



Belgian court seeks guidance from ECJ on Micula award

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The Miculas had sought to attach funds held by an air traffic management agency (Credit: istockphoto)

The Brussels Court of Appeal has stayed the Micula brothers' attempt to enforce their €178 million ICSID award against Romania, while agreeing to seek a preliminary ruling from the European Court of Justice on the relationship between EU law and member states' enforcement obligations under the ICSID Convention.

In a judgment dated 12 March, the court stayed the brothers' appeal regarding the enforcement of the ICSID award until the EU courts make a final ruling on whether Romania's payment of the award would contravene EU law on state aid.

At the same time, the court said it would seek a ruling from the ECJ on three preliminary questions, including whether a 2015 decision by the European Commission on the state aid issue precludes the award's enforcement in the courts of a member state other than Romania.

The long-running dispute relates to Romania's withdrawal of economic incentives ahead of its accession to the EU in 2007. The Miculas, who are Swedish nationals of Romanian origin, own food distribution businesses that had benefited from the incentives.

In 2013, an ICSID tribunal found that the state had breached the 2003 Sweden-Romania bilateral investment treaty through the manner in which it withdrew the incentives and ordered it to pay €178 million in compensation. The award was upheld by an ICSID annulment committee three years later.

However, the European Commission issued a final decision in April 2015 directing Romania not to pay the award on the basis that it amounted to a de facto reinstatement of the incentives and would constitute illegal state aid under EU law. The Miculas are pursuing a challenge to that decision before the EU General Court, which went to a hearing last year but is yet to be decided. Any ruling by the General Court will be appealable to the ECJ.

In Belgium, Viorel Micula obtained leave in September 2015 to serve an attachment against €85 million in funds that were owed to Romania's air traffic services agency, Romatsa, and held by Eurocontrol, the Brussels-based international air traffic management body,

However, a Brussels first-instance court lifted that attachment in January 2016 – ruling that Micula had no valid enforceable title as a result of the Commission's 2015 decision on the state aid issue.

In the latest decision, the Brussels Court of Appeal concluded that as there was no further recourse available in relation to the award, it constituted a valid and lawful title on which basis attachment could be performed.

The court said that the European Commission's decision created a conflict for Romania, which is obliged to enforce the award under the ICSID Convention but also prohibited from doing so by the Commission's decision. The court also observed that the EU courts are still reviewing the Commission's findings.

In those circumstances, the court said that ruling on the Miculas' appeal at this stage created a risk that its own decision might conflict with the future decision by the EU courts. It therefore decided to stay its judgment to await a final determination by the EU courts on the validity of the Commission's decision.

The Court of Appeal also agreed to the Miculas' request that it make a preliminary reference to the ECJ. The court said it would submit three questions to the EU court.

First, it asks whether the Commission's 2015 decision forbidding payment of the award by Romania should be understood as including payments recovered through an enforcement proceeding in the courts of another EU member state.

Second, it asks whether EU law requires that a court of a member state other than Romania, seized with a request to enforce an ICSID award that has the force of res judicata under applicable national rules of procedure, must set aside the award solely on the basis of a subsequent, non-final decision by the European Commission that execution of the award is contrary to EU rules on state aid.

Finally, the court asks whether EU law, including the principle of sincere cooperation, allows the courts of member states other than Romania to disregard their international obligations under the ICSID

Convention in a situation where the European Commission has adopted its state aid decision after the award was rendered, after having participated in the ICSID arbitration and annulment proceedings and argued its case on state aid in those proceedings.

Loyens & Loeff partner Hakim Boularbah in Brussels, who represents Viorel Micula in the Belgian proceedings, says he welcomes the decision, which recognises that “the conflict between the ICSID award and the European Commission’s decision cannot just be resolved by considering that the latter supersedes the former.”

He says the request for a preliminary ruling from the ECJ raises for the first time the question of the scope of the European Commission’s decision and whether it prevents the enforcement of the award in member states other than Romania.

Boularbah argues enforcement of the award cannot be attributable to Romania under state aid rules.

Viorel’s brother Ioan Micula and his companies are also parties to the Belgian proceedings, represented by White & Case in Brussels. The latest decision concludes that their intervention in the appeal was valid as it sought to preserve their rights and support the arguments of Viorel.

Romania is represented by Everest, while the European Commission is represented by Grognard & Associés. Romatsa and Eurocontrol are also parties, taking counsel from local firms Elegis and Xirius respectively.

The Miculas have been pursuing enforcement in a number of other jurisdictions. Last month, they had a setback in Sweden, after the Nacka District Court ruled that under the EU law principle of sincere cooperation, it was compelled to implement the Commission’s 2015 decision and decline enforcement.

The Court of Appeal in London adopted a different approach in July last year, upholding a stay of enforcement of the award while the Miculas’ challenge to the Commission’s decision is pending in the EU courts – but ordering Romania to post £150 million in security.

Like the English and Swedish rulings, the latest Belgian decision does not address the impact of the ECJ’s March 2018 decision in the Achmea case regarding intra-EU BITs.

The Commission has argued before the EU General Court that, even if its other arguments fail, the award should nonetheless be considered illegal state aid as it was issued under a BIT incompatible with EU law. The Miculas maintain that theirs is not an intra-EU BIT award because the arbitration was initiated before Romania’s accession to the EU and concerns measures pre-dating its membership.

The Commission also said in December that it will refer Romania to the ECJ over the state’s failure to recover up to €92 million in illegal state aid allegedly granted to the Micula brothers to comply with the award. The brothers deny having been paid such an amount.

In the Brussels Court of Appeal

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