

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Sodexo Pass International SAS

v.

Hungary

ICSID Case No. ARB/14/20

Procedural Order of 5 May 2016

Professor William W. Park, President of the Tribunal

Mr. Andrea Carlevaris, Arbitrator

Mr. John Christopher Thomas QC, Arbitrator

Secretary of the Tribunal

Ms. Aïssatou Diop

The Tribunal has carefully considered the requests for document production filed by the Parties on 15 April 2016 pursuant to Section 15 and Annex A of Procedural Order No. 1 dated 16 June 2015, as well as ICSID Convention Article 43(a) and ICSID Arbitration Rules 24 and 33-36. In this connection the Tribunal has been guided by the 2010 International Bar Association Rules on the Taking of Evidence in International Arbitration, which permit the orders to compel production of documents relevant to the case and material to its outcome, and not subject to valid objections that include inter alia privilege and unreasonable burden. Having taken into account principles of procedural economy and proportionality, the Tribunal directs as follows, taking for the sake of convenience the numbering for requests as included in the Redfern Schedules filed by each side.

I. Claimant's Requests

Request 1(a)

The Tribunal declines to grant this Request. Respondent has agreed to produce non-privileged responsive documents and has already produced several documents which are prima facie responsive. Moreover, the Request fails to describe in sufficient detail a specific and narrow category of documents, and production would impose on Respondent an unreasonable burden.

Request 1(b)

The Tribunal declines to grant this Request. Respondent has agreed to produce non-privileged responsive documents and has already produced several documents which are prima facie responsive. Moreover, the Request fails to describe in sufficient detail a specific and narrow category of documents, and production would impose on Respondent an unreasonable burden.

Request 1(c)

The Tribunal grants this Request to the extent of documents prepared by the Hungarian State. Respondent shall produce reports and comments prepared by organs of the Hungarian State reporting that Hungary's review revealed "structural problems, rampant misuse, and economic inefficiencies inherent in the voucher system."

Request 2(a)

The Tribunal declines to grant this Request, which does not describe in sufficient detail a specific and narrow category of Documents. Moreover, the Tribunal notes that Respondent has already produced Documents concerning the Széchenyi Club Economy Developing Company's conception of the SZÉP Card.

Request 2(b)

The Tribunal grants this Request to the extent of documents listed in the Reply Column of Claimant's Redfern Schedule. The Requested Documents are relevant to the case and material to its outcome insofar as they would cast light on the process that led to the development of the SZÉP Card. The Requested Documents are described in sufficient detail and constitute a sufficiently narrow and specific category. The Tribunal notes that Respondent agrees "to produce non-privileged Documents responsive to these Requests pursuant to a reasonable search of ministries still in existence."

Request 2(c)

The Tribunal grants this Request to the extent of documents listed in the Reply Column of Claimant's Redfern Schedule. The Requested Documents are relevant to the case and material to its outcome insofar as they would cast light on the process that led to the development of the SZÉP Card. The Requested Documents are described in sufficient detail and constitute a sufficiently narrow and specific category. The Tribunal notes that Respondent accepts "to produce non-privileged Documents responsive to these Requests pursuant to a reasonable search of ministries still in existence."

Request 2(d)

The Tribunal grants this Request to the extent of documents listed in the Reply Column of Claimant's Redfern Schedule. The Requested Documents are relevant to the case and material to its outcome insofar as they would cast light on the process that led to the development of the SZÉP Card. The Requested Documents are described in sufficient detail and constitute a sufficiently narrow and specific category. The Tribunal notes that Respondent accepts "to produce non-privileged Documents responsive to these Requests pursuant to a reasonable search of ministries still in existence."

Request 2(e)

The Tribunal grants this Request to the extent of documents listed in the Reply Column of Claimant's Redfern Schedule. The Requested Documents are relevant to the case and material to

its outcome insofar as they would cast light on the process that led to the development of the SZÉP Card. The Requested Documents are described in sufficient detail and constitute a sufficiently narrow and specific category. The Tribunal notes that Respondent accepts “to produce non-privileged Documents responsive to these Requests pursuant to a reasonable search of ministries still in existence.”

