INSIGHT

The Curious Incident of the 'State Aid' Granted by an International Arbitral Tribunal

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ABSTRACT: In case C-638/19 P *Commission v European Food* ECLI:EU:C:2022:50, the Grand Chamber of the Court of Justice of the European Union held that the Commission was competent to assess the compatibility of State aid granted as a consequence of an arbitral award issued against Romania by a tribunal established under a bilateral investment treaty, even though the facts occurred and the proceedings were initiated before the accession of that State to the EU. In so doing, the CJEU focused on the date of the granting of the aid according to principles arising from art. 107(1) TFEU, finding that only at the end of the arbitral proceedings could the right to receive damage compensation be considered as acquired by the beneficiaries. The judgment, which is not completely convincing in the methodology employed or in its conclusions, may have significant implications for the notion of State aid, insofar as it includes measures enshrined in arbitral or judicial decisions, and on the problematic interaction between EU State aid rules and investment arbitration.

KEYWORDS: State aid - bilateral investment treaties - arbitral award - compensation - accession to the EU - Commission decision.

I. Preliminary remarks

As the judgment in *Lucchini*[1] and the ensuing case-law[2] clearly showed, the approach of the Court of Justice of the European Union (CJEU) in State aid matters may have very far-reaching consequences on the categories of domestic law. It is no mystery that this approach is primarily aimed at preserving the effectiveness of the competences of the European Commission concerning State aid control.[3] In order to ensure that they cannot be circumvented by Member States, the Court seems ready to paralyse undesired ap-

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[1] Case C-119/05 *Lucchini Spa* ECLI:EU:C:2007:434.

[2] See e.g. case C-2/08 *Olimpiclub* ECLI:EU:C:2009:506; case C-507/08 *Commission v Slovakia* ECLI:EU:C:2010:802; case C-505/14 *Klausner Holz Niedersachsen* ECLI:EU:C:2015:742.

[3] See P Nebbia, 'Do The Rules on State Aids Have a Life of Their Own? National Procedural Autonomy and Effectiveness in the Lucchini Case' (2008) ELR 427; R Federico, 'Lucchini Revisited: When Judgments Harm Competition' (2021) European State Aid Law Quarterly 144.

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plication of domestic procedural rules through a very extensive interpretation of EU law.

However, a recent judgment of the Grand Chamber of the CJEU[4] marked a significant breakthrough, as the Court was called upon to examine a case at the crossroads between the application of EU State aid rules and the framework of bilateral investment treaties between Member States in the aftermath of the *Achmea* judgment.[5] In so doing, the Court contributed to the long-standing *Micula* saga, originated by an award issued against Romania by an arbitral tribunal instituted under the ICSID system.[6] That award was the subject-matter of enforcement proceedings in several jurisdictions[7] and attracted significant attention from the European Commission, which is battling hard to remove all of its consequences.[8]

The present *Insight* is not intended to provide an all-encompassing analysis of the judgment, especially with regard to its possible repercussions for the system of investment arbitration. Rather, after a brief summary of the facts of the *European Food* case (section II), the special features of the application of EU State aid rules in connection to damage compensation (section III) and the findings and the reasoning of the Court as to the determination of the time of the granting of the aid in the instant case (section IV) will be discussed; the possible scenario for the future developments of the case (section V) will then be analysed.

II. The facts in *Commission v European Food*

The facts of the case are well-known, and a brief summary will suffice here. Back in 1999, the Romanian authorities decided to grant certain tax incentives to investors in disadvantaged regions of the country. In particular, investments were made in one of those regions by several companies whose majority shareholders were two Swedish citizens benefitting from a bilateral investment treaty concluded in 2002 between Sweden and Romania.

However, in order to comply with its obligations arising from the future accession to the EU, Romania amended and subsequently repealed the tax incentives scheme. In re-

[4] Case C-638/19 P *Commission v European Food* ECLI:EU:C:2022:50.

[5] Case C-284/16 *Slovak Republic v Achmea* ECLI:EU:C:2018:158.

[6] On the consequences of the fact that the arbitral award was issued under the ICSID system, see M Bungenberg, 'Small Tensions: EU State Aid and International Investment Law' (2018) Zeitschrift Für Europarechtliche Studien 499.

