

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Sodexo Pass International SAS
Claimant

v.

Hungary
Respondent (Applicant on Annulment)

(ICSID Case No. ARB/14/20)
Annulment Proceeding

PROCEDURAL ORDER NO. 3
Directions Concerning the Introduction of Annulment Decisions referred to in the Hearing

Members of the ad hoc Committee

Mr. Andrés Jana Linetzky, President of the *ad hoc* Committee
Dr. Ucheora Onwuamaegbu, Member of the *ad hoc* Committee
Dr. Jacomijn van Haersolte-van Hof, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee

Ms. Leah W. Njoroge

November 24, 2020

I. PROCEDURAL BACKGROUND AND PARTIES' POSITIONS

1. On November 17 and 18, 2020, the Committee held a hearing on annulment by videoconference (“**Hearing**”).
2. On the first day of the Hearing, during a session allocated for the Committee’s questions to the Parties, following the Parties’ opening statements, the Committee invited the Parties to provide their respective positions on what action it should take with respect to the Parties’ references, in their oral submissions, to the *Orascom v. Algeria* and the *Edenred v. Hungary* annulment decisions that are not part of the record in these proceedings.¹
3. In response, the Applicant stated that “[t]he Applicant is content with the record as it stands, and that applies to both the [*Orascom v. Algeria*] decision and to the non-admittance of the [*Edenred v. Hungary*] annulment decision.”² The Claimant stated that, with regard to the *Orascom v. Algeria* decision, “I think the issue as far as we are concerned is therefore moot, provided of course that this reference made during this [H]earing is not taken into account by the Committee in its deliberations.”³ With respect to the *Edenred v. Hungary* decision, the Claimant stated that it would not be making any specific requests and asked that the Committee exercise its discretion in this regard.⁴
4. In a follow up question, the Committee invited the Parties to present their respective observations on the introduction of the two annulment decisions if the Committee were to direct that that they be produced.⁵ In response, the Applicant advised that it would oppose the introduction of the *Edenred v. Hungary* annulment decision.⁶ In relation to the *Orascom v. Algeria* decision, the Claimant stated that, “since it was referred to for the first time in

¹ Tr. Day 1, President, 114:13-115:13, referring to Parties’ opening statements and *Orascom TMT Investments S.à r.l. v. People’s Democratic Republic of Algeria* (ICSID Case No. ARB/12/35) (“*Orascom v Algeria*”) and *Edenred S.A. v. Hungary* (ICSID Case No. ARB/13/21) (“*Edenred v. Hungary*”).

² Tr. Day 1, Sanderson, 115:23-116:1.

³ Tr. Day 1, Cavalieros, 116:8-12.

⁴ Tr. Day 1, Cavalieros, 116:13-17.

⁵ Tr. Day 1, President, 117:2-9.

⁶ Tr. Day 1, Sanderson, 117:14-17.

today’s [H]earing, and not in any previous pleadings of the parties, Sodexo opposes [...],”⁷
As regards the *Edenred v. Hungary* annulment decision, the Claimant stated that it does not
oppose the introduction of the decision since it was referred to by both Parties.⁸

5. On the next Hearing day, i.e., November 18, 2020, the Claimant sought leave of the
Committee to address it concerning a procedural matter.⁹ The Committee granted the
Claimant’s request for leave.¹⁰ The Claimant stated that upon further reflection, it had
decided to request the Committee to order the production of the *Edenred v. Hungary*
decision on annulment on the record in these proceedings and proposed that the Committee
might wish to direct the Parties to provide brief submissions on the issue.¹¹ The Applicant
objected to the Claimant’s request and argued that, “[t]he base principle is, as applied to the
Edenred v. Hungary and *UP Awards* in the underlying proceedings, that the decisions and
the awards are confidential, that is the default in ICSID unless the parties agree otherwise
[...]”¹²
6. During its subsequent questioning session, the Committee invited the Parties to present their
observations on the source of the confidentiality in ICSID proceedings referred to by the
Applicant, and noted that Article 48(5) of the ICSID Convention and ICSID Arbitration
Rule 48(4) impose on the Centre a prohibition on publishing the award without the consent
of the parties.¹³ The Applicant identified Procedural Order No. 1 issued in the *Edenred v.*
Hungary annulment proceeding, to be the source of the confidentiality in the proceeding,
specifically stating that “there was an agreement between the parties in respect of
confidentiality and confidentiality of the award.”¹⁴ The Applicant’s counsel read out the

⁷ Tr. Day 1, Cavalieros, 117:20-22.

⁸ Tr. Day 1, Cavalieros, 117:23-118:1.

⁹ Tr. Day 2, Cavalieros, 1:18-2:1.

¹⁰ Tr. Day 2, President, 2:2.

¹¹ Tr. Day 2, Cavalieros, 2:3-3:21, referring to the *Edenred S.A. v. Hungary* (ICSID Case No. ARB/13/21) and *UP and C.D Holding Internationale v. Hungary* (ICSID Case No. ARB/13/35) Awards.

