

# EU General Court Annuls Micula State Aid Decision



On 18 June 2019, the General Court of the European Union (the **General Court**) handed down its long-awaited judgment in the Micula case.

As we discussed before, this case finds its origins in the investment made by the Miculas, two investors of Swedish nationality, in the food production sector in Romania in the 1990s. At the time of investment they relied on numerous tax incentives regimes that Romania had put in place in order to attract foreign investment.

In 2005, as Romania prepared to accede to the European Union, the tax incentives were revoked in an effort to conform to EU law on State aid.

The Miculas then instituted ICSID proceedings against Romania based on the Romania-Sweden Bilateral Investment Treaty, arguing that the revocation of the tax incentives constituted a breach of their rights under that treaty. The arbitral tribunal issued its award in 2013, holding that by revoking the incentives, Romania had indeed failed to award the claimants fair and equitable treatment. The arbitral tribunal awarded the Miculas EUR 180 million.

In 2015, the European Commission handed down a decision (the **2015 EU decision**) declaring that the ICSID award in favour of the Miculas amounted to State aid. The 2015 EU decision required Romania to refrain from paying the amount due under the award. The Commission also ordered Romania to recover any compensation already awarded to the Miculas.

The Miculas sought to challenge this 2015 EU decision before the General Court.

In its judgment handed down on 18 June 2019, the General Court annulled the 2015 EU decision. More particularly, the General Court found that (i) the EU Commission did not have the competence to adopt the 2015 EU decision since EU law was not applicable to international wrongs committed by Romania prior to its accession to the European Union; and (ii) the arbitral award did not constitute State aid within the meaning of Article 107 of the Treaty on the Functioning of the European Union (*TFEU*).

### **Lack of competence to adopt the 2015 EU decision and inapplicability of EU law**

In their challenge, the Miculas argued, first, that the EU Commission lacked competence to issue the 2015 EU decision since EU law was not applicable in 2005 when Romania revoked its favorable tax incentives regime. That Romania joined the EU in 2007 and that the arbitral tribunal only delivered its award in 2013 were irrelevant.

The Miculas also argued that the 2015 EU decision was based on the incorrect premise that the tax incentives regime in place in Romania until 2005 constituted State aid prohibited by EU law.

The EU Commission contested the allegation that the 2015 EU decision was aimed at challenging the tax incentives regime in place prior to 2005. It argued that the aid at issue was granted after Romania's accession to the EU "either through

*the conversion of the arbitral award, by means of its recognition, into a valid legal right under national law, or through Romania's implementation of the arbitral award"* (para. 64).

The General Court dismissed the EU Commission's arguments and agreed with the Miculas.

In particular, the General Court found that the Miculas' right to receive compensation arose at the time when Romania repealed this tax incentives regime (para. 75). Since this event took place before Romania's accession to the EU, EU law did not apply to that situation. According to the General Court, although the decision awarding the compensation to the Miculas was delivered in 2013, this arbitral award was *"merely an ancillary element of the compensation at issue and is not, as such, severable from the earlier tax incentives"*. Consequently, *"it cannot be classified as new aid and serve as a basis for the competence of the Commission and the applicability of EU law for all events occurring in the past [...]"* (para. 77).

Importantly, the General Court also noted that the amounts granted to the Miculas as compensation for the damage resulting from Romania's revocation of the tax incentives regime were calculated by the arbitral tribunal from the moment that this regime was repealed (on 22 February 2005) until its scheduled expiry (on 1 April 2009). The General Court then noted that:

- with respect to the amounts granted as compensation for the period predating Romania's accession to the European Union (*i.e.*, 22 February 2005 – 31 December 2006), those amounts could not constitute State aid within the meaning of EU law since EU law was not applicable during that period; and
- with respect to the amounts granted as compensation for

the period subsequent to Romania's accession to the European Union (*i.e.*, 1 January 2007 – 1 April 2009), *“even assuming that the payment of compensation relating to that period could be classified as incompatible aid, given that the Commission did not draw a distinction between the periods of compensation for the damage suffered by the applicants before or after accession, the Commission has, in any event, exceeded its powers in the area of State aid review”* (para. 91).