[7] See T Kende 'Arbitral Awards Classified as State Aid Under European Union Law' (2015) ELTE Law Journal 37, 52; K Struckmann and W De Catelle, 'State Aid and International Investment Arbitration: The *Micula* Case – Taking Stock in an Ongoing Saga' (2021) ERA Forum 101, 112.

[8] On the position of the Commission against enforcement of arbitral awards allegedly infringing EU State aid rules, see K Struckmann and Others, 'EU State Aid and Arbitration' in L Hancher and JJ Piernas López (eds), *Research Handbook on European State Aid Law* (Elgar 2021) 163, 172 ff.

action to this, in 2005 the concerned companies instituted arbitral proceedings in accordance with the provisions of the investment treaty and obtained an arbitral award granting them euro 180 million in compensation for the damages suffered.

As Romania, which had by that time become a Member of the European Union, took certain steps for the implementation of the arbitral award, the European Commission issued a suspension injunction with regard to those measures, claiming that such action might qualify as unlawful State aid. Having opened the formal investigation procedure, the Commission in its final decision concluded that the payment made in accordance with the arbitral award constituted State aid incompatible with the internal market and that Romania was under a duty not to implement it and to recover all the sums that had been paid out to the investors.[9]

The beneficiaries challenged the decision of the Commission before the General Court, which examined and upheld two of their pleas for annulment.[10] In particular, the General Court held that the Commission lacked competence to adopt the decision, as the measure at issue predated Romania's accession to the European Union; for the same reason, the award of compensation for damages incurred before Romania's accession could not qualify as «an advantage» constituting State aid.

Following the appeal of the Commission, supported by several Member States, the Court of Justice set aside the judgment, referring the case back to the General Court for the examination of the remaining arguments. In its reasoning the ECJ focused on the identification of the date on which the measure could be considered as enacted and found that the supposed State aid had been granted only at the time of issuance of the arbitral award; relying on the *Achmea* judgment, the Court added that, following its accession to the EU, Romania was not bound anymore by the consent given in relation to litigation before the arbitral tribunal.

III. Damage compensation as State aid: generalities

Even though at the present stage the Court expressly declared that it was not going to deal with the characterisation of the measure as State aid, the relevance of the findings of the CJEU in *Commission v European Food* can be better understood by placing them within the broader context of the assessment of the possibility that damage compensation awarded by a court may amount to State aid.

[9] 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 of 11 December 2013.

[10] Joined cases T-624/15, T-694/15 and T-704/15 *European Food v Commission* ECLI:EU:T:2019:423. For commentaries about the judgment, see inter alia AC Bakos, 'Schrödinger's Investment: the EU's General Court Considers that the Compensation Ordered by the Micula Tribunal is Not a Form of State Aid (Although it Might as Well Have Been)' (26 June 2019) EFILA Blog www.efilablog.org; K Struckmann and W De Catelle, 'State Aid and International Investment Arbitration' cit. 110.

This same suggestion had in fact been considered by the Court on other previous occasions. In particular, in *Asteris*[11] the referring court was seised with an action for damages brought by national undertakings, who complained about the failure of domestic authorities to correspond a production aid in the correct amount, due to the invalidity of the applicable Community Regulation, which had been previously annulled by the CJEU itself.[12] The Court, after recalling its well-settled definition of State aid, clarified that "State aid, which is to say measures of the public authorities favouring certain undertakings or certain products, is fundamentally different in its legal nature from damages which the competent national authorities may be ordered to pay to individuals in compensation for the damage they have caused to those individuals".[13]

In other words, the CJEU considered that damage compensation performs a different function compared to State aid, even when it is to be provided by a State authority, as it is aimed at mitigating a loss occurred as a result of an unlawful conduct.[14]

Such a finding was subsequently confirmed without much reasoning in a handful of judgments of the Court of Justice and of the General Court;[15] interestingly, in that context even the European Commission conceded that damage compensation does not, in principle, qualify as State aid.[16]

While in those rulings the Court did not elaborate on a conclusion that appeared to be self-evident, it was considered that, on the one hand, such a measure is not attributable to domestic authorities as it is imposed on them and, on the other hand, it does not provide an advantage in the meaning of art. 107(1) TFEU to the beneficiaries.[17]

However, as to the first point, the requirement of imputability was initially envisaged in State aid matters in order to include in that category measures enacted by un-

[11] Joined cases 106 to 120/87 *Asteris AE and others v Greece and European Economic Community* ECLI:EU:C:1988:457.

