

# Kluwer Arbitration Blog

## Yet Another Chapter in the Micula Saga: The EU General Court Confirms the Qualification of the Micula Award as State Aid

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On October 2, 2024, the EU General Court delivered a much-anticipated [decision](#) in the long-running Micula saga, upholding the European Commission’s qualification of the award in *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]* as State aid. Coming after more than 10 years of litigation across multiple jurisdictions, the decision follows the Court of Justice of the European Union (“CJEU”)’s recent case law on intra-EU investment arbitration and reaffirms the EU’s approach in relation to the conflict between EU law and the ICSID Convention. This post provides a brief background to the dispute before analyzing the key findings and implications of the General Court’s decision in light of previous rulings of the CJEU.

### Background

The case stems from investments made in the late 1990s by the Micula brothers, Swedish citizens of Romanian origin, under a tax incentives scheme introduced for the purpose of attracting investment in disadvantaged regions. In 2005, Romania repealed the tax incentives scheme in order to align its legislation with the *acquis communautaire* in the context of the negotiations for its accession to the EU. In response, the Micula brothers launched an ICSID arbitration against Romania under the Sweden-Romania Bilateral Investment Treaty (“BIT”), which had entered into force in 2003. Their main claim was that Romania’s repeal of the tax incentives had breached their legitimate expectations and failed to provide fair and equitable treatment to their investments.

The ICSID tribunal rendered its award in December 2013, finding that Romania had breached its BIT obligations and ordering the State to pay approximately EUR 178 million, representing damages for the period between the repeal of the incentives and their scheduled expiration date in 2009.

In the meantime, Romania had joined the EU in January 2007, a development which rendered the award’s implementation much more complicated than expected. While Romanian authorities initially made a partial payment, the European Commission commenced a formal investigation over the execution of the arbitral award, culminating in a March 2015 [decision](#) declaring that any payment made under the award would constitute illegal State aid under [Article 107 of the Treaty on the Functioning of the European Union](#) (“TFEU”). The Commission ordered Romania not to

make any further payments and to recover the amounts already paid.

This situation led to multiple parallel proceedings, as the Micula brothers challenged the Commission's decision before the EU General Court and simultaneously pursued enforcement of the award in various jurisdictions, including the United States, Belgium, Luxembourg, Sweden, and the United Kingdom (see our previous coverage [here](#) and [here](#)).

In June 2019, the General Court **annulled** the 2015 decision on State aid, finding that the Commission did not have the competence to review measures pre-dating Romania's accession to the EU and distinguishing the case from *Achmea* (see our previous coverage [here](#)). However, the investors' initial success before the EU court proved to be a Pyrrhic victory. In a January 2022 [judgment](#), the CJEU upheld the Commission's appeal, finding that the Commission's competence to review the award under State aid rules did not depend on when Romania repealed the incentives, but on when the right to compensation crystallized. Since the right to compensation was based on the 2013 ICSID award – well after Romania's accession to the EU – the Commission was competent to characterize the payment of compensation under the award as State aid. In addition, the CJEU made clear that the *Achmea* decision was relevant in the context of the case, meaning that the arbitration mechanism established by the BIT was automatically superseded by the EU judicial system upon Romania's accession. The case was thus referred back to the General Court for examination of the remaining claims of the parties (see our previous coverage [here](#)).

## The Court's Key Findings

### *Admissibility of the Challenge*

At the outset, the Court rejected the Commission's argument that the case was inadmissible. According to the Commission, given that the award was not enforceable under *Achmea*, the applicants could not have any legitimate interest in challenging its decision. The General Court disagreed, explaining that an action for annulment of a Commission's decision is admissible whenever the legal consequences of a favorable decision would benefit the party bringing the proceedings. In this case, the applicants had a clear interest in removing the obstacle to the enforcement of the award, regardless of the inherent merits of their action. In addition, the Court noted that the mere fact that the CJEU had referred back the case for examination of the remaining claims necessarily implied that the case could not be declared inadmissible, even though the award's unenforceability had already been established at that stage.

