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Advocate General Szpunar in *Micula*: *Achmea* Irrelevant, but Commission Competent to Assess Award under EU State Aid Law

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According to Advocate General Maciej Szpunar, the *Micula* case is symbolic of the ‘conflictual relationship’ between EU law and international investment law. Indeed, the European Commission has persistently objected to the execution of the ICSID award issued in *Micula*, not because of the principles of autonomy and mutual trust that underpinned the *Achmea* judgment, but on grounds of EU state aid law. On 1 July 2021, Advocate General Szpunar issued his opinion in *Micula*, advising the Court of Justice of the European Union (‘CJEU’) to set aside the *Micula* judgment of the General Court, which had found against the Commission. In the view of the Advocate General, the General Court had erred when ruling that the European Commission was not competent to assess whether the implementation of the ICSID award was compatible with EU state aid law.

The Long Road to Luxembourg

In 2005, the Swedish brothers *Micula* and some of their companies commenced ICSID proceedings against Romania, challenging the withdrawal of tax incentives which were originally scheduled to remain in place until 2009 but had been terminated in order to ensure Romania’s compliance with EU state aid law upon accession. In 2013, the ICSID tribunal awarded approximately EUR 178 million in damages to the claimants, finding that Romania had breached the fair and equitable treatment standard prescribed in the Romania-Sweden BIT. Already during the arbitral proceedings, the European Commission had argued that any compensation granted for the withdrawal of the tax benefits would be subject to EU state aid law. In 2015, the Commission adopted a decision, finding that any compensation paid by Romania under the ICSID award constituted incompatible state aid which would have to be recovered by Romania. In 2019, the General Court annulled the Commission’s decision, ruling that the latter had lacked the competence to assess the compatibility of the ICSID award with EU state aid law, since the award effectuated a right to compensation which arose when Romania repealed the tax incentives, i.e. before Romania’s accession to the EU (see earlier blog [here](#)).

The Nuances of *Achmea*

Since the *Micula* arbitration was based on an intra-EU BIT, it is unsurprising that arguments based on *Achmea* appeared during the proceedings in Luxembourg. The General Court had briefly addressed the point, dismissing the relevance of *Achmea* to the *Micula* case. Since the General Court had found that the *Micula* case, unlike the *Achmea* case, concerned events predating Romania's accession to the EU, the *Micula* tribunal was not bound to apply EU law. Nonetheless, it was argued in cross-appeal by Spain, supported by the Commission and Poland, that the rationale of the *Achmea* judgment applied to the *Micula* arbitration and that, for that reason, the Miculas' application for annulment of the Commission's state aid decision was inadmissible.

Advocate General Szpunar expressed 'some doubts' as to whether the annulment application would be inadmissible even if the arbitration would have been incompatible with EU law. He noted, in footnote 11 to the opinion, that the incompatibility of the arbitration with EU law would not automatically have 'the effect of placing an obligation on the applicants to repay the compensation', while 'the annulment of the decision at issue would necessarily have an impact on their situation, since that decision determines whether they may keep the payments made by Romania'.

In any event, the Advocate General rejected the substance of Spain's cross-appeal. While *Achmea* implied that all arbitration proceedings initiated on the basis of an intra-EU BIT are incompatible with EU law, this approach was 'debatable' in respect of proceedings initiated before a state's accession to the EU. The Advocate General agreed with the cross-appellants that EU law applied to the *Micula* arbitration proceedings as of Romania's accession to the EU on grounds of the principle of the immediate applicability of EU law to the future effects of a situation that arose before accession, but this did not yet answer the question of compatibility.

The Advocate General noted that *Achmea* was concerned with the risks posed to the autonomy of EU law by arbitration proceedings in which EU law might be interpreted or applied. In the view of the Advocate General, all intra-EU BITs carry this risk, irrespective of whether it can be conclusively determined that a specific dispute involves the interpretation or application of EU law. Nevertheless, in the case of an arbitration initiated *before* accession, 'no dispute capable of concerning the interpretation or the application of EU law is removed from the judicial system of the European Union'. The Advocate General considered that if instead of an arbitral tribunal, a Romanian court had been hearing the *Micula* dispute, it would not have been able to make a preliminary reference to the CJEU even after accession, since 'the Court does not have jurisdiction to rule on the interpretation of EU law in a dispute concerning a situation that arose before accession'.