[12] Case 192/83 *Greece v Commission* ECLI:EU:C:1985:3567.

[13] *Asteris* cit. para. 23, emphasis added.

[14] See, by contrast, joined cases 106 to 120/87 *Asteris AE and others v Greece and European Economic Community* ECLI:EU:C:1988:363, opinion of AG Slynn; as well as in *Asteris* and joined cases C-346/03 and C-529/03 *Atzeni* ECLI:EU:C:2005:256, opinion of AG Ruiz-Jarabo Colomer, para. 198, which support the position taken by the Commission in Decision 2015/1470.

[15] Joined cases C-164/15 P and C-165/15 P *Commission v Aer Lingus* ECLI:EU:C:2016:990 para. 72; case T-62/08 *Thyssenkrupp Acciai Speciali Terni v Commission* ECLI:EU:T:2010:268 para. 60; case T-791/16 *Real Madrid Club de Fútbol v Commission* ECLI:EU:T:2019:346 para. 57. See also case C-369/07 *Commission v Greece* paras 83-87.

[16] *Thyssenkrupp Acciai Speciali Terni v Commission* cit. para. 60.

[17] Cf C Tietje and C Wackernagel, 'Outlawing Compliance? The Enforcement of Intra-EU Investment Awards and EU State Aid Law' (2014) Policy Papers on Transnational Economic Law 2. By contrast, a cautious approach is suggested by S Donzelli and B Willemot-Nieuwenhuys, 'New Trends in State Aid Enforcement by National Courts: Damages Claims and the State Aid Cooperation Tools' in PL Parcu and Others (eds), *EU State Aid Law: Emerging Trends at the National and EU Level* (Elgar 2020) 141, 167.

dertakings operating under the supervision of State authorities.[18] In particular, on some occasions the Court required the existence of a situation of strict control with regard to the relevant private entity, enabling the State to be involved in the adoption of the relevant measures.[19] However, in cases other than *Asteris*, the same has never been expressly raised with regard to domestic courts, which are organs of the State and are under a duty to comply with EU State aid rules.[20]

On a different note, the idea that State aid implies that an advantage is granted to private enterprises appears to be clearly at odds with principles underlying damage compensation. As a general rule, the notion of an 'advantage' encompasses not only subsidies but also indirect benefits when they have the effect of relieving undertakings of costs which should be usually covered by their budget.[21]

By contrast, that notion does not include measures which are compensatory in nature, as they mitigate costs which private undertakings have to bear only as a consequence of decisions or actions of the public authorities. In particular, the Court held that, with regard to enterprises discharging public service obligations, a subsidy covering additional costs incurred for the performance of those obligations does not in principle constitute State aid provided that certain conditions expressly envisaged in the case-law are met.[22] With regard to damage compensation, the same reasoning seems to apply: if unlawful conduct of State authorities causes loss to an enterprise, the consequential costs cannot be expected to be covered by the budget of the enterprise itself.

IV. The relevant date for the application of State aid rules

As noted, the judgment in *Commission v European Food* focused on the date when the aid was granted, while it will be for the General Court to assess whether the measure meets the requirements in art. 107(1) TFEU. However, the conclusions already reached by the Court of Justice can be expected to exert a significant influence on the examination of the latter issue.

At the outset, it is necessary to stress that the method of assessment employed by the CJEU in the judgment may give rise to some doubts.

The Court based its reasoning on the assumption that its duty was to ascertain the date of the granting of the aid, in order to clarify whether the Commission was competent to open the investigation procedure and to adopt the final decision. It is thus remarkable

[18] Joined cases 67, 68 and 70/85 *Van der Kooy* ECLI: ECLI:EU:C:1988:38 para. 37; case C-303/88 *Italy v C*ommission ECLI:EU:C:1991:136 para. 11.

[19] See case C-482/99 *France v Commission* ECLI:EU:C:2002:294 paras 50-57; case C-677/11 *Doux Élevage* ECLI:EU:C:2013:348 paras 33-41.

[20] *Lucchini* cit. para. 61.

[21] See case C-387/92 *Banco Exterior de España* ECLI:EU:C:1994:100 para. 13; case C-172/03 *Heiser* ECLI:EU:C:2005:130 para. 36.

