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Micula Case: The UK Supreme Court Rules That The EU Duty Of Sincere Co-operation Does Not Affect The UK's International Obligations Under The ICSID Convention

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In a decision likely to enthuse investors willing to enforce intra-EU ICSID awards in the UK, the UK Supreme Court unanimously held yesterday that the UK's enforcement obligations under the ICSID Convention could not be affected by the EU duty of sincere co-operation (in this case, the question of whether the award obtained by the Micula brothers against Romania constitutes state aid prohibited under EU law is pending before the CJEU), as the UK's ratification of the ICSID Convention preceded its accession to the EU.

Background

As further developed in a previous post, an ICSID tribunal constituted under the 2002 Sweden-Romania BIT ruled in 2013 that Romania impaired the Micula brothers' investments by repealing certain incentives offered to investors in disfavoured regions. Romania repealed these incentives in 2005, in view of its accession to the EU, in order to eliminate domestic measures that could constitute state aid incompatible with the *acquis communautaire*.

Following partial payment of the c. €178 million award by Romania, the European Commission ruled in 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. This decision was quashed by the General Court in June 2019, on the basis that the award recognised a right to compensation for the investors existing before Romania's accession to the EU and thus that the Commission was precluded to apply EU state aid rules to this situation. This allowed the court to avoid discussing the relationship between EU law and intra-EU investment arbitration, by ruling that "*in the present case, the arbitral tribunal was not bound to apply EU law to events occurring prior to the accession before it, unlike the situation in the case which gave rise to the judgment* [in the Achmea case]" (para. 87). The General Court's decision was appealed by the Commission before the Court of Justice on 27 August 2019.

In parallel, the Micula brothers lodged applications for recognition and execution of the arbitral award before national courts. In the UK, they were granted the registration of the award in 2015, under the Arbitration (International Investment Disputes) Act 1966 (implementing the ICSID Convention in the UK). In 2017, the High Court stayed the enforcement proceedings pending the

state aid proceedings before the CJEU, because, among others, the question of whether EU state aid law would preclude enforcement was discussed before the General Court. The stay was confirmed by the EW Court of Appeal on 27 July 2018, although it ordered Romania to provide security in the sum of £150m. Both limbs of this decision were appealed before the Supreme Court, respectively, by the Micula brothers (against the stay) and by Romania (against the security).

The position of the UK courts was in line with the view adopted by most of the EU domestic courts seized by the Micula brothers. Interestingly, in March 2019, the Brussels Court of Appeal made a preliminary ruling reference to the CJEU, requesting guidance on the interplay between the Member States' apparent contradictory obligations under EU State aid rules and the ICSID convention.

UK Supreme Court's decision

On the face of it, the UK Supreme Court was indeed faced with a question that has become central in the relationship between EU law and intra-EU investment arbitration since the Achmea case: should it give more weight to the EU duty of sincere co-operation (aiming at preserving the effectiveness of EU law) or to the UK's international obligations under Article 54 of the ICSID Convention (pursuant to which "*each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State*")? An interesting question for the supreme court of a state having just left the Union…

In yesterday's decision, the Supreme Court first conceded that "*the existence of a pending appeal to the Court of Justice with a real prospect of success is, in itself, sufficient to trigger the duty of cooperation and, subject to the further grounds of appeal considered below, requires the grant of a stay so as not to undermine the effect of the Commission Decision, should it be upheld*" (para. 56). The Supreme Court also agreed with the Court of Appeal that UK courts have the power to stay execution of an ICSID award in limited circumstances (in accordance with the rules applicable to domestic final judgments). However, awaiting a final decision at EU level would exceed that power because "*the Court of Appeal made use of powers to stay execution granted by domestic law in order to thwart enforcement of an award which had become enforceable under the ICSID Convention*" (paras. 84).

The Supreme Court considered that this conclusion was not affected by the EU duty of sincere cooperation, as it was inapplicable in the case at hand by virtue of Article 351 TFEU, according to which "*the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties*". As the UK joined and implemented the ICSID Convention before its accession to the EU on 1 January 1973, the duty of sincere co-operation enshrined in Article 4(3) TEU could not affect the UK's obligation to enforce the award under Articles 54 of the ICSID Convention. The stay had therefore to be lifted.

