

EU State Aid Law: further EU challenges to investment arbitration



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Competition and EU Law

It is common knowledge by now that EU law does not take a favourable view of intra-EU investment arbitrations. As discussed in previous issues of the Investment Arbitration Outlook,¹ the Court of Justice of the European Union ('CJEU') has handed down a number of landmark judgments essentially concluding that there is no place for investment arbitration between EU Member States and EU investors. While the general stance in the *Achmea* case² and subsequent decisions has attracted the arbitration world's attention, the idiosyncratic EU State aid laws are on

the radar as the next concern for EU investors (and perhaps even non-EU investors) who seek to obtain or enforce a favourable investment arbitration award.

This Article reveals that EU State aid law, in the subset of investment cases where it could apply, may have more far-reaching effects than the general prohibition on intra-EU investment arbitrations. Firstly, State aid rules may apply to all arbitration cases where an EU Member State is the respondent (i.e. even if the claimant is not based in the EU), so the scope of these rules exceeds that of the intra-EU arbitration concerns that the CJEU has raised to date. And secondly, where they are applied, the strong enforcement measures that underpin EU State aid rules could present an insurmountable obstacle to actually enforce an award.

¹ See E. Arnaldo Orts and J. Lamas de Mesa, 'Intra-European Union Investment Protection: What Now?' (October 2021) 8 Investment Arbitration Outlook, p 19 and J. Lamas de Mesa, 'The *Achmea* decision: significant uncertainties linger' (May 2019), p 19.

² CJEU, Case C-284/16, *Slovakische Republik (Slovak Republic) v Achmea BV* (6 March 2018), EU:C:2018:158.



[Home](#)

[Editorial](#)

[Insight](#)

[A Human Rights Perspective on Investment Arbitration after COVID-19: current issues and future trends](#)

[Global Briefing](#)

[EU State Aid Law: further EU challenges to investment arbitration](#)

[Interim Measures and Emergency Arbitration in Chile](#)

[Insolvency and Arbitration Agreements in Spain: new decision overrules judgment 255/2020 of 30 October 2020 and lifts the arbitration clause's suspension](#)

[In Focus](#)

[Remote Hearings in International Arbitration during the Pandemic](#)

[A Guide to the New Bilateral Investment Treaty between the Kingdom of Spain and the Republic of Colombia](#)

[Investment Arbitration: Contact Lawyers](#)

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What is State aid law?

Articles 107 and 108 of the Treaty of the Functioning of the European Union ('TFEU') prohibit EU Member States from granting an economic advantage to companies on a selective basis if to do so could distort competition. This general prohibition does not apply when the decision to grant State aid is notified in advance to the European Commission *and* this institution indicates that the conditions of the State aid measure in question are compatible with the internal market. The CJEU's case law has developed and extended these rules significantly, to the point that they now encompass almost any type of State aid measure, from clear-cut cases of subsidies granted to individual companies to tax exemptions or public-private dealings that cannot be adequately explained by market dynamics.

The European Commission and the EU courts have taken the position that investment arbitration awards can constitute a State aid measure³ when they compensate an investor for the withdrawal of a State aid measure which was itself unlawful or incompatible. This reduces the scope for State aid issues to arise in investment arbitration to only those cases where the underlying facts of the investment claim relate to a State aid measure that falls within the scope of Articles 107 and 108 TFEU and does not have Commission approval (but, as we have seen, the measures that may constitute aid are numerous and not always obvious).

The *Micula* and *Antin* cases

To date, the European Commission has considered that an investment arbitration award constituted State aid in two cases: the *Micula v Romania* and *Antin v Spain* ICSID awards.⁴

The *Micula* award was the culmination of a 15-year saga of arbitral and judicial decisions that has attracted a great deal of attention. In summary, an ICSID tribunal found that Romania had breached the Sweden-Romania

³ See CJEU, Case C-638/19 P, *Commission v European Foods and others* (25 January 2022), ECLI:EU:C:2022:50 and European Commission, Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – *Micula v Romania*, ICSID Case No ARB/05/20, Award (11 December 2013).