[22] Cf, in particular, case C-280/00 *Altmark Trans* ECLI:EU:C:2003:415 para. 87.

that, unlike in previous judgments similarly concerning aids granted by States which had recently become Members,[23] the relevance and the contents of the specific rules contained in the Act of Accession of Romania[24] were neither taken into consideration in the Commission Decision nor discussed by the CJEU. Yet an infringement of that Act had been expressly invoked in the grounds of appeal submitted by the Commission itself[25] and the transitional provisions contained therein appeared to provide a legal basis for the action of the Commission concerning aids granted by Romania even before the accession.[26]

Be that as it may, the CJEU chose to refer exclusively to the principles drawn from its previous case-law concerning art. 107(1) TFEU, which is all the more problematic for the following reasons.

First, this line of reasoning inevitably leads to a vicious circle: unless it is apparent that the measure constitutes a State aid, principles inferred from art. 107(1) TFEU should not apply. In this regard, the Court should have taken into consideration that the principles concerning the date of the granting of the aid had been developed in very different cases. In particular, in *Magdeburger Mühlenwerke*[27] and in *Nerea*[28] the fact that the measures amounted to State aid was not disputed, while in other cases the question of the date of the granting was scrutinised simultaneously with the analysis of the conditions mentioned in art. 107(1) TFEU.[29]

Obviously, this argument is not meant to suggest that the Commission may not exercise its powers of assessment under article 108 TFEU until it is established that the measure does constitute State aid. Indeed, the examination of a State measure, even when the formal investigation procedure is opened, may always result in a decision finding that it does not meet the notion provided in article 107(1) TFEU. However, it is questionable that this notion includes, in itself, any requirement as to the time of the granting of the aid.

Indeed, the above-mentioned case-law suggested that it was necessary to evaluate the date of the granting of the aid according to the "national applicable legislation"[30]. Nonetheless, the Court made no effort to clarify on which date the aid could be considered as conferred on its beneficiaries as a matter of Romanian law, but confined itself

[23] See *Electrabel v Commission* cit.; case C-262/11 *Kremikovtzi* ECLI:EU:C:2012:760.

[24] Cf Annex V to the Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union [2005].

[25] *Commission v European Food* cit. paras 61-62.

[26] For an analysis of the problems connected with State aid control in the context of the accession process, see P Schütterle, 'State Aid Control – An Accession Criterion' (2003) CMLRev 577.

[27] Case C-129/12 *Magdeburger Mühlenwerke v Finanzamt Magdeburg* ECLI:EU:C:2013:200.

[28] Case C-245/16 *Nerea SpA v Regione Marche* ECLI:EU:C:2017:521.

[29] Case C-385/18 *Arriva Italia* ECLI:EU:C:2019:1121 para. 35; case C-357/14 P *Electrabel v C*ommission ECLI:EU:C:2015:642 paras 57-68.

[30] For instance, in *Magdeburger Mühlenwerke* cit. paras 40-41 the CJEU invited the referring court to determine for itself the relevant date.

to drawing conclusions from art. 107(1) TFEU and from its purpose of preventing possible distortions of competition.

Turning to the actual determination of the relevant date, several alternatives were, in principle, available for consideration. In the first place, the partial disbursement of the amount awarded by the arbitral tribunal was the conduct of the Romanian authorities that prompted the reaction of the Commission.[31] In particular, in Decision 2015/1470 it was pointed out that the measure at stake was imputable to Romania insofar as the implementation of the arbitral award, either voluntary or through enforcement, could be attributed to its organs.[32] However, according to the settled case-law of the CJEU, the date of the implementation of the measure is irrelevant for the determination of the date on which the aid is granted;[33] that option was thus already discarded before the General Court.[34]

At the other end of the spectrum, the General Court held that the date of the event giving rise to the damage for which compensation was granted could be seen as the crucial time. The Court of Justice itself admitted that, in conformity with a principle recognised in many national legal systems, civil liability arises when the unlawful conduct of the author takes place and compensation for damages is due from that moment. Reference is also made by the CJEU, in an *obiter dictum* apparently not coordinated with the general reasoning developed in the judgment,[35] to the principle that the right to compensation arises from the moment that the injurious effects occur, as envisaged in the case-law concerning non-contractual liability of the EU under arts 268 and 340 TFEU. [36]

Nonetheless, the CJEU followed the opinion of the Advocate General and reversed the finding of the General Court, assuming that the acquisition of a definitive right to receive the aid was necessary in order to consider the aid itself as granted. In the Court's view, such an acquisition occurred only after the issuance of the arbitral award, insofar as at that moment "the arbitration applicants were able to obtain actual payment of that compensation".[37]

Again, the conclusion raises more problems than it solves. On the one hand, a possible inconsistency has to be stressed: the Court relied on the fact that the arbitral award allowed the claimants to obtain actual payment of the compensation. However, this statement does not seem to be in line with the above-mentioned principle, under which the moment of the transfer of resources is not decisive for the granting of State aid.