As to the principle of mutual trust, the Advocate General observed that this principle does not apply in relationships between the EU and third states. Precisely because of the lack of trust between EU member states and third states, the European Commission had promoted the conclusion of BITs between member states and aspiring member states in central and eastern Europe. The arbitration clause in these BITs served to compensate for the absence of mutual trust and to ensure an effective remedy for investors of member states in these states prior to their accession to the EU. Accordingly, the Advocate General considered it 'lawful' that a tribunal that was validly seized on the basis of a BIT whose conclusion had been encouraged by the EU would not relinquish jurisdiction upon the respondent state's accession to the EU, 'since the arbitration proceedings made it possible before accession, on the same basis as the principle of mutual trust after accession, to ensure the protection of investors' rights'.

The Timing of State Aid

The main appeal questioned whether the European Commission had been competent to assess the arbitral award under EU state aid law. In this context, the parties debated the moment in time when any state aid allegedly granted in connection with the award was actually granted. Citing *Magdeburger Mühlenwerke*, the Advocate General noted that state aid is granted at the moment ‘that the right to receive it is conferred on the beneficiary under the applicable national rules’. For that reason, not the moment of payment was the decisive criterion, but the moment of ‘the acquisition, by the recipient of the aid measure at issue, of a definitive right to receive it, and the corresponding commitment, by the State, to grant the aid’. In the view of the Advocate General, the *Micula* tribunal retroactively established the existence of a right to compensation that, prior to the award, did not definitively exist but was actually contested by Romania. Accordingly, the alleged aid measure was granted at the moment when the right to compensation was recognised by the tribunal or when the award was implemented by Romania, i.e. after accession. Accordingly, contrary to the General Court’s ruling, the Advocate General concluded that the Commission was competent to assess the compatibility of the award with EU state aid law.

The Advocate General’s conclusion on the timing of the state aid measure logically implied a rejection of the General Court’s finding that the Commission had wrongly qualified the award as an ‘advantage’, which is one of the criteria of state aid as defined in Article 107 TFEU. According to the General Court, EU law was not applicable to the compensation at issue and the *Miculas* could therefore rely on the *Asteris* judgment, which draws a distinction between compensation for damages and an advantage in the sense of EU state aid law. Advocate General Szpunar, however, had already established that EU law applied to the compensation, since it was awarded after Romania’s accession to the EU.

Moreover, he noted that the General Court had failed to address other reasons why the award might not qualify as compensation for damages in the sense of *Asteris*. For instance, the Commission had argued that *Asteris* only applied in the context of the general rules on civil liability under domestic law and not in the context of arbitration proceedings, and that the Romanian Competition Council had classified the original tax incentives as state aid under the 1995 association agreement between the European Economic Communities and Romania. In the view of the Advocate General, the General Court should have engaged with these arguments.

Concluding Remarks

Timing is everything in the *Micula* saga. Because of the complex timeline of the events, including arbitration proceedings commenced before Romania’s accession to the EU but concluded after accession, a variety of arguments have been raised in respect of the applicability of EU law to this particular case. According to Advocate General Szpunar, the *Micula* proceedings are not affected by the *Achmea* judgment because the arbitration concerned events before accession and was commenced before accession. At the same time, the fact that the award was rendered after accession gave the European Commission competence to assess the award under EU state aid law. If the Court follows this opinion, the case will be referred back to the General Court which will have to assess whether the Commission was not only competent but also right to qualify the award

as incompatible state aid. The answer to this question will likely have implications beyond the *Micula* case, given the Commission's continuing [reliance](#) on the state aid argument.

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This entry was posted on Sunday, August 1st, 2021 at 8:00 am and is filed under [Accession to the EU](#), [Achmea](#), [CJEU](#), [Micula](#), [Romania](#), [State Aid](#)

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