# Op-Ed

Holger Hestermeyer

# "When regimes collide: Micula – and the fragmentation of the international legal system"

www.eulawlive.com

**Suggested citation:** Holger Hestermeyer, "When regimes collide: Micula – and the fragmentation of the international legal system", *EU Law Live*, 11 February 2022

# “When regimes collide: Micula – and the fragmentation of the international legal system”

Holger Hestermeyer

In the last four years the Court of Justice has decided a number of important cases on the relationship between EU law and investment law. *Achmea* (C-284/16), the first, was a clap of thunder for the investment arbitration community. The Court confirmed and refined its ruling in the *CETA Opinion* (1/17), *Republic of Moldova* (or *Komstroy*) (C-741/19) and *PL Holdings* (C-109/20). *Micula* (C-638/19 P) is the latest in this line of cases, but it was the first case to be filed in Luxembourg, in November 2015, at the General Court (T-624/15, T-629/15, T-704/15). The *Micula* saga is essential to understand the tumultuous relationship between EU law and international investment law, particularly with regard to bilateral investment treaties (BITs) concluded between EU Member States. This comment will recount the story of *Micula* as an example of a conflict between two legal regimes and an illustration of the limits of the techniques we possess to resolve such conflicts. The possibility of conflicts between international regimes – according to a narrow definition, a situation in which one regime mandates an action or omission that the conflicting regime prohibits – is a much discussed consequence of the fragmentation of international law.

This Op-Ed will briefly recount the events of the case and the decisions by the General Court and the Court of Justice, which could likely expose Romania (again) to conflicting obligations. I will then focus on how such an outcome could have been avoided and show why the tools we have at our disposal for resolving conflicts between legal regimes are insufficient. For further reading I recommend the Op-Eds by Maurizia De Bellis, Andrés Delgado Casteleiro and Juan Jorge Piernas.

**The *Micula* saga**

The *Micula* saga began in Romania before its accession to the EU, but after the entry into force of the Europe Agreement in 1995. In 1998/1999 Romania adopted rules granting incentives for ten years for investments in disadvantaged regions of the country. In 2000, the Micula brothers, Swedish nationals, and their companies (which I shall refer to together as “the Miculas”), invested, taking advantage of these incentives. In the same

year, accession negotiations with Romania started. As part of the accession process, to comply with Community state aid rules Romania repealed the investment incentives in 2005. In July 2005, the Miculas began ICSID investment arbitration proceedings under the Sweden-Romania BIT. On 1 January 2007 Romania acceded to the European Union. In December 2013 the arbitration tribunal issued its award, ruling that Romania had failed to ensure fair and equitable treatment of the claimants' investments and awarding damages.

The Commission informed Romania that it would regard the implementation of the award as constituting new state aid. Romania was now exposed to conflicting obligations. On the one hand it had to pay the award, particularly after its attempt to annul the award had failed and the Miculas had started enforcement proceedings in a number of countries including Romania, the US and the UK. On the other hand, payment would be regarded as illegal state aid by the Commission. In the end, Romania was forced to pay.

In 2015 the Commission adopted a decision holding that payment to constitute illegal state aid and demanding its recovery. The Miculas brought proceedings in the General Court to annul the Commission decision. The Court found in their favour, arguing that the right to receive compensation arose when Romania repealed the incentives for investment breaching the BIT, i.e. before Romania's accession. Accordingly, the Commission lacked the competence to adopt the attacked decision and could not consider the payment of compensation as state aid. The Court also found that, given the timeline of events, *Achmea* did not apply. In light of these findings, it did not address the remaining pleas raised by the Miculas. For a brief moment, the regime conflict seemed to have been avoided.

On appeal, however, the Court of Justice set aside the judgment of the General Court and referred the case back to it to adjudicate on the remaining pleas. The Court disagreed with the General Court regarding the determination of the date on which the state aid was granted. It recalled that under the case law the decisive date is that 'on which the right to receive [the aid] is conferred on the beneficiary under the applicable national legislation'. Following AG Szpunar it held that the decisive factor for establishing that date is the acquisition by the beneficiaries of a definitive right to receive the aid and to the corresponding commitment by the State to grant that aid. In this case, the right to obtain actual payment was only granted by the arbitration award, i.e. after Romania's accession to the EU. The Commission, accordingly, was competent to adopt the decision on state aid at issue. The Court added that as the compensation sought by the Miculas in the arbitration included damage suffered after Romania's accession, the principles of the *Achmea* judgment applied from that moment and the judicial remedies provided for under EU law replaced those under the BIT, as Romania's consent from that moment on lacked any force.