Request 2(f)

The Tribunal grants this Request to the extent of documents listed in the Reply Column of Claimant’s Redfern Schedule. The Requested Documents are relevant to the case and material to its outcome insofar as they would cast light on the process that led to the development of the SZÉP Card. The Requested Documents are described in sufficient detail and constitute a sufficiently narrow and specific category. The Tribunal notes that Respondent accepts “to produce non-privileged Documents responsive to these Requests pursuant to a reasonable search of ministries still in existence.”

Request 2(g)

The Tribunal declines to grant this Request, even as narrowed by the Reply Column of Claimant’s Redfern Schedule. Claimant fails to demonstrate how the Requested Documents would be relevant to the case and material to its outcome insofar as they would not directly prove whether “Hungary deliberately avoided consulting Claimant.”

Request 2(h)

The Tribunal need make no decision on this Request given Claimant’s confirmation that this request has been satisfied.

Request 3(a)

The Tribunal grants this Request with reference to the categories of documents identified in the Reply Column of Claimant’s Redfern Schedule.

Request 3(b)

The Tribunal grants this Request with reference to the categories of documents identified in the Reply Column of Claimant’s Redfern Schedule.

Request 3(c)

The Tribunal grants this Request with reference to the categories of documents identified in the Reply Column of Claimant’s Redfern Schedule. The Tribunal notes that Respondent accepts to “produce any non-privileged Documents responsive to this Request pursuant to a reasonable search.”

Request 3(d)

The Tribunal grants this Request as narrowed in the Reply Column of Claimant's Redfern Schedule. The Requested Documents are relevant to the case and material to its outcome insofar as they would cast light on the process that led to the Amendment Proposal No. T/4662/193. The Tribunal notes that Respondent accepts to "produce any non-privileged Documents responsive to this Request pursuant to a reasonable search."

Request 3(e)

The Tribunal declines to grant this Request, given that is unduly burdensome scope covering documents "prepared by ministries, the Government, public bodies and civil society groups." The Tribunal notes that the Claimant acknowledges that some Documents responsive to the Request have already been produced. The Tribunal further notes that Respondent will "produce any non-privileged Documents responsive to this Request pursuant to a reasonable search". The Request, even as narrowed in the Reply Column of Claimant's Redfern Schedule does not describe in sufficient detail a specific and narrow category of Documents.

Request 3(f)

The Tribunal grants this Request. The Requested Documents are relevant to the case and material to its outcome insofar as they are intended to substantiate Claimant's argument that the amendment was detrimental to SPI, as it made the SZÉP Card a product in direct competition with SPH's hot meal voucher. The Request describes in sufficient detail a specific and narrow category of Documents.

Request 3(g)

The Tribunal grants this Request, as narrowed in the Reply Column of Claimant's Redfern Schedule. The Requested Documents are relevant to the case and material to its outcome insofar as they are intended to substantiate Claimant's arguments about the circumstances in which the Erzsébet Act was adopted. As narrowed in the Reply Column of Claimant's Redfern Schedule, the Request does not place an unreasonable burden on Respondent as it describes in sufficient detail a specific and narrow category of Documents. Claimant's Request that Respondent provide the context and date of SODEX002914 is also admitted.

Request 3(h)

The Tribunal declines to grant this Request. Even as narrowed in the Reply Column of Claimant's Redfern Schedule, the Requested Documents do not appear relevant to the case and material to its outcome. Moreover, even as narrowed, the Request does not describe in sufficient detail a narrow and specific category of Documents.

Request 4(a)

The Tribunal grants this Request as narrowed in the Reply Column of Claimant's Redfern Schedule. The Requested Documents are relevant to the case and material to its outcome insofar as they are intended to substantiate Claimant's argument that the circumstances that led to the enactment of the 2013 Tax Amendment (with respect to the meal voucher sector) show that this reform was implemented to put Claimant at a competitive disadvantage. As narrowed, the Request describes in sufficient detail a specific and narrow category of documents.

Request 5(a)

The Tribunal grants this Request, noting that Claimant has accepted to produce any non-privileged Documents responsive to this Request.

