionality of the aid (aid to the minimum): the aid amount must be limited to the minimum needed to induce the additional investment or activity in the area concerned;
- f) avoidance of undue negative effects on competition and trade between Member States: the negative effects of aid must be sufficiently limited, so that the overall balance of the measure is positive;
- g) transparency of the aid: Member States, the Commission, economic operators, and the public, must have easy access to all relevant acts and to pertinent information about the aid awarded thereunder.

(69) The Commission has serious doubts that the execution of the Award of 11 December 2013 would fulfil these cumulative criteria. Most centrally, the Commission is concerned that a retroactive reimbursement of normal operating expenses that were incurred between 2005 and 2009, profits lost during that period, and interest on these amounts, cannot be qualified as contributing to a well-defined objective of common interest, as responding to a need for State intervention, as being appropriate or as having an incentive effect:

- a) Execution of the award would pursue the objective of complying with Romania's obligations under the ICSID Convention, which is not one of the objectives of common interest recognised under Article 107(3) of the Treaty.
- b) Even if considered to aid at contributing to an objective of common interest, the execution of the Award of 11 December 2013 would be extremely unlikely to induce additional activity of the claimants; it is not clear how a retroactive payment could be an appropriate policy instrument to serve an objective of common interest.

(70) In view of the above, the Commission has serious doubts that the measure 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. As no other basis of compatibility seems to be applicable either, the Commission has serious doubts that any compatibility can be established.

## 5. CONCLUSION

(71) The foregoing analysis indicates that any execution of the Award of 11 December 2013 would amount to the granting of incompatible "new aid", subject to the State aid rules contained in the Treaty. The Commission regrets that Romania has already, according to the information provided, partially implemented the Award of 11 December 2013 by cancelling outstanding tax debts of European Food SA.

(72) In the light of the foregoing considerations, the Commission has decided to initiate the formal investigation procedure provided for in Article 108(2) of the TFEU in relation to the measures described above.

(73) Acting under the procedure laid down in Article 108(2) of the Treaty, the Commission requests Romania to submit its comments and to provide all such information as may help to assess the aid/measure, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

(74) The Commission wishes to remind Romania that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient. The Commission also reminds Romania of the suspension injunction, which enjoined Romania to immediately suspend any action which may lead to the execution or implementation of the Award. As Romanian domestic courts are organs of the Romanian State, the suspension injunction is also directly binding for the Romanian domestic courts.

(75) According to the case-law of the Court and contrary to the findings of the Arbitration Tribunal, the Commission at present sees no scope for legitimate expectations. The Court has held that, save in exceptional circumstances, undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in Article 108(3) TFEU. A diligent economic operator must be assumed to be able to determine whether that procedure has been followed.<sup>41</sup> That reasoning applies by analogy also to the Europe Agreements, in particular in light of the negative opinion of the Competition Council.

(76) The Commission warns Romania that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

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<sup>41</sup> Case C-5/89 *Commission v Germany* ECLI:EU:C:1990:320, paragraph 14.

- (77) If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission  
Directorate-General for Competition  
State Aid Greffe  
B-1049 Brussels  
Belgium  
Fax: +32 2 296.12.42

Yours faithfully,  
For the Commission

Joaquín ALMUNIA  
Vice-President