⁴ See *Ioan Micula et al. v Romania*, ICSID Case No ARB/05/20, Award (11 December 2013) ('*Micula case*') and *Antin Infrastructure Services Luxembourg S.à.r.l. and another v Spain*, ICSID Case No ARB/13/31 (15 June 2018) ('*Antin case*').

bilateral investment treaty ('BIT') by withdrawing government incentives that were not consistent with EU law and therefore had to be removed before Romania could join the EU.⁵ The Commission then concluded that paying the awarded compensation would breach EU State aid rules because the underlying governmental incentives were incompatible with the EU's internal market.⁶ Romania was placed in the impossible position of having to decide between breaching its obligations under the ICSID Convention or the EU treaties. The claimants have sought to enforce the award in the EU and elsewhere, while challenging the lawfulness of the Commission's decision before the CJEU. In a recent judgment, the CJEU held that the Commission had the power to conduct the State aid investigation (even though the underlying Romanian aid commenced before Romania's accession to the EU) and that the Commission was right to apply Articles 107 and 108 TFEU to the investment award. The CJEU has referred the case to the lower General Court for further proceedings to consider whether the Commission's substantive State aid analysis was correct.⁷

The *Antin* case is one of the many investment arbitration cases challenging the Spanish decision to

⁵ *Ioan Micula et al. v Romania*, ICSID Case No ARB/05/20, Award (11 December 2013).

⁶ European Commission, Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – *Arbitral award Micula v Romania*, 11 December 2013.

⁷ CJEU, Case C-638/19 P, *Commission v European Foods and others* (25 January 2022), ECLI:EU:C:2022:50.

[Home](#)

[Editorial](#)

[Insight](#)

[A Human Rights Perspective on Investment Arbitration after COVID-19: current issues and future trends](#)

[Global Briefing](#)

[EU State Aid Law: further EU challenges to investment arbitration](#)

[Interim Measures and Emergency Arbitration in Chile](#)

[Insolvency and Arbitration Agreements in Spain: new decision overrules judgment 255/2020 of 30 October 2020 and lifts the arbitration clause's suspension](#)

[In Focus](#)

[Remote Hearings in International Arbitration during the Pandemic](#)

[A Guide to the New Bilateral Investment Treaty between the Kingdom of Spain and the Republic of Colombia](#)

[Investment Arbitration: Contact Lawyers](#)

[Home](#)[Editorial](#)[Insight](#)[A Human Rights Perspective on Investment Arbitration after COVID-19: current issues and future trends](#)[Global Briefing](#)[EU State Aid Law: further EU challenges to investment arbitration](#)[Interim Measures and Emergency Arbitration in Chile](#)[Insolvency and Arbitration Agreements in Spain: new decision overrules judgment 255/2020 of 30 October 2020 and lifts the arbitration clause's suspension](#)[In Focus](#)[Remote Hearings in International Arbitration during the Pandemic](#)[A Guide to the New Bilateral Investment Treaty between the Kingdom of Spain and the Republic of Colombia](#)[Investment Arbitration: Contact Lawyers](#)

The European Commission and the EU courts have taken the position that investment arbitration awards can constitute a State aid measure

withdraw its 2007 scheme to subsidise renewable energy projects. The ICSID panel found that the decision breached Antin's rights under the Energy Charter Treaty and awarded it compensation. Spain notified the award to the European Commission as a State aid measure. The Commission's preliminary position is that (i) the 2007 Spanish subsidy scheme constituted unlawful State aid; and (ii) the award would also constitute State aid, as it granted Antin an advantage equivalent precisely to that provided by the scheme.⁸ The investor and Spain

can now make submissions to the Commission, which will then issue its final decision on the matter.

While neither case has concluded, both are important because they illustrate clearly that investment arbitration awards *can* be subject to exacting European Commission scrutiny and that, if that happens, it becomes much more challenging to enforce them.

What are the practical implications of these two decisions?

