

International Arbitration, Investment Protection and EU State Aid Rules: the General Court of the EU Annuls the European Commission's State Aid Decision in the Micula Case



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In a long-awaited ruling of June 18, 2019, the General Court of the European Union (“GCEU”) annulled the European Commission’s 2015 State aid decision in the *Micula* case (joined cases T-624/15, T-694/15 and T-704/15). The ruling provides valuable clarifications regarding the relationship between intra-EU bilateral investment treaties (“BIT”) and EU State aid rules.

In sum, the GCEU confirmed that the European Commission lacked jurisdiction to apply EU law in a situation where all relevant events took place before accession to the EU. The validity of intra-EU BITs was not at issue because, during the relevant time period, the BIT in question (the 2002 Sweden-Romania BIT) was between a Member State (Sweden) and a third country (Romania).

Factual background

Romania was in a difficult economic, financial and social situation following the collapse of the communist regime in 1989. In its efforts to boost regional development, in 1998 and 2000, Romania adopted various incentives to induce investors to invest in certain economically challenging regions of the country. Enticed by these incentives, Swedish citizens Viorel and Ioan Micula made substantial investments in Romania.

In 2000, when Romania began accession talks with EU, the Commission identified the incentives as possibly inconsistent with EU State aid rules. In order to successfully conclude the accession negotiations, Romania repealed the incentive programs as of February 2005. As a consequence, the Micula brothers suddenly found themselves without the benefit of the incentives that had induced them to invest in the first place.

The arbitration proceedings

In the summer of 2005, the Micula brothers and three of their companies (“claimants”) filed a request for arbitration under the rules of the International Centre for the Settlement of Investment Disputes (ICSID: case ARB/05/20 *Micula and Others v Romania*). Claimants argued successfully that Romania’s premature

revocation of the incentives in the manner that it took place breached the fair and equitable treatment principle under the Sweden-Romania BIT. Claimants further argued that the premature revocation caused them damage for which they must be compensated.

On 11 December 2013, the arbitral tribunal awarded the claimants approximately 80 million Euros plus interest, *i.e.*, approximately 178 million Euros at the time of the award. The award was upheld by an ICSID annulment committee in 2016. The Commission intervened as *amicus curiae* in the arbitration proceedings, claiming that any compensation re-establishing the advantages of the incentives would constitute incompatible State aid under EU law.

As the Micula brothers sought to enforce the ICSID award, the Commission issued an injunction preventing Romania from making any payment under the ICSID award. On 30 March 2015, the Commission adopted its final decision, finding that the payment of compensation under the ICSID award constitutes incompatible State aid. The Commission further ordered Romania to recoup any amounts already paid to claimants.

The GCEU's judgment

Claimants challenged the Commission's decision in the GCEU. The GCEU accepted claimants' argument that the Commission lacked jurisdiction ("competence") to apply EU State aid rules in this case because Romania's repeal of the incentives, the initiation of the arbitration proceedings, and all other relevant events occurred before Romania's accession to the EU on 1 January 2007. Accordingly, the 2013 ICSID award, which was based on pre-accession incentives, could not be classified as new aid and thus could not provide a basis for the Commission's competence. This timing issue also distinguishes this case from the famous *Achmea* case, in which the Court of Justice of the EU ruled that the arbitration clause in an intra-EU BIT was contrary to EU law.

For the GCEU, the Commission's conclusion that the payment of the compensation constituted State aid was underpinned by the idea that the incentives were themselves incompatible with EU law. But they were repealed in 2005, so the Commission was simply not competent to assess them under EU law, at least with regard to the period predating accession. The Commission could not retroactively exercise its powers to a situation which occurred pre-accession.

Although not necessary to the outcome, the GCEU also accepted claimants' argument that the compensation in question did not confer any advantage on the recipients, which is one of the defining features of State aid. In principle, damages are not considered State aid under EU law unless they compensate for the withdrawal of a measure which itself constitutes incompatible State aid. As the Commission was not competent to assess the incentives for the pre-accession period, the compensation for that period cannot be regarded as compensation for the withdrawal of such a measure.

Conclusion

The GCEU's ruling confirmed a point that might seem obvious in retrospect, but apparently not for the Commission, namely: the Commission does not have jurisdiction to apply EU law in a situation where all relevant events predated a Member State's accession to the EU.

Interested parties will have to wait for a different case for the Commission to establish that intra-EU BITs can result in awards that are contrary to EU law, and State aid rules in particular.

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