Kluwer Arbitration Blog

Last Gasps of Brexit: The CJEU Holds that the UK Breached EU Law in a Continuation of the Micula Saga

James Hope, Nils Ivars, Kateryna Lazarchuk (Vinge) · Wednesday, May 1st, 2024

In a recent judgment dated 14 March 2024, *European Commission v UK* Case C-516/22, the Court of Justice of the European Union ("CJEU") ruled that the UK failed to comply with its obligations under EU law (the "CJEU Judgment").

A casual reader may wonder how this could be. After all, the UK officially left the EU in January 2020. The answer is that the Withdrawal Agreement between the UK and the EU required the UK to comply with its EU law obligations during a transition period that ended on 31 December 2020 (*see* Arts. 86(2) and 127(1) of the Withdrawal Agreement).

During this transition period, on 19 February 2020, the UK Supreme Court ("UKSC") issued a judgment in *Micula v Romania* (the "UKSC Judgment"). In that judgment, the UKSC decided to allow enforcement of an ICSID award, obtained by the Micula brothers in 2013, pursuant to the UK's obligations under the ICSID Convention, even though the EU Commission considered such an enforcement a violation of the EU state aid rules (in particular, Arts. 107 and 108 of the Treaty of the Functioning of the European Union ("TFEU")).

Now, four years later, the CJEU has found that the UKSC erred in law by issuing that judgment, violating the "principle of sincere cooperation" under Art. 4(3) of the Treaty of the European Union ("TEU") and a number of other provisions in the EU treaties.

By its decision, the CJEU strengthens its *Achmea* doctrine, further underlining its restrictive view on investment arbitration in the EU. Yet, perhaps more interestingly, the *Micula* case raises a fundamental question: who ultimately decides on the enforcement of an ICSID award that may clash with the EU law obligations?

The *Micula* Saga

This is the latest event in a long-running saga concerning investments made in Romania by the Micula brothers prior to Romania's accession to the EU on 1 January 2007.

In summary:

- In the early 2000s, the Miculas made investments in Romania under an investment incentive

scheme named EGO 24.
- In preparation for its EU accession and to comply with the EU state aid rules, Romania repealed most of the EGO 24 scheme.
- In 2005, the Miculas, being Swedish nationals, brought claims against Romania before ICSID under the Sweden-Romania BIT. In December 2013, an ICSID tribunal ruled in their favour, ordering Romania to pay approximately EUR 178 million plus interest (*see* the Final Award of 11 December 2013 in ICSID Case No. ARB/05/20, the "ICSID Award").

After this, a certain amount of procedural turmoil began:

- Romania initially made a partial payment of the ICSID Award, but in May 2014, the EU Commission issued a so-called injunction decision, effectively ordering Romania to immediately suspend any enforcement of the ICSID Award. The Miculas subsequently sought annulment of this decision (*see* the Claimant's Application for Annulment of Decision C(2014) 3192 final).
- Later, in 2015, the EU Commission issued its final decision, ruling that payment of the ICSID Award would constitute state aid in violation of the EU treaties, thus prohibiting enforcement (*see* Decision 2015/1470 of 30 March 2015). This decision was annulled in June 2019 by the first instance EU court, the General Court (*see* Judgment of the General Court in Cases T?624/15, T?694/15 and T?704/15 of 18 June 2019); but in January 2022, the CJEU set aside and referred the case back to the General Court (*see* C-638/19 P Commission v European Food of 25 January 2022), where the case is still pending. Thus, the state aid question has not yet been finally decided.
- Romania also tried unsuccessfully to annul the ICSID Award and suspend its enforcement.

Following the ICSID Award, the Micula brothers sought enforcement in multiple jurisdictions, including the United States, France, Belgium, Luxemburg, Sweden, and the UK.

In these enforcement proceedings, the national courts in the EU Member States faced a dilemma, torn between their obligations under the ICSID Convention to enforce an ICSID award in their territory and the EU Commission's decision, establishing that an enforcement would constitute a breach of the EU treaties.

One example where such a conflict between obligations under the ICSID Convention and EU law was explicitly raised occurred in the enforcement proceedings in 2019 before the Nacka District Court in Sweden. In its decision, the District Court acknowledged Sweden's obligation under the ICSID Convention to enforce the ICSID Award as if it were a national judgment, but refused enforcement, nonetheless, on the basis that the enforcement would undermine the EU Commission's decision, ultimately violating the EU state aid rules. This conclusion is in line with the well-established principle of the primacy of EU law over national laws.

The UKSC, however, came to a different conclusion in the enforcement proceedings in the UK in the UKSC Judgment.

Interpretation of Art. 351 TFEU

Much of the difference between the conclusions of the CJEU and the UKSC stems from a difference in legal culture and turns on a simple question: who decides?

