

# Kluwer Arbitration Blog

## Was the European Commission Right to Qualify the Micula Award as State Aid? The Question is Referred Back to the EU General Court

Guillaume Croisant (Linklaters) · Tuesday, January 25th, 2022

In its [judgment](#) rendered today, the Court of Justice has quashed the General Court's decision having ruled that the European Commission was not competent *ratione temporis* to assess whether the compensation paid by Romania to the Micula brothers, in implementation of a 2013 ICSID [award](#) rendered under the 2002 Sweden-Romania BIT, was constitutive of state aid. As opposed to the General Court, but in line with the [opinion](#) of its Advocate General, the Court of Justice found that the investors' definitive right to compensation arose from the award itself (rendered *after* Romania's accession to the EU) and not from Romania's breach of the BIT (which occurred *before* such accession). The Commission was thus competent, as the alleged aid was obtained by the investors at a time when EU law was applicable.

Contrary to its Advocate General, the Court of Justice considered that the [Achmea](#) case law was relevant to the *Micula* state aid proceedings since the dispute brought before the arbitral tribunal could not be regarded as being confined in all respects to a period during which Romania, having not yet acceded to the EU, was not yet bound by the principles stemming from *Achmea*.

The case is thus referred back to the General Court, which will have to rule whether the European Commission was right to consider that the compensation obtained by the Micula brothers in the arbitration proceedings was constitutive of state aid. In doing so, the General Court will have to take into consideration the *Achmea* case, on which the European Commission had heavily relied in its initial state aid decision.

### Background

An ICSID tribunal constituted in 2005 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 of the country. Romania repealed these incentives in 2005, shortly before its accession to the EU on 1 January 2007, in order to eliminate domestic measures that could constitute state aid incompatible with the *acquis communautaire*. The investors were awarded around EUR 178 million for their damage from 22 February 2005 up to 31 March 2009, i.e. from the effective abrogation of the tax incentives up to the date until which the arbitral tribunal considered that the investors had a legitimate expectation to benefit from these incentives.

Key facts thus occurred both *before* Romania's accession to the EU in 2007 (start of the arbitration proceedings, abrogation of the incentives) and *after* the same (rendering of the award, part of the relevant period for the damages). This dichotomy constituted the crux of the issues at stake before the Court of Justice.

Following partial payment of the 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 from applying EU state aid rules to this situation (see more in our [previous post](#)). This allowed the General 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 *Achmea*]*" (para. 87). The General Court's decision was [appealed](#) by the Commission before the Court of Justice on 27 August 2019.

Spain filed a cross-appeal, supported by the European Commission and Poland, claiming that the award breached the principle of mutual trust and the autonomy of EU law as interpreted in *Achmea* and, as a result, that the Micula brothers would have had no legitimate interest in bringing an action against the Commission's 2015 state aid decision.

In parallel, the Micula brothers lodged applications for recognition and execution of the arbitral award before national courts. In the UK, as further set out in our [previous post](#), the UK Supreme Court unanimously [held](#) in February 2020 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), since the UK's ratification of the ICSID Convention preceded its accession to the EU.

### Advocate General Szpunar's opinion

As reported in a [previous post](#), on 1 July 2021, Advocate General Szpunar [opined](#) that the General Court erred in law when it considered that the time when the aid was granted would have been when Romania repealed the incentives (i.e. before its accession to the EU). For the Advocate General, "*the decisive factor for the purpose of establishing the time when alleged aid was granted is 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*" (para. 125). In the case at hand, Romania disputed during the proceedings that it was required to pay compensation and it was only after the award was rendered that the investors acquired a right to compensation (para. 129). The compensation was thus granted after accession, and the European Commission was competent to assess its compatibility with state aid law.