The Supreme Court did not discuss this aspect, but it should be noted that the UK ratified the Energy Charter Treaty in 1996, i.e. *after* its accession to the EU. However, ICSID awards may be rendered under Article 26 ECT, similarly to what is provided for by the dispute resolution

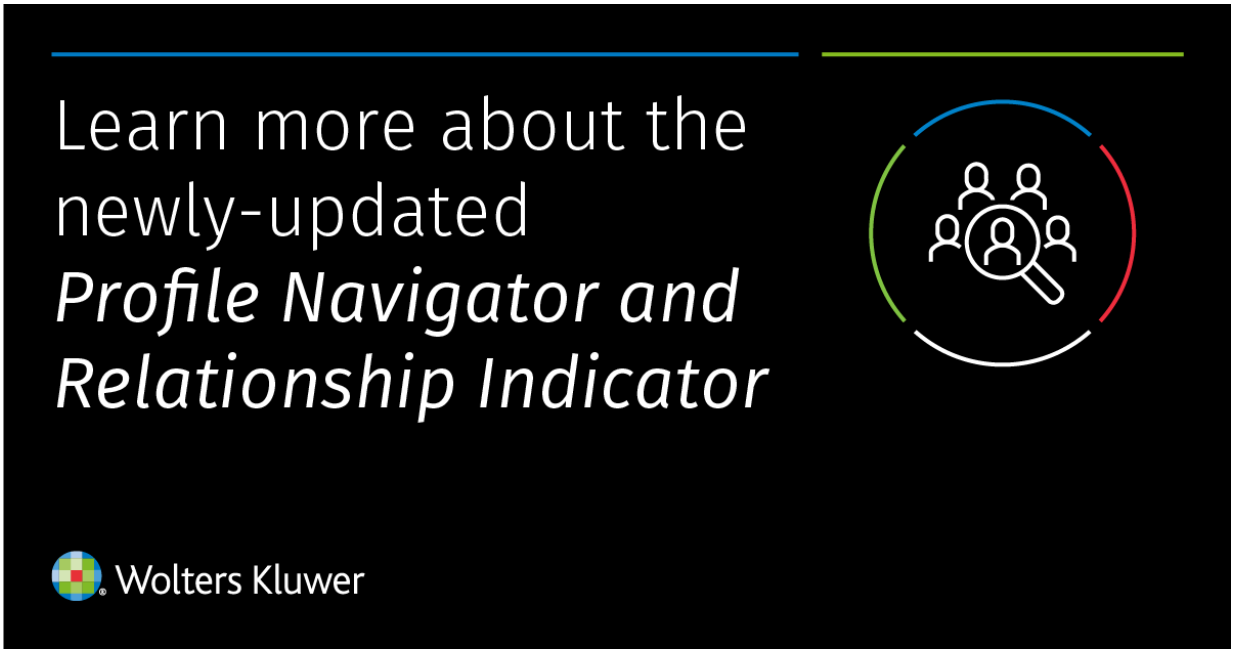
mechanism of the 2002 Sweden-Romania BIT.

The Supreme Court rebutted Romania's argument that Article 351 TFEU was not applicable to intra-EU situations, holding that "*while it is correct that in order for article 351 TFEU to apply relevant obligations under the prior treaty must be owed to a non-member state, that does not impose an additional requirement that the particular dispute before the court must relate to extra-EU activities or transactions […]. It is clear that the specific duties in articles 54 and 69 of the ICSID Convention are owed to all other Contracting States. The Convention scheme is one of mutual trust and confidence which depends on the participation and compliance of every Contracting State*" (paras. 100 and 104).

The majority view of the Court of Appeal was that a stay was required in the UK because the applicability of Article 351 TFEU was an issue before the General Court and there was thus a clear risk of conflicting decisions. By contrast, the Supreme Court held that such risk would be "*both contingent and remote*", because (i) questions as to the existence and extent of obligations under prior treaties, in the context of article 351 TFEU, are not reserved to the EU courts; (ii) in the State aid proceedings, what is at stake is the potential conflict between EU law and the responding state's (here, Romania) obligations under Article 53 of the ICSID Convention, as opposed to a third state's (here, the UK) enforcement obligations under Article 54 of that convention; and (iii) the General Court did not rule on the question of Romania's obligations under the ICSID Convention (while the pending appeal to the Court of Justice is limited to those grounds on which the General Court decided the application). The Supreme Court added that the preliminary reference made by the Brussels Court of Appeal was not relevant since Belgium was already an EU Member State when it ratified the ICSID Convention (paras. 111-117).

Finally, the Supreme Court envisaged the possibility for the European Commission to bring infringement proceedings against the UK because of its decision, but considered that there would be "*no realistic prospect of success in disputing the existence*" of the obligations owed by the UK to non-member states under the ICSID Convention and that "*the principle of comity and the two-way application of the principle of sincere co-operation would be likely to lead the Court of Justice to leave the interpretation of the Convention, to which the EU is not a party, to the domestic courts of the United Kingdom as a Contracting State*" (para. 116).

Several commentators considered that the UK could become a fertile ground for the enforcement of intra-EU awards upon its withdrawal from the EU. The Supreme Court's decision, rendered during the transition period, appears to go in that direction, at least for ICSID awards.



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