### **The Micula's arbitral award does not constitute State aid**

The Miculas also argued that the arbitral award did not confer an advantage on them (which is an essential constitutive element of State aid pursuant to Article 107 TFEU[1]). The Miculas argued that the arbitral award was intended solely to compensate them for the damage they suffered. In particular, they argued that the award did not reinstate the tax incentives regime, but rather granted them compensation for Romania's breach of its obligations under the Romania-Sweden Bilateral Investment Treaty.

In view of this argument, the General Court made the following conclusions:

– Regarding the compensation corresponding to the period predating Romania's accession to the European Union (*i.e.*, 22 February 2005 – 31 December 2006), the General Court recalled the holding in *Asteris* (joined cases C-106/87 to 120/87), that *“compensation for damage suffered cannot be regarded as aid unless it has the effect of compensating for the withdrawal of unlawful or incompatible aid”*.

On the basis of this case law and since EU law was not applicable during the 2005 – 2006 period, those amounts could not be regarded as *“compensating for the withdrawal of unlawful or incompatible aid”*. Consequently, in so far

as the arbitral award offered compensation during that period, it did not confer an advantage to the Miculas.

– Regarding the compensation corresponding to the period subsequent to Romania’s accession to the European Union (*i.e.*, 1 January 2007 – 1 April 2009), the General Court found that since *“the compensation at issue covered, at least in part, a period predating accession (from 22 February 2005 to 1 January 2007) and as the Commission did not draw a distinction, among the amounts to be recovered, between those falling within the period predating accession and those falling within the period subsequent to accession, the decision by which it classified the entirety of the compensation as aid is necessarily unlawful”*.

Consequently, the General Court concluded that the 2015 EU decision was unlawful *“in so far as it classified as an advantage and aid within the meaning of Article 107 TFEU the award, by the arbitral tribunal, of compensation intended to compensate for the damage resulting from the withdrawal of the tax incentives, at least in respect of the period predating the entry into force of EU law in Romania”*.

### **Conclusion and follow-up implications**

Although I personally welcome the outcome of the case (if the General Court had ruled otherwise, any form of judgment or decision ordering an EU Member State to pay compensation to a private company would have constituted a State aid...), I am (on the basis of my preliminary analysis) a bit concerned with the approach of the General Court and with how it quickly (and without thorough analysis) dismissed the argument that the compensation corresponding to the period subsequent to Romania’s accession to the European Union could indeed be constitutive of State aid. I would therefore not be surprised if those parts of the General Court’s reasoning offered the EU Commission ammunition for a potential appeal before the Court

of Justice of the European Union (**CJEU**).

If the EU Commission wishes to file an appeal before the CJEU, it must do so within two months (+ 10 days on account of distance). Such an appeal, however, will not be suspensory (unless the parties apply for such suspension and if this is accepted by the CJEU). Consequently, irrespective of any appeal before the CJEU, the decision of the General Court handed down on 18 June 2019 will certainly have immediate and direct consequences on the Micula enforcement cases currently pending in other jurisdictions, particularly in [the UK](#) and in Belgium. In the latter proceeding, the Brussels Court of Appeal recently requested a preliminary ruling from the CJEU asking essentially whether the 2015 EU decision superseded the enforcement proceedings of an ICSID award. The judgment handed down today may render this request for preliminary ruling moot.

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[\[1\]](#) It is settled case law that, in order for a measure to be classified as State aid under Article 107 TFEU, there must be (i) an intervention by the State or through State resources; (ii) the intervention must be liable to affect trade between Member States; (iii) it must confer an advantage on the recipient; and (iv) it must distort or threaten to distort competition.

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