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Micula Case: The General Court Quashes the Commission's Decision and Rules that the Award is Not State Aid

Guillaume Croisant (Linklaters) · Wednesday, June 19th, 2019 · Linklaters

In a striking new episode of the long-running *Micula* saga, the General Court of the CJEU has quashed the European Commission's 2015 decision that Romania's payment of the €178 million award rendered by an ICSID tribunal back in 2013 would constitute illegal State aid in the meaning of Article 107 of the TFEU. In its [judgment](#) rendered yesterday, the General Court considered that the award recognised a right to compensation for the investors existing before Romania's accession to the EU. As a result, the Commission was precluded to apply EU State aid rules to this situation, at least with respect to the pre-accession period. The General Court's decision can be appealed before the Court of Justice.

Background

In 2005, in the framework of the accession process of Romania to the EU, the country repealed incentives offered to certain investors in disfavoured regions in order to eliminate domestic measures that could constitute State aid incompatible with the *acquis communautaire*. Romania subsequently acceded to the EU on 1 January 2007.

Two of these investors, the Micula brothers (and their investment vehicles), launched ICSID arbitration proceedings on the basis of the [2002 Sweden-Romania BIT](#). In a majority [award](#) dated 11 December 2013, the arbitral tribunal ruled that Romania impaired the Micula brothers' investments in breach of the fair and equitable treatment or the prohibition of expropriation clauses of the BIT. The investors were awarded c. €178 million, despite the claim of the European Commission, intervening as *amicus curiae* during the arbitration proceedings, that any ruling of the arbitral tribunal reinstating the privileges abolished by Romania, or compensating the investors for the loss of these privileges, would lead to the granting of new aid incompatible with EU State aid rules. Romania requested the annulment of the award before an *ad hoc* ICSID Committee, but its application was rejected on [26 February 2016](#).

Following partial payment of the award by Romania, the European Commission ruled on [30 March 2015](#) that such payment constituted illegal State aid. It precluded any

further payment by Romania and ordered it to recover the partial payment that had been made. The Micula brothers filed an annulment application of this decision with the General Court of the CJEU.

In parallel, the Micula brothers lodged applications for recognition and execution of the arbitral award before national courts, including in Romania, Belgium, France, Luxembourg, Sweden, the UK and the US. Most of these courts stayed the proceedings, pending the General Court's decision (by contrast, the Swedish Nacka District Court ruled that it was compelled to implement the Commission's decision and to decline enforcement). Interestingly, in March of this year, the Brussels Court of Appeal made a preliminary ruling reference to the CJEU, requesting guidance on the interplay between the Member States' contradictory obligations under EU State aid rules and the ICSID convention.

The General Court's decision

In its [ruling](#) of yesterday, a five-judge bench of the General Court upheld the investors' application and annulled the Commission's 2015 decision, considering that EU State aid law was inapplicable and that the Commission had exercised its powers retroactively.

Indeed, all the events at stake (namely Romania's adoption of the incentive measures, the investors' acquisition of the licences enabling them to benefit from these incentives, the entry into force of the BIT, the revocation of the incentives and the initiation of the arbitration proceedings) took place before Romania's accession to the European Union on 1 January 2007.

In this respect, after having recalled that "*new rules apply, as a matter of principle, immediately to the future effects of a situation which arose under the old rule*" (§83), the Court highlighted that, contrary to the Commission's contention, "*it cannot be considered that the effects of the award constitute the future effects of a situation arising prior to accession [...], since that award retroactively produced definitively acquired effects which it merely 'stated' for the past, that is to say, effects which, in part, were already established before accession*" (§84). It was merely the enforcement of a right that had arose in 2005, when Romania repealed the relevant incentives.

With respect to the intra-EU aspect of the applicable BIT (concluded between Sweden and Romania), the General Court further distinguished, very briefly, the *Micula* case from *Achmea*, ruling that "*the arbitral tribunal was not bound to apply EU law to events occurring prior to the accession before it*", as opposed to the *Achmea* tribunal (§87).

The Commission also exceeded its powers with respect to the amounts granted as compensation by the arbitral tribunal for the period subsequent to Romania's accession since, in its decision, it did not draw a distinction between the periods of compensation for the damage suffered by the applicants before or after accession (§91).

In addition, the General Court ruled that the contested decision was unlawful in so far as it classified the award as an aid within the meaning of Article 107 TFEU since, pursuant to the Court's case law, compensation for damage suffered cannot be regarded as aid unless it has the effect of compensating for the withdrawal of unlawful aid, which was not the case here as EU State aid law is not applicable to situations pre-dating Romania's accession (§§103-104).

The General Court's decision remains subject to appeal to the Court of Justice.

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This entry was posted on Wednesday, June 19th, 2019 at 10:49 am and is filed under Achmea, CJEU, EU Law, ICSID Arbitration, Micula, Recognition and enforcement of arbitral award

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