



INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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February 17, 2022

By email

Uniper SE, Uniper Benelux Holding B.V. and
Uniper Benelux N.V.
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Re: Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands
(ICSID Case No. ARB/21/22)

Dear Mesdames and Sirs,

I write further to the instructions of the Tribunal, in relation to the Claimants' Request for Provisional Measures, dated December 3, 2021 (the "**Claimants' Request**").

The Tribunal has reviewed the Parties' submissions, including the Claimants' Request and accompanying documents, the Respondent's Observations on the Claimants' Request, dated January 21, 2022 and accompanying documents, and the Parties' further observations of February 4, 2022.

The Tribunal has also taken due consideration of the positions presented by the Parties at the Hearing on the Claimants' Request, which was held on February 3, 2022.

During the Hearing on the Claimants' Request, the Claimants recommended that the Tribunal issue its decision in two stages, first the operative part of the decision, and second the full decision with the Tribunal's reasoning. The Respondent indicated that it had no objection to this recommendation.

Considering what precedes, the Tribunal hereby issues the operative part of its decision on the Claimants' Request (the "**Tribunal's Decision**"). The Tribunal's Decision with the Tribunal's reasoning will follow.

DECISION

Having carefully considered all the evidence and arguments presented by the Parties, and for reasons to be supplemented in a further decision in due course, the Tribunal rules as follows:

- a. The Tribunal declares that pursuant to Articles 26 and 41 of the ICSID Convention, it has exclusive competence and authority to hear and resolve any objections to its jurisdiction.
- b. The Tribunal acknowledges that within the EU law system, EU courts correspondingly have exclusive competence to issue interpretations of the EU Treaties and accordingly of EU law. This authority does not, however, extend to valid interpretations of the jurisdiction of an ICSID tribunal.
- c. Given these parallel but independent competencies, the Tribunal expresses grave concern regarding the specific mechanism engaged by the Respondent in the German Court to seek an interpretation of EU law, as pursuant to section 1032(2) of the German Code of Civil Procedure (i) the timing of the request must precede the constitution of the Tribunal; and (ii) the request for relief said to be formally required by this mechanism, and in any event sought by the Respondent, could result in a declaration that Claimants' claims in this specific Arbitration are "inadmissible", *i.e.*, without jurisdiction.
- d. Notwithstanding this apparent conflict, the Tribunal notes the Respondent's representations to the Tribunal that:
 - i. it commenced the German Proceedings in a good faith effort to meet what it views as its obligations under the EU Treaties and not to challenge the *kompetenz-kompetenz* of this Tribunal;
 - ii. in the German Proceedings,
 1. it seeks only a declaration as to EU law, as required by its understanding of its EU Treaty obligations;
 2. it does not seek determinations under the ICSID Convention; and
 3. it has expressly advised the German Court of this position, specifically stating to the German Court that it "*is not called upon to decide a question of the ICSID Convention, but to clarify a question of EU law and German law*";
 - iii. it will not argue before any forum that any decision that might be rendered by the German Court constitutes anything other than a declaration under EU law; and
 - iv. the declaration if granted, in and of itself, will not have any effect on any of the Claimants' ability to continue participating in the ICSID proceedings, as there is neither a concept of contempt of court under German law, nor is the Respondent seeking any injunctive or similar relief.
- e. In these circumstances, it is clear both that any ruling the German Court may issue on a question of the Tribunal's jurisdiction does not impact the Tribunal's authority to determine its own jurisdiction under the ICSID Convention and the ECT, and that the Respondent in turn does not challenge this proposition.

- f. Based on these facts, the Tribunal denies the Claimants’ request for a provisional measures recommendation that the Respondent immediately withdraw the German Proceedings with prejudice or otherwise cause them to be discontinued with prejudice.
- g. The Tribunal nonetheless defers for later consideration the question of whether, notwithstanding the absence of a need for immediate provisional relief, the Respondent’s initiation and continuation of the German Proceedings was a breach of Articles 26 and 41 of the ICSID Convention.
- h. Given the seriousness of this issue, the Tribunal recommends that the Respondent reconsider whether it is necessary or appropriate to continue the German Proceedings, as there appears to be no dispute between the Parties concerning the relevant content of EU law: the Claimants have stipulated that, following the CJEU’s issuance of the *Komstroy* Judgment, “the CJEU has determined that, as a matter of EU law, Article 26 of the [ECT] should be interpreted so as to not apply to intra-EU disputes.”
- i. The Tribunal also recommends that to the extent it maintains the German Proceedings, the Respondent shall provide a copy of this Decision to the German Court.
- j. Further, the Tribunal strongly recommends that the Respondent take no further steps that could aggravate the dispute or deter, restrain or preclude any of the Claimants from continuing to participate fully and freely in this Arbitration.
- k. The Tribunal expressly reserves the right to revisit these determinations on an expedited basis if evidence is presented that there is a threat to the integrity of this Arbitration.
- l. The Tribunal defers the issue of costs of the Claimants’ Request to a subsequent decision, order, or the Award.

Yours sincerely,

[signed]

Jonathan Chevry
Secretary of the Tribunal

cc: Members of the Tribunal