

Compensation payment based on the enforcement of an arbitral award cannot be qualified as new state aid

JUDGMENT OF THE EUROPEAN GENERAL COURT DATED 18 JUNE 2019 | MICULA BROTHERS & OTHERS VS. EUROPEAN COMMISSION.

Executive Summary

- The European General Court has annulled the European Commission decision of March 2015 that qualified the payment of compensation awarded by the ICSID tribunal as state aid within the meaning of Article 107 (1) of the Treaty on the Functioning of the European Union.
- The European General Court ruled that the European Commission was not competent to treat the ICSID award as state aid because the underlying claim of the arbitral award occurred before Romania's accession to the European Union.
- Since the arbitral award is merely an ancillary element of the compensation and is not severable from the earlier incentives, the arbitral award cannot be qualified as new aid and serve as a basis for the competence of the European Commission and the applicability of EU law.
- The European General Court clarified that the present case is different from the Achmea decision. Unlike the situation which gave rise to the Achmea decision, in which the arbitral tribunal was obliged under the BIT to interpret and apply EU law, the arbitral tribunal in the Micula case was not bound to apply EU law.

I. Introduction and Background of the Decision

With decision dated 18 June 2019 the European General Court annulled the European Commission's 2015 decision on state aid. The European Commission had qualified the payment of compensation awarded by the International Centre for Settlement of Investment Disputes (ICSID) tribunal as state aid incompatible with the internal market.

The history of the dispute goes a long way back in the past. The Swedish investors Ioan and Viorel Micula and their companies (hereinafter "**Micula**") invested in the food production sector in Romania in the early 2000s. These investments were made on the basis of a Romanian incentive regime under the Emergency Government Ordinances (EGOs) which provided inter alia tax incentives and exemptions from customs duties.

In 2003 a bilateral investment treaty (BIT) between the Kingdom of Sweden and Romania entered into force granting protection of investments for investors.

In 2004, as the process of Romania's access to the European Union went forward, Romania repealed their incentive regime in order to comply with European law on state aid rules.

As a result of the repeal of the investment incentives the Micula brothers commenced proceedings at the ICSID and claimed for losses in July 2005. The claimants alleged that by revoking the incentive scheme, Romania had infringed the investors' legitimate expectations and violated their rights.



With effect of 1 January 2007 Romania accessed to the EU.

In December 2013 the ICSID tribunal decided in favour of Micula. The tribunal decided that Romania failed to ensure the claimant's fair and equitable treatment, owed to the Swedish investors. The arbitral tribunal awarded the claimants compensation for losses of approximately EUR 178 million.

This was the starting point of a whole series of proceedings on all different levels of legal jurisprudence – national, European and international – involving proceedings which started with the enforcement of the ICSID award and ended in the annulment of the ICSID award by the European Commission.

After Micula had first successfully enforced the award in 2014 and received a partial amount of the awarded losses by Romania, the European Commission issued an injunction against Romania, ordering the suspension of any further payment on the ICSID award. The European Commission was of the opinion, no further payment shall be made by Romania until the Commission decided whether such payments were compatible with the internal market or rather constituted state aid.

In March 2015 the European Commission decided that: The payment of the compensation awarded by the ICSID arbitral tribunal constitutes new state aid within the meaning of Article 107 (1) of the Treaty on the Functioning of the European Union (“TFEU”) and is therefore incompatible with the internal market.

The European Commission argued, unless an aid measure is declared to be compatible with the internal market by the Commission itself, the Member States are prohibited from putting State aid measures into effect (*Commission Decision of March 2015 ((EU) 2015/1470)*). A Member State must notify any plans to alter or grant aid to the Commission and shall not put its proposed measure into effect until the Commission has taken a final decision on that measure's compatibility with the internal market.

Therefore, the European Commission ordered that Romania shall not make any further payments of such incompatible aid and Romania was even obliged to recover the payment already made in order to eliminate distortion of competition caused by state aid.

The European Commission's decision was then challenged by Micula before the European General Court.



II. Main Rulings of the Decision

In favour of Micula the main rulings of the European General Court were as follows:

- the European Commission was by no means competent to assess their alleged unlawfulness in the light of European Law **(1.)**
- the European Commission classified wrongly the arbitral award as an advantage and state aid within the meaning of Article 107 TFEU as such compensation for damage suffered cannot be regarded as state aid as recalled in the European Commission's decision of March 2015 **(2.)**



1. Lack of Competence of the European Commission

The European General Court decided that as the claim for compensation of losses, which were the basis for the ICSID award, occurred before Romania's accession to the European Union, the Commission was not competent to decide whether payments of Romania were compatible with the internal market or rather constituted state aid.

In accordance with European case-law, state aid must be considered to be granted at the time where all conditions under the applicable national law for obtaining such aid are met. At the case at hand Romania repealed the EGO incentives in 2005 and not, as the European Commission claimed, only after Romania's accession to the European Union which was in 2007.

Therefore, in favour of Micula it was ruled that in order to assess the merits of the time-related arguments, it is necessary to define the date on which the alleged aid was granted. The European General Court states further, that the incentive regime of the EGO, on which Micula relied on, took place before Romania's accession to the European Union.

Considering these facts, it is irrelevant that the payment itself was performed years later in 2014/2015. The arbitral award is only the recognition of the rights under the EGO and BIT and the performed payments only represent the sole enforcement of the arbitral award.

Since the award is only a supplementary part of the compensation and cannot be separated from the previous incentives, the award cannot be qualified as new aid. Therefore the award is not capable to provide a basis for the competence of the European Commission and the applicability of EU law.

2. Compensation Payment is not State Aid

The European General Court decided that the European Commission wrongly classified the arbitral award as state aid within the meaning of Article 107 TFEU and shall be interpreted on the basis of objective factors.

However, according to European case-law (cf. Asteris), compensation for damage suffered cannot be regarded as aid unless it has the effect of compensation for the withdrawal of unlawful or incompatible aid.

Since the EU law and also the scope of Article 107 TFEU is not applicable to any event in relation to EGO and therefore also to the compensation for the withdrawal of EGO, at least in respect of the period predating accession, the European Commission could not argue that the arbitral award was incompatible aid.

Ultimately the European General Court made clear that the decision of the European Commission was already unlawful because the European Commission did not draw a distinction, among the amounts to be recovered falling within the period predating accession and those falling within the period subsequent to accession.

III. Summary

The *Micula* decision of the European General Court did not further refine the question – which arose from the *Achmea* decision – of how the relationship of EU law and intra-EU BITs has to be interpreted and to what extent the intra-EU BITs with its investor-state dispute resolution mechanisms remain applicable.

The background of the *Micula* decision exemplified the procedural difficulties that can arise, if the European Commission tries to prevent payment based on the enforcement of an arbitral award. The decision indicates which subsequent questions arise when an arbitral award on the grounds of an intra-EU BIT is enforced in the European Union.



The European General Court clarifies that the present case is different from the *Achmea* decision. Unlike the situation which gave rise to the *Achmea* decision, in which the arbitral tribunal was obliged under the BIT to interpret and apply EU law, the arbitral tribunal in the Micula case was not bound to apply EU law to events occurring prior to the accession of Romania.

The European General Court found the European Commission not only exceeded its jurisdiction, but also that the European Commission had incorrectly qualified the arbitral award as incompatible aid.

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