The Advocate General favoured the dismissal of Spain's cross-appeal, by considering that *Achmea* could not be applied "*in arbitration proceedings initiated on the basis of a BIT concluded between two Member States before the accession to the European Union of the State party to the arbitration and still pending at the time of that accession*" (para. 107). The principle of autonomy of EU law

was not affected because no dispute capable of concerning the interpretation or the application of EU law was removed from the EU judicial system. Indeed, the subject matter of the proceedings was a factual situation that arose *before* accession for which the CJEU would not have had jurisdiction to rule on the interpretation of EU law even if a Romanian court, rather than an arbitral tribunal, would have been seized of the dispute (paras. 92-95).

The Court of Justice followed its Advocate General on the *ratione temporis* application of EU state aid law and the ensuing competence of the Commission (paras. 108-136), but adopted a different position with respect to the relevance of *Achmea* (paras. 137-145).

### **The alleged aid measure was granted when the award was rendered (rather than at the time of the breach of the BIT)**

On the first limb, the Court of Justice held that “*even if, as the General Court pointed out on numerous occasions in the judgment under appeal, the repeal, allegedly in breach of the BIT, of the tax incentives scheme at issue constitutes the event giving rise to the damage, the right to the compensation in question was granted solely by the arbitral award issued by that court, which, having upheld the claim brought by the arbitration applicants, not only found the existence of that right, but also quantified the amount thereof*” (para. 125). As a result, the alleged state aid occurred *after* accession, thereby leading to the application of EU state aid rules and the competence of the European Commission to assess the compatibility of the compensation granted to the investors with such rules.

### **The *Achmea* judgment is relevant to the *Micula* case**

Having concluded that the General Court’s decision had to be quashed, the Court of Justice did not rule on Spain’s cross-appeal regarding the alleged breach of the principle of mutual trust and the autonomy of EU law by the award (para. 148). It nevertheless pointed out that the General Court was wrong to have considered that the *Achmea* case was irrelevant in the case at hand. Since the compensation sought by the investors did not relate exclusively to the damage allegedly suffered before the 2007 accession (as the relevant period for such damage extended to 31 March 2009), the arbitral proceedings could not be regarded as being confined in all respects to a period prior to such accession. As a result, “*with effect from Romania’s accession to the European Union, the system of judicial remedies provided for by the EU and FEU Treaties replaced that arbitration procedure, the consent given to that effect by Romania, from that time onwards, lacked any force*” (para. 145).

### **The potential qualification of the *Micula* award as state aid is referred back to the General Court**

After having ruled that the Commission was competent to assess the compatibility of the alleged aid, the Court of Justice concluded that the case had to be referred to the General Court since the review of the validity of the Commission’s 2015 decision “*involves complex assessments of fact, in respect of which the Court does not have all the necessary facts*” (para. 154).

The General Court will thus have to determine whether the Commission was right to consider that the payment by Romania of the compensation granted by the award was constitutive of state aid by reviewing the four conditions of the same, namely whether there was (i) an intervention by Romania, which (ii) gave the Micula brothers an advantage on a selective basis, (iii) distorted or may have distorted competition, and (iv) was likely to affect trade between Member States. To conclude that these conditions would have been met, the Commission relied heavily on the fact that the award would have been rendered on the basis of an intra-EU BIT contrary to EU law (although Romania's accession occurred during the proceedings). In its upcoming assessment, the General Court will have to factor in the *Achmea* case as well, in view of the Court of Justice's conclusion on its relevance.

The upcoming assessment of the General Court will be key for other intra-EU BIT/ECT arbitration proceedings. Since most arbitral tribunals have remained undeterred by the *Achmea* case law, the state aid argument offers another way for the European Commission to oppose the enforcement of the awards rendered by these tribunals, in addition to the filing of *amicus curiae* in (non-EU) enforcement proceedings and its efforts to have the intra-EU BITs repealed by the Member States.

Almost 20 years after the start of the arbitration proceedings, the upcoming General Court's decision is unlikely to be the end of the story, as it will likely be subject to a new appeal to the Court of Justice.

*The views express herein are the author's only.*

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