¹² Tr. Day 2, Sanderson, 4:21-24.

¹³ Tr. Day 2, President, 58:9-21.

¹⁴ Tr. Day 2, Sanderson, 59:17-21.

following text of the relevant section of Procedural Order No. 1 in the *Edenred v. Hungary* annulment proceeding: “The ICSID Secretariat will publish the decision on annulment and any order or decision in the present case where both parties consent to publication. Otherwise, ICSID will publish excerpts of the decision on annulment pursuant to Arbitration Rule 48(4) and include bibliographic references to rulings made public by other sources on ICSID’s website and in its publications.”¹⁵ The Committee noted that this is a repetition of provisions directed at the Centre, in ICSID Arbitration Rule 48(4) and Article 48(5) of the ICSID Convention and similar to section 21.1 of Procedural Order No. 1 in this proceeding.¹⁶

7. In response, the Claimant contended that the relevant clause in Procedural Order No. 1, referred to by the Applicant, did not mention the word “confidential.”¹⁷ Further, the Claimant noted that the Applicant confirmed that it did not obtain Edenred’s consent to provide the *Edenred v. Hungary* award in the underlying arbitration¹⁸ and that “any risk in this respect of breaching potential confidentiality agreement, whether it existed or not, was not met.”¹⁹

II. DECISION

8. Having considered the position of the Parties, the Committee has decided that both annulment decisions, *Orascom v. Algeria* and *Edenred v. Hungary* shall be incorporated into record of these annulment proceedings.
9. In making this decision, the Committee has considered that, as a general matter, annulment committees benefit from the possibility of having access to previous *ad hoc* committees’ decisions on annulment, since, in particular, to a greater or lesser extent, those decisions concern the legal issues that are in front of this Committee. In the view of the Committee,

¹⁵ Tr. Day 2, Kohegyi, 61:2-9.

¹⁶ Tr. Day 2, President, 61:10-17.

¹⁷ Tr. Day 2, Cavalieros, 62:25-63:1.

¹⁸ Tr. Day 2, Cavalieros, 63:3-4.

¹⁹ Tr. Day 2, Cavalieros, 63:12-14.

this is especially so considering the specific nature of the task of annulment committees under the ICSID system, which requires the application of the *numerus clausus* grounds for annulment contained in Article 52(1) of the Convention.

10. In conducting this task, the generalized practice of *ad hoc* committees is to extensively refer to previous annulment decisions and the trends those decisions may reflect, either to find support for their analysis or to depart from them as the case may be.
11. In objecting to the request made by the Claimant for the production of the *Edenred v. Hungary* decision on annulment on the record, the Applicant stated that, as default rule in the ICSID system, awards and decisions are confidential.²⁰ Further, the Applicant stated that Procedural Order No. 1, issued in the *Edenred v. Hungary* annulment proceeding, contains a specific provision regarding confidentiality.²¹
12. The Committee does not consider these to be valid objections.
13. In the view of the Committee, the ICSID Convention and the ICSID Arbitration Rules do not impose a duty of confidentiality on the parties with respect to the awards or, *mutatis mutandis*, the annulment decisions.²² Indeed, Article 48(5) of the ICSID Convention establishes a prohibition, only on the Centre, from publishing awards or annulment decisions without the consent of the parties. Moreover, Rule 48 of the Arbitration Rules, after reiterating the limitation of Article 48(5), requires the Centre to promptly include in its publications excerpts of the legal reasoning of the Tribunal.
14. With respect to the Applicant's assertion that Procedural Order No. 1, issued in the *Edenred v. Hungary* annulment proceedings, is the source of confidentiality between the parties, the Committee considers that the relevant provision referred to by the Applicant, being a mere replication of Rule 48(4) of the Arbitration Rules, does not constitute a confidentiality provision that would limit the production of the annulment decision adopted by the *ad hoc*

²⁰ Tr. Day 2, Sanderson, 4:21-24.

²¹ Tr. Day 2, Sanderson, 59:17-21.

²² See Article 52(4) of the ICSID Convention and Rule 53 of the ICSID Arbitration Rules.

committee in that case. This is even more so considering that Rule 48(4) requires the Centre to publish excerpts of the legal reasoning, which is the relevant part of *ad hoc* committees' decisions given the nature of annulment proceedings.

III. ORDER

15. The Applicant shall produce by **November 30, 2020**, the decision on annulment rendered by the *ad hoc* committee in *Edenred S.A. v. Hungary* (ICSID Case No. ARB/13/21).
16. The Applicant is also directed to produce, by the same date, the decision on annulment rendered by the *ad hoc* committee in *Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35).
17. Both Parties are invited to simultaneously submit comments on those decisions by **December 4, 2020**.

For and on behalf of the Committee,

[signed]

Name: Andrés Jana Linetzky
President of the Committee
Date: November 24, 2020