

General Court of the European Union Annuls European Commission Decision on State Aid

11 July 2019

On 18 June 2019, the General Court of the European Union (“GCEU”) annulled the European Commission’s 30 March 2015 ruling that Romania’s payment of the €178 million 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* (ICSID Case No. ARB/05/20) constituted illegal State aid. The GCEU’s ruling that the payment of an adverse arbitration award by a European Union (“EU”) Member State does not constitute illegal State aid will be welcome news for EU investors that have obtained awards against EU Member States. However, the decision was tied to the timing of the measures that violated the Sweden-Romania bilateral investment treaty and gave rise to the damages award, which

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& Plimpton**

occurred prior to Romania’s accession to the EU. It may therefore be primarily of relevance to investors with claims and awards arising from events in EU Member States prior to accession.

The GCEU’s ruling was delivered amidst increasing uncertainty about the future of intra-EU investor-State arbitration, particularly following the Court of Justice of the European Union’s March 2018 judgment in *Slowakische Republik v Achmea B.V.* (the “Achmea Judgment”). The GCEU emphasised that the *Micula* Tribunal was not obliged to apply EU law to the pre-accession period.

BACKGROUND

On 11 December 2013, the *Micula* Tribunal issued its final award, holding Romania liable for breaches of the Sweden-Romania bilateral investment treaty following its withdrawal of economic incentives that benefited the Claimants’ food production business. The Tribunal ordered payment of €178 million to the Micula brothers and their companies. Romania subsequently paid part of the award (approximately €76 million) by offsetting a tax debt owed by one of the Claimants (European Food).

In October 2014, the European Commission commenced infringement proceedings against Romania in respect of the part payment and any future payment of the arbitral award, on the basis that it allegedly constituted illegal State aid. On 30 March 2015, following an investigation, the European Commission issued its decision: (i) finding that payment of the arbitral award constitutes illegal State aid under EU law; and

(ii) directing Romania to recover part payment of the award and refrain from making further payments against the award. The arbitral Claimants commenced proceedings before the GCEU in November 2015 requesting that the GCEU annul the Commission's decision.

THE GCEU'S RULING

The GCEU annulled the European Commission's decision on State aid on two principal grounds.

The Commission Retroactively Applied EU Law to a Situation Pre-dating Romania's EU Accession

The Applicants contended that the *Micula* Tribunal had found Romania liable for wrongful acts and omissions that took place prior to Romania's accession to the EU (1 January 2009) and, therefore, EU State aid law did not extend to Romania's wrongful measures. The Commission took the position that "the unconditional right to the full compensation subsequently awarded could have arisen only after Romania's accession to the European Union" and that EU State aid law therefore applied.

The GCEU identified the need to establish the date on which the alleged aid was granted, noting that, according to EU case law, "State aid must be considered to be granted at the time that the right to receive it is conferred on the beneficiary under the applicable national rules". Considering that the compensation provided for in the arbitral award "was intended to re-establish the situation in which the applicants would have, in all likelihood, found themselves had the [economic incentives] not been repealed", the Applicants' right to receive compensation dated from the time that the incentives were repealed. This, in turn, pre-dated Romania's accession to the EU. The Commission had therefore, in the GCEU's reckoning, exercised its powers retroactively.

The GCEU acknowledged that the *Micula* Tribunal had calculated damages from the moment the economic incentives were withdrawn (22 February 2005) until their initial scheduled expiry (1 April 2009), admitting that this period included 27 months during which Romania was an EU Member State. However, the GCEU held that the Commission had nonetheless exceeded its powers, as it drew no distinction between compensation due for damage suffered pre- and post-accession.

The GCEU made a brief distinction between its decision and the *Achmea* Judgment, which held that a clause "such as" Article 8 of the Netherlands-Slovak Republic BIT (the dispute resolution clause at issue in *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13) was not compatible with EU law. The GCEU pointed out in this regard that the *Micula* Tribunal was not bound to apply EU law to events occurring prior to Romania's accession to the EU.

The Commission Unlawfully Classified the Arbitral Award as an Advantage and Aid Under EU Law

The Applicants claimed that the arbitral award conferred no advantage on them, but simply sought to compensate them for damage suffered. The Applicants pointed out that they had expressly amended their claim before the *Micula* Tribunal to remove the request that the economic incentives be reinstated, and had maintained only their request for compensation for Romania's breaches of the Sweden-Romania bilateral investment treaty. The Commission argued that the arbitral award constituted "an indirect grant of State aid", reinstating *de facto* the economic incentives.

The GCEU recalled the case law on the classification of State aid under EU law, which requires: (i) an intervention by the State or through State resources; (ii) a liability to affect trade between Member States; (iii) the conferral of an advantage on the recipient; and (iv) distortion, or the threat of distortion, of competition. The GCEU did not, however, decide this question and reverted to its earlier reasoning finding that the Commission had retroactively applied its powers in upholding the Applicants' pleas on this second ground.

Having upheld the Applicants' pleas on these grounds, the GCEU annulled the Commission's decision in its entirety without examining the remaining grounds.

LOOKING FORWARD

The GCEU's decision is a positive development for EU investors with extant awards against EU Member States, or who may in the future need to resort to investment arbitration against EU Member States, as well as for the Micula brothers who are attempting to enforce the unpaid portion of their award against Romania in multiple jurisdictions. However, the decision's reasoning is tied to proceedings and awards regarding measures taken by a Member State pre-accession. The Commission may also choose to appeal the GCEU's decision to the Court of Justice of the European Union, indeed, it has very recently, in *Micula et al. v. Government of Romania* (case number 1:17-cv-02332 in the U.S. District Court for the District of Columbia), argued that "[i]t would be premature to assume that the General Court's judgment amounts to the E.U. judiciary's final word on the matter." The uncertainty regarding the interplay of EU law and investment treaty arbitration for EU investors remains high, especially as the debate about and ramifications of the *Achmea* Judgment continue to unfold.

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Please do not hesitate to contact us with any questions.

LONDON



Lord (Peter) Goldsmith QC
phgoldsmith@debevoise.com



Tony Dymond
tdymond@debevoise.com



Wendy J. Miles QC
wjmiles@debevoise.com



Samantha J. Rowe
sjrowe@debevoise.com



Patrick Taylor
ptaylor@debevoise.com



Merryl Lawry-White
mlawrywhite@debevoise.com

NEW YORK



Mark McCloskey
mmccloskey@debevoise.com



Donald Francis Donovan
dfdunovan@debevoise.com



David W. Rivkin
dwrivkin@debevoise.com



Catherine Amirfar
camirfar@debevoise.com



Mark W. Friedman
mwfriedman@debevoise.com



Ina C. Popova
ipopova@debevoise.com

PARIS



Dietmar W. Prager
dwprager@debevoise.com



Natalie L. Reid
nlreid@debevoise.com



Antoine F. Kirry
akirry@debevoise.com