With the decision of the Court of Justice the prospect of Romania facing conflicting obligations returns. The decision now rests with the General Court. The stakes have been raised on the side of both regimes: On the investment law side the award against Romania has been

confirmed in the US and by the UK Supreme Court, i.e. outside the EU. On the EU law side the Commission has threatened to take Romania to Court for failure to recover state aid and, on 9 Feburary 2022, has announced it had decided to begin infringement proceedingsbefore the Court of Justice against the UK because of the Supreme Court decision allowing enforcement of the *Micula* award.

**The tools we have to avoid regime conflicts – and why they fail**

The clash between the investment law regime regarding intra-EU BITs and EU state aid law in *Micula* that the Court of Justice has brought back to the table was not entirely inevitable.

Before the *Micula* arbitral tribunal Romania had argued – supported by the Commission as *amicus curiae* – that the BIT had to be read taking into account (Art. 31(3)(c) of the VCLT) EU law or at least the Europe Agreement, which also contained a state aid regime and that if such a reading was not possible, EU law should prevail according to the conflict rules under general international law. EU law was also argued to be relevant to determine wrongfulness. The tribunal did not follow these proposals entirely. It held that there was no real conflict of treaties, but that applicable treaties have to be read with due regard to other applicable treaties. It refused to engage in a discussion relating to possible future problems with enforcing the award resulting from EU state aid law. The closest the tribunal came to accommodating EU law concerns was in its analysis of fair and equitable treatment. It extensively discussed whether it was reasonable for the Miculas to rely on Romania's promise of investment incentives in light of the impending EU accession of Romania and applicable state aid rules. However, the tribunal considered that it was reasonable to rely on the promise. The partial award of the investment tribunal in *Saluka investments v. Czech Republic* (para. 351) shows that a more accommodating position is possible. As part of its fair and equitable treatment analysis it held (in other circumstances) that the claimant had no basis for expecting that the government's policy would not change due to state aid rules in the Europe Agreement. So why did the *Micula* tribunal not do more to accommodate EU law demands?

The same question, of course, can be posed to the Court of Justice. It did not discuss rules for a possible regime conflict, nor did it follow the General Court's ruling with regard to the decisive moment when state aid is granted, avoiding a conflict. Why did it not go the extra mile to avoid a clash with investment law?

The answer, in both cases, lies in the normative order that created the respective Court or tribunal and that the tribunal or Court is tasked to enforce. Tribunals look at the world through the eyes of that respective normative order. That does not mean that they read their order 'in clinical isolation', but it does mean that it is *their* order that defines the applicable rules. The tools for systemic integration can go some way towards accommodating other regimes, but the norms on treaty interpretation are rather restrictive in that regard – and interpretation, the most important tool, has limits. This also explains why *Achmea* defences have been given short

shrift in investment arbitration. In light of this, both tribunals did their job – and did it well.

Finding a solution to the conflict is thus left to politics. Progress in that regard has been made with the agreement for the termination of intra-EU BITs, the EU taking charge of investment policy and its initiatives for investment treaty reform, namely the establishment of investment court systems and the project to establish a multilateral investment court. For Romania, this is cold comfort.

***Holger Hestermeyer*** *is Professor of International and EU Law at King's College London and Fellow at CAPAS, Heidelberg.*

**EU Law Live** is an online publication, focused on European Union law and legal developments related to the process of European integration. It publishes News on a daily basis, along with Analyses, Op-Eds, and Weekend Long Reads.



**ISSN**

| | |
|---|---|
| EU Law Live | 2695-9585 |
| EU Law Live Weekend Edition | 2695-9593 |

Subscription prices are available upon request. Please contact our sales department for further information at

subscriptions@eulawlive.com


stay alert | keep smart