EU State Aid Law and International Investment Treaties: An Arm-Wrestling Contest?

In the course of the past thirty years, the State aid discipline has expanded markedly in terms of its volume (with cases related to State aid making up well over 10% of the annual case-load at the General Court in 2015) and of its range, with issues both substantive and procedural becoming ever more elaborated as novel situations are examined from the perspective of the State aid rules. In that process, there have been a series of first “close encounters” between the State aid rules and other legal fields whose own practitioners consider that they are entirely unconnected to the State aid rules. On such occasions, there can be a tendency for each side to regard the other and their ways of thinking as alien. Just such a moment of contact occurred only over a decade ago, when tax schemes met the State aid, and a similar first meeting now seems to be happening as the domains of investor State protection rules and arbitration awards brushes up against Article 107 and 108 of the Treaty. There can be a tendency for those interactions to be scrutinized as though they were an arm-wrestling contest, to see which one of the two is ultimately stronger. The process is ultimately more useful, it is submitted, in telling us more about the internal consistency of the colliding fields. This piece attempts to pull out some of the lines of force that are emerging in the current encounter.

International investment treaties seek to preserve stability in relation to foreign direct investments made in the signatory State. By so doing, a form of risk is eliminated for the investors covered by such treaties. As long as that risk does not in fact arise, there are no State aid issues. However, from a State aid perspective the exclusion of those investors from the alterations of State measures that would apply to other undertakings seems to fall squarely within the notion of “favouring certain undertakings”, by affording more favourable treatment to them than applies to others who are in a comparable factual and legal situation, assessed in light of the objectives of measures in question. The recent ruling of the Court in Case C-15/14 P MOL v Commission, however, offers food for thought in regard to that view. That case is not directly on point, given that the situation before the Court there concerned the bare question of selectivity, since the “freezing” of the mining fees payable by MOL did not involve an advantage at the time when it was instituted and the Commission had not shown that Hungary intended to shield MOL from less favourable treatment that it would put in place for its competitors. As such, the initial impression still stands that the activation of such treaties could satisfy one of the requirements for State aid to be present.

In terms of selectivity, there is also the issue of whether compensation awarded based on such treaties can be considered as a general measure, in line with the line established in the long-standing Asteris case-law that awards of damages do not themselves constitute State aid. That line of defence seems partial, since it decouples the award of compensation from the nature of wrong allegedly committed by the signatory State. Both the Court and the General Court have recently expressed scepticism that the State aid rules can be by-passed through a claim that the firm which now finds itself unable to obtain the benefit to which it was otherwise, in the absence of a State aid approval, entitled to have. In Case C-672/13 OTP Bank the Court was categorical that “the beneficiaries of a State guarantee, such as that at issue in the main proceedings, granted without regard for Article 108(3) TFEU and, therefore, unlawful, do not have any remedies available in accordance with EU law.” More recently, the General Court indicated in Case T-15/14 Simet v Commission that an award of damages in respect of unpaid aid can-
not be put outside the State aid rules, since to do so would allow circumvention of Articles 107 and 108 TFEU.

The issue of imputability also crops up in those contexts, both in terms of the awards made pursuant to investor protection treaties by arbitral tribunals and in terms of the enforcement of those awards, especially (as regards the latter issue) where the investor seeks enforcement outside the signatory State.

As a general remark, it would seem strange in terms of first principles of legal responsibility if the creation of a mechanism in which the signatory State was intimately involved and to which it had agreed in advance that it would defer was a step which broke the connection between that State and the ultimate award of compensation. Such mechanisms are not a novelty; for example, Member States have in the past agreed on a bilateral or a multilateral basis to establish international bodies that are able to grant advantage on non-market conditions to individual firms (the example of the International Fund for Ireland, established by Ireland and the United Kingdom in the wake of the Anglo-Irish Agreement in 1986, comes to mind). It would be extraordinary if a Member State could, by acting on its own or in conjunction with others, shield the actions taken by such bodies from the State aid discipline.

As for the enforcement of arbitral awards in courts outside the signatory State, it is hard to see the logic in a claim that the mechanism set in motion by that State is outside its responsibility even if that mechanism is no longer within its control once activated. There is the added dimension that if the court in question is in another Member State, such a court could be seen as overlooking its Union law obligations of loyal cooperation if it makes an order or recognises an award with the direct result of the breach by the signatory State of its own duties under Article 108(3) TFEU. Of course, a different set of considerations arise where the court in question is outside the EEA.

Finally, when State aid meets investor protection agreements it is mainly where the latter have largely been used as shields against recovery. In that case, the issue is not so much whether the State has been granting aid when putting in place such a mechanism, but whether an investor, having otherwise received unlawful and incompatible aid, can use an arbitral award to avoid recovery – possibly unlike other investors having received aid under the same measure. At first glance, the issue seems covered by the general statement of principle in OTP Bank, though the matter arose before the Court in a different context in that case.

There are therefore several reasons why investor protection regimes and arbitral awards have become a "hot button topic" for State aid practitioners. The modest suggestion made here is that while the configurations of fact are new, the legal elements that will supply answers are already in place and have previously been explored.

Leo Flynn*

* Legal Adviser, European Commission. All views expressed are personal.