SLAUGHTER AND MAY

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Supreme Court rules in favour of Micula brothers

On 19 February 2020 the UK Supreme Court handed down its judgment in ***Micula and others v Romania***. The judgment is the latest instalment in the ongoing attempt by brothers Viorel and Ioan Micula to enforce an investment arbitration award made in their favour in 2013.

Background

Prior to Romania's accession to the EU in 2007, Romania offered tax incentives to those investing in 'disfavoured' regions. In 2005, as part of the accession process, Romania repealed these incentives to align its policies with EU State aid rules. The Micula brothers, who had invested in food production in the relevant region in the early 2000s, launched ICSID (International Centre for Settlement of Investment Disputes) arbitration proceedings against this decision. The arbitration tribunal ruled that Romania had infringed a bilateral investment treaty between Romania and Sweden and ordered Romania to compensate the investors.

However, in March 2015 the European Commission found that payment of the compensation constituted unlawful State aid, and ordered Romania to recover any compensation paid. That decision was successfully appealed to the European General Court (GC), which annulled the Commission's decision in June 2019 on the basis that the Commission had purported to apply its powers retroactively to events pre-dating Romania's access to the EU (as covered in a previous edition of our **newsletter**). The Commission has appealed that ruling to the European Court of Justice (CJ).

In parallel, in 2014 the brothers successfully applied for registration of the ICSID award in England. The High Court, upheld by the Court of Appeal, nevertheless granted Romania's application to stay enforcement of the award pending the outcome of the GC proceedings. Both parties appealed to the Supreme Court, which handed down its judgment last Wednesday.

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

The Supreme Court judgment

Finding for the brothers, the Supreme Court ruled that the stay should be lifted and the arbitration award enforced, regardless of the ongoing EU proceedings.

The Court rejected the brothers' first ground of appeal – that, following the GC's judgment, the duty of sincere cooperation (which requires the EU and its Member States to avoid conflicting decisions between national courts and EU institutions) no longer required domestic courts to stay the enforcement of the award. The Court considered that, although the GC's ruling annulled the Commission's final State aid decision, it did not affect its initial decision to open a State aid investigation. Without a final decision closing the formal investigation procedure, the duty of sincere cooperation persisted (subject to the Court's consideration of the other grounds of appeal).

Regarding the second and third grounds of appeal – that the Court had no power to stay the award under the ICSID Convention in law and that the stay was incompatible with the ICSID Convention on the facts – the Supreme Court held that although the Court did have the legal power to stay the award, this power was limited and did not apply on the facts. Moreover, Article 351 TFEU (which provides that Member States' pre-accession obligations owed to non-Member States are unaffected by EU law) meant this obligation could not be affected by anything contained in the European treaties, including the obligation of sincere cooperation. The Court considered that Romania's attempt to invoke the obligation of sincere cooperation was *"an attempt to pull itself up by its own bootstraps"* and that Romania *"cannot show that the obligation of sincere cooperation has any application at all"*.

Finally, taking the fourth and fifth grounds together – that the UK's obligations to recognise and enforce awards under the ICSID Convention are pre-accession obligations within Article 351 and therefore unaffected by EU obligations – the Court agreed. It moreover held that the duty of sincere cooperation did not require the UK courts to impose a stay pending the outcome of proceedings before the European Courts, since the possibility that the European Courts may at some point consider the applicability of Article 351 in this context was contingent and remote.

The Court therefore concluded that the duty of sincere cooperation was not relevant in the case, and that there was no impediment to lifting the stay, which it described as *"an unlawful measure in international law and unjustified and unlawful in domestic law"*.

