



Press and Information

Court of Justice of the European Union

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Judgment in Case C-638/19 P
Commission v European Food SA and Others

The General Court erred in law in finding that the Commission lacked competence to examine, in the light of the law on State aid, the compensation paid to Swedish investors by Romania in implementation of an arbitral award

While that award had upheld the argument of those investors that that Member State had unlawfully repealed a tax incentives scheme before its accession to the European Union, the aid measure referred to by the Commission was nevertheless granted after that accession

On 29 May 2002, the Kingdom of Sweden and Romania concluded a bilateral investment treaty on the promotion and reciprocal protection of investments ('the BIT'), Article 2(3) of which provides that each contracting party would at all times ensure fair and equitable treatment of the investments by investors of the other contracting party. The BIT provides, in addition, that disputes between investors and the contracting countries are to be settled by an arbitral tribunal.

In 2005, in the context of the negotiations for Romania's accession to the European Union, the Romanian government repealed a national tax incentives scheme for the benefit of certain investors in disadvantaged regions ('the tax incentives scheme').

Considering that, by repealing the tax incentives scheme, Romania had breached its obligation to ensure fair and equitable treatment of the investments in accordance with the BIT, several Swedish investors requested the establishment of an arbitral tribunal with a view to obtaining compensation for the damage caused. By arbitral award of 11 December 2013, that tribunal ordered Romania to pay those investors damages in the sum of approximately EUR 178 million.

Notwithstanding various warnings by the European Commission as to the necessity of complying in this case with the rules and procedures applicable to State aid, the Romanian authorities paid the compensation awarded by the arbitral tribunal in favour of the Swedish investors.

By decision of 30 March 2015 ('the decision at issue'),¹ the Commission classified the payment of that compensation as State aid incompatible with the internal market, prohibited its implementation and ordered the recovery of the sums already paid.

Hearing a number of actions, the General Court annulled that decision² on the ground, in essence, that the Commission had retroactively applied its competences to facts pre-dating the accession of Romania to the European Union on 1 January 2007. The General Court started from the premiss that the aid referred to had been granted by Romania on the date of repeal of the tax incentives scheme, namely in 2005.

On appeal, the Court of Justice, sitting as the Grand Chamber, sets aside that judgment of the General Court and confirms the Commission's competence to adopt the decision at issue, whilst referring the case back to the General Court for it to rule on the pleas and arguments raised before it as regards the merits of that decision.

Findings of the Court

¹ 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 (OJ 2015, L 232, p. 43).

² Judgment of 18 June 2019, *European Food and Others v Commission*, ([T-624/15](#), [T-694/15](#) and [T-704/15](#)).

As the Commission had acquired competence to control, pursuant to Article 108 TFEU, aid measures granted by Romania with effect from its accession to the European Union, the Court of Justice recalls that State aids must be regarded as being granted, within the meaning of Article 107(1) TFEU, on the date on which the right to receive it is conferred on the beneficiary under the applicable national legislation. The decisive factor for establishing that date is acquisition by those beneficiaries of a definitive right to receive the aid in question and the corresponding commitment, by the State, to grant that aid. It is at that date that such a measure is liable to distort or affect competition and affect trade between Member States, within the meaning of Article 107(1) TFEU.

In the present case, the Court finds that the right to compensation for the damage alleged by the Swedish investors, even though it was the result of the repeal by Romania, allegedly in breach of the BIT, of the tax incentives scheme, was only granted by the arbitral award of 11 December 2013, which not only upheld that right, but also quantified its amount. It was only upon the conclusion of that arbitration procedure that those investors were able to obtain actual payment of compensation, even if it was intended to make good, in part, the damage that they alleged they had suffered in a period before the accession of Romania to the European Union.

Thus, having regard to the fact that the aid measure in question was granted after Romania's accession to the European Union, **the General Court erred in law in holding that the Commission lacked competence *ratione temporis* to adopt the decision at issue under Article 108 TFEU.**

The Court states that the question of whether the compensation granted by the arbitral award is capable of constituting State aid, within the meaning of Article 107(1) TFEU, falls outside its jurisdiction on an appeal, in so far as it was not examined by the General Court. However, the Commission's competence under Article 108 TFEU cannot in any case depend on the outcome of the examination of that question as the prior control by the Commission pursuant to that article is intended to determine, *inter alia*, whether the compensation in question constitutes State aid.

Finally, the Court finds that the General Court also erred in law in finding that the judgment of the Court of Justice in *Achmea*³ is irrelevant to the present case.

In the *Achmea* judgment, the Court of Justice held that Articles 267 and 344 TFEU preclude an international agreement concluded between two Member States which provides that an investor from one of those Member States, in the event of a dispute concerning investments in the other Member State, may bring proceedings against that other Member State before an arbitral tribunal whose jurisdiction that other Member State has undertaken to accept. By the conclusion of such an agreement, Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of that law.

In the present case it is common ground that **the compensation sought by the Swedish investors also related to alleged damage suffered after Romania's accession to the European Union, with effect from which EU law, including Articles 107 and 108 TFEU, applied to that Member State.** To that extent, the dispute brought before the arbitral tribunal could not be regarded as being confined in all respects to a period during which Romania, having not yet acceded to the European Union, was not yet bound by the rules and principles stemming from the *Achmea* judgment. It is also common ground that the arbitral tribunal does not form part of the EU judicial system which the second subparagraph of Article 19(1) TEU requires the Member States to establish in fields covered by EU law.

Accordingly, Romania's consent to the arbitration system laid down in the BIT became inapplicable following the accession of that Member State to the European Union.

³ Judgment of 6 March 2018, *Achmea*, [C-284/16](#) (see also Press Release No [26/18](#)).

In the light of all those considerations, the Court sets aside the judgment under appeal and refers the case back to the General Court to adjudicate on the pleas and arguments raised before it concerning the merits of the decision at issue, in particular the question whether the measure referred to in that decision satisfies, from a substantive point of view, the conditions laid down in Article 107(1) TFEU.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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