[31] Cf M Momic, 'Can an ICSID Arbitral Award for the Compensation of Damages be Regarded as State Aid?' (2019) European State Aid Law Quarterly 346.

[32] Decision 2015/1470 cit. paras 117-121.

[33] See, *inter alia*, *Arriva Italia* cit. para. 36.

[34] *European Food v Commission* cit. para. 80.

[35] *Ibid.* para. 140.

[36] See e.g. case C-460/09 P *Inalca v Commission* ECLI:EU:C:2013:111 paras 45-60.

[37] *Commission v European Food* cit. para. 124.

On the other hand, for the first time in the judgment in *Commission v European Food,* the Court referred to the acquisition of a *definitive* right to the granting of the aid as a requirement. Such wording seems to be designed to provide a solution that is especially tailored for State aids granted in a judgment,[38] whose effects differ from the effects attached to a measure emanating from legislative or administrative authorities. In particular, while legislative or administrative measures may establish the right to obtain a State aid, the notion of a judicial decision awarding damage compensation is indissociably connected to the idea that such judgment declares the existence of a right which has already arisen, so that the court is merely called upon to define it.

For that reason, the situation where aid is granted by a judicial decision displays some special features, as the cases mentioned by the Advocate-General in his opinion also show:[39] however, as this is a general issue, the Court should have evaluated the question in a broader context.

A more comprehensive solution could have been reached in this perspective if the CJEU had accepted the suggestion provided in the opinion of the Advocate General Wathelet in *Achmea*. Indeed, discussing the possible relevance of *Micula* in that context, the Advocate-General dismissed that idea on the assumption that "in 2005… the arbitration commenced and… the dispute crystallised. Consequently, EU law was not applicable to the facts referred to in that arbitral procedure".[40]

Keeping in mind this remark, one can argue that, when the granting of State aid is a possible outcome of judicial proceedings, the relevant date for ensuring compliance with EU State aid rules should be determined in connection with the initiation of those proceedings. Such a solution would have several benefits, first in terms of consistency with general principles of national law: if we assume that a domestic judgment awards a right to damage compensation (or the different right claimed in the proceedings), which already exists and which is to be traced back to the applicable rules of (domestic) law, it seems correct to conclude that such a right can be considered as granted, at the latest, on the date when the court action is lodged.

This option is also preferable, compared to the solution suggested by the General Court, in terms of compatibility with the principle of legal certainty: while it may prove difficult to identify the exact date of the event giving rise to damage, the reference to the date when the action is lodged is straightforward.

[38] On this category of measures enacting State aids, R Federico, 'Lucchini Revisited' cit. 146.

[39] Case C-590/14 P *DEI v Alouminion* ECLI:EU:C:2016:797, concerning the judicially ordered prorogation of an existing aid, to be treated as a new aid; case T-720/16 *ARFEA v Commission* ECLI:EU:T:2018:853, concerning a judgment ordering regional authorities to provide compensation that a domestic court considered not be a State aid, as it appeared to meet the conditions set out in *Altmark* cit. See also case C-586/18 P *Buonotourist v Commission* ECLI:EU:C:2020:152.

[40] See case C-284/16 *Achmea* ECLI:EU:C:2017:699, opinion of AG Wathelet para. 46 and fn 49.

In addition, this could help State authorities prevent the undesirable situation in which a judgment that is binding on them infringes State aid rules.[41] As the practice shows, State authorities tend to comply with their duty of notification only after the judgment is issued, when they are caught between the obligations arising from domestic law and those arising from EU law.[42] By contrast, if the Commission is informed about the proceedings since their initial stage, this may lead it to activate the cooperation tools with domestic courts[43] and to exercise its powers, so as to influence the course of the proceedings.[44]

In the case at hand, since at the date when the arbitral proceedings were activated EU State aid rules were not applicable to Romania, this should have led the Court to reject the appeal proposed by the Commission, unless a different basis for the exercise of its power of assessment could be found in the Act of Accession.