Request 6(a)

The Tribunal grants this Request. The Requested Documents are relevant to the case and material to its outcome insofar as they are intended to substantiate Claimant's claim based on Hungary's lack of transparency and willingness to engage in its negotiations with Claimant. The Request describes in sufficient detail a specific and narrow category of documents. Moreover, Claimant would have no other access to documents concerning a relationship to which it is not a party.

Request 7(a)

The Tribunal declines to grant this Request, noting Respondent's statement that "the Erzsébet website [...] contains updated figures regarding the Erzsébet Program's beneficiaries". The Tribunal further notes that Respondent has already produced a Document in this respect (R-0043). A broader production would place an unreasonable burden on Respondent insofar as the Request potentially calls for the production of a very large volume of Documents.

Request 8(a)

The Tribunal need make no decision on this Request, given Claimant's confirmation that this request has been satisfied.

Request 9(a)

The Tribunal grants this Request, as narrowed in the Reply Column of Claimant's Redfern Schedule, on condition that Respondent complies with an undertaking to maintain confidentiality in the sense that the produced financial information would be available only to Claimant and the Tribunal for the purposes of this arbitration, but not to any third party or the general public. The Requested Documents are relevant to the case and material to its outcome insofar as they are intended to cast light on whether the proceeds are used for social purposes. As narrowed by Claimant, the

request describes in sufficient detail a specific and narrow category of documents and would not place an unreasonable burden on Respondent. Respondent failed to substantiate its allegation that the Request would be prevented from compelling grounds of commercial confidentiality.

Request 9(b)

The Tribunal grants this Request, as narrowed in the Reply Column of Claimant's Redfern Schedule, on condition that Respondent complies with an undertaking to maintain confidentiality in the sense that the produced financial information would be available only to Claimant and the Tribunal for the purposes of this arbitration, but not to any third party or the general public. The Requested Documents are relevant to the case and material to its outcome insofar as they are intended to cast light on whether the proceeds are used for social purposes. As narrowed by Claimant, the request describes in sufficient detail a specific and narrow category of documents and would not place an unreasonable burden on Respondent. Respondent failed to substantiate its allegation that the Request would be prevented from compelling grounds of commercial confidentiality.

Request 9(c)

The Tribunal grants this Request, as narrowed in the Reply Column of Claimant's Redfern Schedule, on condition that Respondent complies with an undertaking to maintain confidentiality in the sense that the produced financial information would be available only to Claimant and the Tribunal for the purposes of this arbitration, but not to any third party or the general public. The Requested Documents are relevant to the case and material to its outcome insofar as they are intended to cast light on whether the proceeds are used for social purposes. As narrowed by Claimant, the request describes in sufficient detail a specific and narrow category of documents and would not place an unreasonable burden on Respondent. Respondent failed to substantiate its allegation that the Request would be prevented from compelling grounds of commercial confidentiality.

Request 9(d)

The Tribunal need make no decision on this Request, given that the requested evidence does not exist.

Request 9(e)

The Tribunal need make no decision on this Request, given the requested material does not exist.

Request 10(a)

The Tribunal grants this Request, as narrowed in the Reply Column of Claimant's Redfern Schedule. The Requested Documents are relevant to the case and material to its outcome insofar as they are intended to cast light on the evolution of the voucher and meal voucher markets in Hungary. As narrowed, the Request describes in sufficient detail specific and narrow categories of Documents and would not place on Respondent an unreasonable burden.

Request 10(b)

The Tribunal grants this Request, in that Respondent must either produce the Requested Documents concerning the electronic payment market in Hungary from 2009 to date, or else confirm that it is not in possession of such material. The burden of obtaining this information is outweighed by its potential for assisting the Tribunal in deciding the case.

Request 10(c)

Given that it has not reviewed the documents produced by Respondent as source data for Exhibit NAV-0020, the Tribunal is not in a position to assess whether the documents are responsive to the Request. The Tribunal reserves its position in this respect if, and until after, the documents will be produced.

Request 10(d) through 10(h)

The Tribunal need make has made no decision on these Requests, which have been withdrawn.