### *The Relationship Between EU Law and Other International Obligations*

On the merits, one of the applicants' main arguments was based on [Article 351 TFEU](#), a provision that prevents EU law from affecting the obligations of EU Member States under international agreements concluded with third countries before their accession to the EU. The applicants argued that Romania remained bound by its obligations under the BIT with Sweden and the ICSID Convention, which were entered into by Romania before its accession to the EU and required the execution of arbitral awards.

The Court noted that, in light of the decision on appeal, the relevant date to make an assessment

based on Article 351 TFEU was that of the award. At that time, Romania had already acceded to the EU, with the consequence that Article 351 TFEU was not applicable to the BIT with Sweden because that provision only concerns obligations vis-à-vis third countries, not intra-EU obligations.

Next, and more significantly, the Court addressed the argument based on the [ICSID Convention](#). Under Article 53 of the Convention, the parties to a dispute are required to comply with the award, while Article 54 requires all States Parties to enforce pecuniary obligations under an ICSID award. However, according to the Court, Romania did not have any obligation to honor the award, given that the arbitration clause providing for the jurisdiction of the arbitral tribunal was invalid as a matter of EU law. In so deciding, the Court referred to another [ruling](#) of the CJEU in the Micula saga, rendered in the context of a preliminary reference procedure requested by the Brussels Court of Appeal that was examining one of the Micula brothers' enforcement attempts. Since there was no obligation on the part of Romania, there could not be any corresponding right of third States with respect to the enforcement of the award.

The Court added that, despite its multilateral nature, the ICSID Convention essentially governs bilateral relationships between contracting parties. Third states might have a factual interest in seeing ICSID awards enforced, but this does not amount to a “right” within the meaning of Article 351 TFEU. That interpretation echoed the March 2024 [decision](#) of the CJEU in the infringement proceedings lodged by the Commission against the UK for having allowed the Micula brothers to proceed with the enforcement of the ICSID award (see our previous coverage [here](#)).

The General Court therefore dismissed the applicants' argument based on Article 351 TFEU and proceeded to analyze their additional claims concerning EU State aid law.

#### *The State Aid Analysis and the Issue of Joint Liability*

In particular, the Court rejected the applicants' argument that the payment of compensation represented mere damages and could not be qualified as State aid. The compensation ordered by the arbitral tribunal was found by the Court to be a reinstatement of the benefits repealed by Romania in order to comply with EU State aid law. The Court stated that the operative part of the award made clear that the amounts were calculated on the basis of the original tax incentives scheme, thus constituting an economic advantage falling within State aid rules.

The General Court then addressed the applicants' theory that the payment under the award could not be imputable to Romania, and thus could not constitute State aid, because it was merely an automatic consequence of its international obligations under the ICSID Convention. The Court recalled its previous finding that Romania was under no obligation to implement the award and noted that such a reasoning would create a dangerous loophole, allowing Member States to circumvent State aid rules by simply entering into conflicting international obligations. The Court concluded that the fact that Romanian authorities had actually made partial payments showed that those payments were imputable to Romania.

The Court also upheld the Commission's approach with respect to joint liability. The Micula brothers' direct involvement in the management and control of their various companies justified treating them and their companies as a single economic unit for State aid purposes, thus allowing to recover the partial payments from any of the companies and the individual claimants, without having regard to who had actually received those payments.

## Conclusion

The General Court's decision comes as no surprise. The Court was bound by the CJEU's appeal judgment and had limited room for maneuver in examining the remaining claims. Nonetheless, the decision confirms once again the EU's uncompromising stance on intra-EU investment arbitration. While this ruling marks another significant milestone in the Micula saga, it is unlikely that it is going to be the last. The decision is subject to appeal and domestic courts will have to take it into account in the ongoing enforcement attempts by the Micula brothers.

*The views expressed in this post are the author's personal views, and do not necessarily reflect the opinions of Curtis, Mallet-Prevost, Colt & Mosle or its clients.*

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