V. The measure constituting State aid – next episode of the saga

It has been pointed out that the reasoning of the CJEU in *European Food v Commission* is unconvincing. More clearly than on other occasions, the judgment appears to be inspired by the intention to support the initiatives of the Commission in the *Micula* case and to ensure that the action brought by it on several fronts against the implementation of the arbitral award is not impaired.[45] This approach induced the Court to provide an interpretation which relies too much on the circumstances and on the context of the specific case, and does not seem to take into sufficient consideration the general framework.

In addition, as a consequence of the unfortunate procedural sequence of the examination of pleas and arguments by the General Court, the CJEU was forced to evaluate the date of the granting of the aid before deciding whether an aid was granted or not. While the findings of the Court on this very point were aimed at establishing the compe-

[41] On the argument submitted by Romania about its conflicting obligations, see A Scott, 'A Recipe for Confusion: Parallel Treaties and Parallel Proceedings in State Aid Cases' in PL Parcu and Others (eds), EU State Aid Law cit. 170, 185.

[42] For the idea that State aid rules may constitute a defence for public authorities in civil proceedings, see G Skovgaard Ølikke, 'State Aid as a Defence for Public Authorities?' (2016) European State Aid Law Quarterly 286.

[43] Communication from the Commission 2021/C 305/01 Notice on the enforcement of State aid rules by national courts.

[44] On the problem of concurrent proceedings, see F Pastor-Merchante and G Monti, 'The Function of National Courts in the Private Enforcement of State Aid Law' in PL Parcu and others (eds), *EU State aid law* cit., 121, 137 ff.

[45] For instance, in the United Kingdom the stay of enforcement was lifted by the UK Supreme Court after the General Court annulled the Commission's Decision: see A Florou, 'The UK Supreme Court Judgment in *Micula v Romania*: A Landmark Judgment for the Relationship between EU Law and International Investment Law?' (2021) ICSID Review 295.

tence of the Commission to adopt the challenged Decision, they also entail important consequences as to the nature of the measure allegedly constituting State aid.

In particular, it seems very clear that in the judgment the measure possibly constituting State aid was identified with the arbitral award, thus departing from the approach of the Commission: this conclusion brings about further difficulties, that the General Court and probably the CJEU itself will be called upon to solve in the near future and that can only be outlined here.

First and foremost, if the measure constituting State aid is enshrined in the arbitral award, it is very difficult to envisage how it can be seen as imputable to Romania. Accepting that the decision of an international tribunal, which is obviously not subject to any control by the State, can amount to a State aid in the meaning of art. 107(1) TFEU seems to stretch that notion too far, as remarked by certain scholars.[46]

Moreover, in Decision 2015/1470 the Commission expressly argued that the case had to be distinguished from *Asteris*, as damage compensation had been awarded by the arbitral tribunal for an amount corresponding to the State aid not obtained by the beneficiaries between 2005 and 2009, so that it could be considered as an advantage.[47] However, the position taken on this point by the Commission apparently overlooks the fact that the award refers to damages incurred by the investors following the violation of their legitimate expectations by Romania, which had failed to act transparently and did not afford them fair and equitable treatment. As the basis for damage compensation is not directly linked to the repeal of the incentives scheme *per se*, the measure would qualify as State aid only by virtue of its amount and irrespective of its actual contents.

Finally, the CJEU reiterated its view that the provision contained in a bilateral investment treaty conferring jurisdiction on an arbitral tribunal is precluded by EU law from the date of the accession of Romania.[48] In the context of *Micula*, it is by now unclear which role that principle can be expected to play when it comes to the analysis of the conditions laid down in art. 107(1) TFEU: if the arbitral award is the measure constituting a State aid, as the CJEU seems to hold, a great deal of uncertainty remains as to the consequences to be drawn from the fact that it is invalid, because of the incompatibility of the clause establishing the arbitral tribunal with EU law.

[46] On the problem of qualifying arbitral awards as State aid, see also JH Fahner, 'From State Aid to Autonomy and Back: The Commission's Continuing Campaign Against Intra-EU ISDS' (2021) LIEI 339, 342 ff.

[47] Decision 2015/1470 cit. paras 100-108.

[48] On this point, cf J Odermatt, 'Is EU Law International? Case C-741/19 Republic of Moldova v Komstroy LLC and the Autonomy of the EU Legal Order' (2021) European Papers www.europeanpapers.eu.