Request 10(i)

The Tribunal declines to grant this Request. The Tribunal notes that Respondent produced a Document (revised version of Appendix D.1.i of the Navigant Report) which explains how Navigant assumed 15%, instead of 16%, discount rate for the actual scenario. Claimant failed to show that Respondent is in possession of Documents on which Navigant based its assumption.

II. Respondent's Requests

Request 1

No decision need be made on this Request, given that the Tribunal will decide whether to draw the appropriate inference that no such documents ever existed at the appropriate time.

Request 2

No decision need be made on the Request, given that the Tribunal will decide whether to draw the appropriate inference that no such documents ever existed at the appropriate time.

Request 3

The Tribunal grants this Request. The Requested Documents are relevant to the case and material to its outcome as they concern the potential or actual impact of measures undertaken in relation to the Hungarian fringe benefit market.

Request 4

The Tribunal grants this Request. The Requested Documents are relevant to the case and material to its outcome insofar as they are intended to show whether, and to what extent, the Challenged Reforms affected Claimant's investment.

Request 5

The Tribunal grants this Request, as narrowed in the Reply Column of Respondent's Redfern Schedule. The Requested Documents are relevant to the case and material to its outcome insofar as they relate to Claimant's expectation of "long-term returns" and Respondent's objection thereto. As narrowed, the Request is not excessively broad and does not place on Claimant an unreasonable burden. No compelling ground of commercial confidentiality prevents production of the Requested Documents. The Parties are under an obligation not to disclose the relevant documents for purposes other than this arbitration (First Procedural Order, paragraph 24) and as narrowed, the Request relate to documents created more than four years ago.

Request 6

The Tribunal declines to grant this Request. Respondent failed to show that the Requested Documents are relevant to the case and material to its outcome insofar as they are not intended to show whether, and to what extent, Claimant suffered a substantial deprivation of the value of its investment. Moreover, the Tribunal notes that Claimant has already produced documents responsive to the Request.

Request 7

The Tribunal declines to grant this Request. Respondent failed to show that the Requested Documents are relevant to the case and material to its outcome insofar as they are not intended to show whether, and to what extent, Claimant suffered a substantial deprivation of its investment as a consequence of the Challenged Reforms. Moreover, the Request does not identify in sufficient detail a specific and narrow category of documents.

Request 8

The Tribunal declines to grant this Request. Respondent failed to show that the Requested Documents are relevant to the case and material to its outcome insofar as they are not intended to show whether, and to what extent, Claimant suffered a substantial deprivation of its investment as a consequence of the Challenged Reforms. Moreover, the Request does not identify in sufficient detail a specific and narrow category of documents.

Request 9

The Tribunal declines to grant this Request. The Requested Documents do not constitute a sufficiently specific and narrow category of documents and would place an excessive burden on Claimant. Respondent failed to show that the Requested Documents are relevant to the case and material to its outcome. Moreover, the Tribunal notes, and Respondent acknowledges, that Claimant has already produced documents that fall within the scope of the Request.

Request 10

The Tribunal notes Claimant's statement that it "cannot locate [the Requested Documents] despite its best efforts" and makes no order in this respect. The Tribunal will consider whether to draw the appropriate inferences at the relevant time.

Request 11

The Tribunal grants this Request to the exclusion of documents containing or soliciting legal advice. The Requested Documents are relevant and material insofar as they relate to, and support, the conclusions of Claimant's expert.

Request 12

The Tribunal grants this Request with respect to the Budget Plans (or equivalent Documents) from 2007 and 2008. Claimant has not objected to the production of such Documents. The Tribunal notes, and Respondent acknowledges, that Claimant has produced documents responsive to the Request from 2009 onwards. The Tribunal further notes that Claimant will produce the 2016 Budget Plan once available.

III. Timing of Production

As provided in Annex A of Procedural Order No. 1 dated 16 June 2015, documents whose production has been compelled by the Tribunal shall be produced not later than 3 June 2016

On behalf of the Tribunal

[signed]

Professor William W. Park
President of the Tribunal

5 May 2016