EFTA Surveillance Authority Gives Green Light to Arbitration-Set Energy Price

On 10 September 2019, the EFTA Surveillance Authority (the ***ESA***)* handed down a decision where it ruled that energy prices, set in an arbitral award, which a private company had to pay to the Icelandic State-owned energy producer did not amount to State aid.

In the case at hand, a dispute had arisen between *Elkem Iceland* (***Elkem***), a ferrosilicon producer, and *Landsvirkjun* (***Landsvirkjun***), the Icelandic state-owned energy producer, concerning the price to be paid by Elkem to Landsvirkjun for energy supply.

Pursuant to the contract between Elkem and Landsvirkjun, the dispute was referred to arbitration.

In May 2019, the arbitral tribunal handed down its award in which the tribunal set the energy price to be paid by Elkem to Landsvirkjun.

However, concerned that such an arbitration-set energy price could amount to State aid, Iceland notified the arbitral award to the ESA for an assessment with State aid rules.

In its decision of 10 September 2019, the ESA concluded that the arbitral award did not amount to a State aid given that the award did not give Elkem any advantage.

Although the decision handed down by ESA is not yet publicly available (according to the press release, the decision handed down by ESA will be made available in the ESA's State aid register once all confidential information is cleared), I find it important to distinguish this case from the *Micula* case in which compensation to be paid by Romania to Swedish investors pursuant to an investment arbitral award was found, by the EU Commission, to constitute State aid (see previous coverage here, here and here):

First of all, the present case derives from commercial arbitration proceedings while *Micula* derives from intra-EU investment proceedings. For EU institutions, this makes a big difference given that the EU Commission has long requested its Member States to terminate their intra-EU BITs. Paragraphs 54 and 55 of *Achmea* also distinguish between commercial arbitration and investment arbitration.

Secondly, contrary to *Micula*, the present case does not relate to compensation to be paid by a Member State to a private party. Rather the case relates to the price of energy to be paid by a private party to a public entity. The analysis conducted by ESA was thus different than the analysis conducted by the European Commission in *Micula*. In *Micula*, the Commission examined whether the investor gained an advantage by receiving compensation from Romania. In the case at hand, however, we can assume that the ESA examined whether the price set by the arbitral tribunal was high enough (*i.e.*, whether that price corresponded to the market price) not to confer an advantage to Elkem to the detriment of its competitors.

* *The ESA is the institution that monitors the implementation and compliance, in non-EU EEA countries (i.e., Iceland, Liechtenstein and Norway), of the Internal Market Rules which*

*are applied within the whole European Economic Area (**EEA**). The EEA is an economic zone which comprises the 28 Member States of the European Union as well as Iceland, Norway and Liechtenstein. The purpose of the EEA is to extend the rules of the Internal Market of the 28 EU Member States (i.e., the free movement of persons, goods, services and capital) to those three non-EU countries. Therefore, all relevant EU legislations relating to the free movement of goods, persons, services and capital equally apply in those 31 countries forming the whole EEA.*