The most obvious conclusion that follows from the *Micula* and *Antin* cases is that a post-award State aid

enquiry can easily call into question the supposed finality arbitration awards offer, with investors facing an institution (the European Commission) with a very different perspective of what must be reviewed. While investment arbitration tribunals assess whether the host State has mistreated investors, the European Commission assesses whether the host State has benefited investors unjustifiably. This difference in perspective has led, at least in the *Micula* and *Antin* cases, to these bodies reaching contradictory positions.⁹

The second conclusion is less obvious (given that the investors in both *Micula* and *Antin* were based in the EU) but potentially significant: given that EU State aid rules are not concerned with the nationality of the aid's recipient, in

principle the restrictions to enforcing an award on State aid grounds could also apply to non-EU investors and therefore go further than *Achmea*. Indeed, a non-EU investor could receive public aid and if such aid ends up before an investment arbitration tribunal, the award's enforcement could later be challenged on State aid grounds.

Finally, the fact that an investment arbitration award is found to be unlawful State aid is also relevant in terms of the award's enforcement. This is due to the additional and powerful measures to enforce and recover aid that are associated with Articles 107 and 108 TFEU, which may be applied regardless of whether the party seeks to enforce the award in the EU or elsewhere. If the Commission takes an unfavourable view of an award, a Member State court would likely refuse

⁸ European Commission, Decision C(2021) 5405 final of 19 July 2021 on State aid SA.4155 (2021/NN) – Spain – Arbitration award to Antin.

⁹ The Commission's decision in the *Antin* case is not final and it could reach a different conclusion after hearing the investors' arguments.

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to enforce the award.¹⁰ Indeed, the European Commission has recently commenced infringement proceedings against the United Kingdom following its Supreme Court's decision to allow the *Micula* award to be enforced while the Commission's decision was on appeal before the CJEU.¹¹

And things are not necessarily easier if the award is enforced outside the EU as the Commission may compel an EU Member State to recover all amounts unlawfully paid.¹² This recovery requirement comes with an obligation to pay interest and a lengthy ten-year limitation period (which almost any Commission or Member State action interrupts automatically).¹³

Therefore, if an EU Member State were to pay anything to an investor further to an enforcement action brought outside the EU, the European Commission could technically compel the Member State to recover those amounts in its own territory, starting a vicious cycle of payments outside the EU and recoveries within its territory.

All in all, it is clear that any party thinking of bringing a claim against an EU Member State must be aware of these challenges and factor potential State aid issues into its decision to commence investment claims. Where such issues are surmountable, investors may want to consider engaging with the European Commission (and the respondent State) as early as possible in the dispute, with the aim of getting a decision that there is no incompatible State aid before the award is rendered. Ultimately, Member States have a powerful tool to resist adverse investment awards. We are bound to see some interesting developments in this area, not just in *Micula* and *Antin*, but presumably also in other investment cases (perhaps following on from other awards that were adverse to Spain in the same matter leading to *Antin's* claim).

¹⁰ Even though ICSID awards must be treated as final national judgments under the ICSID Convention, the CJEU has held that national procedural rules on finality of judgments are not enough on their own to impede the recovery of State aid; see CJEU, Case C-119/05, *Lucchini* (18 July 2007), ECLI:EU:C:2007:434.

¹¹ European Commission, 'Sincere cooperation and primacy of EU law: Commission refers UK to EU Court of Justice over a UK Judgment allowing enforcement of an arbitral award granting illegal State aid' (9 February 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_802> accessed 17 February 2022.

¹² See Art 16 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Art 108 of the Treaty on the Functioning of the European Union.

¹³ *Ibid*, Art 17.



[Home](#)

[Editorial](#)

[Insight](#)

[A Human Rights Perspective on Investment Arbitration after COVID-19: current issues and future trends](#)

[Global Briefing](#)

[EU State Aid Law: further EU challenges to investment arbitration](#)

[Interim Measures and Emergency Arbitration in Chile](#)

[Insolvency and Arbitration Agreements in Spain: new decision overrules judgment 255/2020 of 30 October 2020 and lifts the arbitration clause's suspension](#)

[In Focus](#)

[Remote Hearings in International Arbitration during the Pandemic](#)

[A Guide to the New Bilateral Investment Treaty between the Kingdom of Spain and the Republic of Colombia](#)

[Investment Arbitration: Contact Lawyers](#)