CHAPTER 5


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Abstract

The Micula brothers, Ioan and Viorel, together with three companies that they control, brought ICSID proceedings against Romania in July 2005. An ICSID Tribunal rendered its final decision on 11 December 2013, granting the claimants damages of RON 376,433,229 (equivalent to US$116 million) plus interest accruing until full satisfaction of the Award.1 The claimants have to date brought at least six sets of enforcement proceedings against Romania all over the world, none of which have yet reached fruitful final conclusion. The conflict between the EU legal order and the ICSID regime, as to the enforcement of awards, has manifested itself in the six different sets of enforcement proceedings. The aim of this case note is to provide an overview of the competition law dimension to the ICSID proceedings in the Micula case. The European Commission’s involvement in the Micula case, including its decision prohibiting Romania from fulfilling the ICSID award and the Commission’s intervention in the ICSID and subsequent enforcement proceedings is also examined. This case note concludes with the observation that the CJEU is due to issue a couple of decisions in the coming months, which could signpost the way for investors to enforce ICSID awards, when these involve the application of intra-EU bits.

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1 The Background to the Micula Case

The dispute arose from an investment made by the claimants in the food and beverage industry in Romania. The country had in the 1990s emerged from a period of communism, and wanted to attract investment and accede to the European Union (EU). The claimants' investment was made in reliance with the representations made and tax incentives offered in 1998 by Romania, which the State represented would be in place for at least ten years (the EGO 24/1998 incentives).

These incentives were however withdrawn by the State in 2004, in tandem with its accession to the EU. The claimants argued that this was premature and violated their legitimate expectations.2

Romania signed the Europe Agreement in February 1993, establishing the legal framework for its accession. This was five years before the incentives were granted.3 In May 2003, the EU requested that Romania address all fiscal aid measures deemed incompatible with the EU acquis, with immediate effect. The Commission disapproved of the EGO 24/1998 incentives, considering these incompatible with EU rules on State aid.4 Romania's accession to the EU was conditioned on the termination of these incentives.

To comply with EU competition regulations and pave the way to EU accession, Romania revoked the EGO 24/1998 incentives on 31 August 2004 (effective 22 February 2005).5 Romania signed the Accession Treaty with the Member States of the EU on 25 April 2005, and formally acceded to the EU on 1 January 2007.

2 The ICSID Arbitration and the Tribunal's Decision

The claimants filed their request for ICSID arbitration in July 2005, claiming that Romania had breached the Sweden-Romania BIT by revoking the EGO 24/1998 incentives. They claimed that Romania had discriminated against their investment, failed to afford them fair and equitable treatment, and expropriated their investment. The State’s response was that the revocation was within its sovereign powers to regulate the public welfare (in a non-discriminatory

3 Article 64 of the Europe Agreement provided that any public aid which distorted or threatened to distort competition would be incompatible with the proper functioning of the Agreement.
4 See n 1, paras. 235, 789, 790, 793, 796.