The difference centres on the interpretation of para. 1 of Art. 351 of the TFEU, which reads:

> "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." (emphasis added)

Art. 351 TFEU, thus, provides for an exception from the principle of EU law primacy in certain situations: when a Member State has a prior treaty obligation to a non-Member State, the Member State is *not* bound to give precedence to EU law over its other treaty obligations (*see* para. 78 of the CJEU Judgment).

Importantly, both the CJEU and the UKSC agree on this premise. In addition, both courts appear to agree—at least in principle—that the CJEU is the ultimate and exclusive authority to rule on the interpretation of the EU treaties (*see* para. 99 of the UKSC Judgment).

However—and here comes one of the key points of the case—in order to determine whether the enforcement of the Micula brothers' ICSID Award falls within the scope of Art. 351 TFEU, one must also determine whether the treaty obligation in question is *towards a non-EU Member State*. In practice, this requires an interpretation of the UK's obligations under the ICSID Convention—which is undisputedly *not* part of the EU law (*see* para. 68 of the CJEU Judgment).

In short, who decides on that further issue of interpretation?

The UKSC's Judgment

On this question, the UKSC found that it was competent to interpret the ICSID Convention in these circumstances and that it did not need to defer the question to the EU courts, stating (para. 110 of the UKSC Judgment):

> "Neither the EU courts nor domestic courts have competence to give an authoritative decision, binding as between States, as to the existence and extent of obligations under a prior multilateral convention. The convention itself will usually make provision for the resolution of disputes. In the case of the ICSID Convention that function is reserved to the International Court of Justice by article 64."

The UKSC found that Arts. 54 and 69 of the ICSID Convention impose on the UK a duty to effectively enforce an ICSID award in its territory, which is a duty owed to all Contracting States of the ICSID Convention, not only to Sweden and Romania (the parties to the BIT on which the Miculas' claims relied) (para. 104).

In taking this position, the UKSC referred to, *inter alia*, the preamble, structure, and overall scheme of the ICSID Convention, Schreuer's commentary, and the *travaux préparatoires* to the ICSID Convention (paras. 104-08).

The CJEU's Judgment

The CJEU, on the other hand, has now clarified that it is of a different view.

The CJEU emphasized that the scope of Art. 351 TFEU is a matter of EU law and, thereby, within the CJEU's exclusive authority (*see* paras. 120-22 of the CJEU Judgment).

Contrary to the UKSC's view, the CJEU found in paras. 70-74 that the proceeding before the UK Supreme Court *only* related to the UK's potential treaty obligation to Sweden (the country of the Micula brothers) and its nationals to enforce the ICSID Award, not to all the ICSID Contracting States, as found by the UKSC. Thus, the CJEU concluded that Art. 351 TFEU was not applicable.

Rebutting the UKSC's view on this question, the CJEU concluded in para. 76 that third countries could well "have an interest" in the UK enforcing the ICSID Award, but that such "factual interest cannot be equated with a 'right', within the meaning of the first paragraph of Article 351 TFEU."

The Judgments of the UKSC and the CJEU: A Clash of Culture and Perspective

It is perhaps not surprising that the UKSC and the CJEU came to opposite conclusions in this case.

As a matter of substance, there is a clash between the Miculas' rights pursuant to public international law and EU law principles of state aid. Procedurally, the UK's obligations to enforce ICSID awards pursuant to the ICSID Convention clash with EU courts' procedural obligations, including the principle of sincere cooperation. From an international law perspective, the UKSC's decision is likely correct. But from an EU law perspective, the CJEU's decision is also correct. To a large extent, these perspectives are irreconcilable.

This clash is also demonstrated by the CJEU's statements in relation to actions for annulment of EU legislation (which was not the case in the *Micula* case). In its judgment (para. 128), the CJEU added that in the context of Art. 351 TFEU it "alone [has] jurisdiction to interpret the relevant prior international agreement." This is, from a strict EU law perspective, quite natural. Yet, one might wonder if the International Court of Justice would agree that the CJEU "alone" has such power.

What Will Happen Next?

In the operative part of its judgment, the CJEU declared that the UK had failed to fulfil its obligations under Art. 4(3) TEU, Arts. 108(3), 267(1), (3) and 351(1) TFEU, read in conjunction with Art. 127(1) of the Withdrawal Agreement, and the CJEU ordered the UK to pay costs. In accordance with the Withdrawal Agreement, the CJEU judgment has binding force and the UK is obligated to take the necessary measures to comply with the judgment—ultimately at the risk of a penalty payment pursuant to Art. 260 TFEU.

Nevertheless, it seems unlikely that the UK will agree to do so, given that the UK government chose not to defend itself before the CJEU and explicitly stated that it did not intend to participate in the proceedings.

Politically, it also seems unthinkable that the UK will comply. Brexit has now happened, and the UK no longer has any continuing obligations pursuant to the principle of sincere cooperation under Art. 4(3) of TEU.

What will happen next? That remains to be seen.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Wednesday, May 1st, 2024 at 8:57 am and is filed under Achmea, Brexit, Enforcement, English courts, European Commission, European Court of Justice, Micula, Sweden, UK Supreme Court
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.