Conclusion

In lifting the stay, the Supreme Court has finally given effect to the ICSID award of seven years earlier. The judgment may be seen by some as controversial: giving precedence to the ICSID Convention over EU law in a post-Brexit era. However, the judgment makes no reference to the current political climate, instead drawing authority solely from the constitutional articles of the EU and the technical provisions of the ICSID Convention. Many will have been waiting for this ruling – not only the Micula brothers but also the Commission, investors and lawmakers. But there is more yet to come – not least the CJ's ruling on whether the award constitutes unlawful State aid. Many will be awaiting that next instalment with interest.

Other developments

Merger control

CMA provisionally finds that Bottomline/Experian merger does not raise competition concerns

On 18 February 2020 the Competition and Markets Authority (CMA) provisionally **found** that the completed acquisition by Bottomline Technologies (de), Inc. of Experian Limited's Experian Payments Gateway business (EPG) does not raise competition concerns. The CMA now seeks views on these provisional findings by 10 March 2020 and has until 5 April 2020 to make a final decision.

Bottomline and EPG provide payments software used by businesses to submit direct debits, run payroll and pay suppliers, which directly connects to the UK's Bacs and Faster Payments Direct Corporate Access systems. The CMA initially **found** at Phase 1 that the merger may increase prices, reduce product availability and/or reduce investment in innovation. The CMA indicated this is because, if Bottomline had not bought EPG, EPG would have been bought by another party, resulting in more competition, greater product development and more consumer choice.

However, following an in-depth analysis as part of a Phase 2 investigation, the CMA has provisionally found that the merger is not likely to raise competition concerns. This is mainly due to the CMA finding that there remain sufficient alternative providers available to the customers and EPG no longer being a strong force in the market. The CMA further found that the possible loss of potential future competition is not supported by its provisional conclusions on the counterfactual that absent the merger, Experian would have sold EPG to an alternative purchaser, who "*would not have invested significantly*" to *"bring about a step-change in the functionality and growth of EPG's product".*

CAT issues ruling on consequences of its judgment in Tobii/Smartbox merger

On 17 February 2020 the Competition Appeal Tribunal (CAT) **issued** a ruling on matters consequent to its **judgment** handed down on 10 January 2020 in an appeal by Tobii AB against the CMA's **decision** to unwind Tobii's completed acquisition of Smartbox Assistive Technology Limited and Sensory Software International Limited (Smartbox).

Both Tobii and Smartbox supply augmentative and assistive communication (AAC) solutions, which cater to the needs of people with communication difficulties due to a disability or disease. In its final report, the CMA identified horizontal competition concerns in the supply of certain AAC solutions in the UK. The CMA also found that the merged entity may: a) reduce access to an AAC software by their rival providers of certain AAC solutions (partial input foreclosure); and b) limit compatibility of an AAC software with Tobii's competitors in the supply of eye gaze cameras.

Tobii then applied to the CAT for review of the CMA's decision. While the CAT dismissed most of Tobii's arguments in its judgment, Tobii succeeded in demonstrating that the CMA's findings regarding partial input foreclosure lacked a sufficient evidential basis. The CAT therefore quashed the CMA's decision to the extent that the CMA found the merged entity had the ability and incentive to foreclose its rivals by increasing the wholesale price of its software and the merged entity had the incentive to foreclose its rivals by reducing the extent to which that software supported rival hardware.

On 17 February 2020 the CAT issued a further ruling on matters consequent to its earlier judgment. It specified paragraphs in the CMA's final report that should be quashed due to Tobii's success on the issue of partial input foreclosure. However, the CAT refused to entertain Tobii's request to refer the issue back to the CMA for further consideration. In the same ruling, the CAT also rejected Tobii's application for permission to appeal.

Antitrust

Antitrust fines on China's concrete makers prompt questions on the limitation period for Anti-Monopoly Law infringements

On 7 February 2020 China's Zhejiang provincial Administration for Market Regulation (Zhejiang AMR) imposed cumulative penalties of RMB4.15m (approximately £460,000) on 12 local concrete firms over anti-competitive agreements. The **decisions** have prompted questions on the limitation period for enforcement against Anti-Monopoly Law infringements.

This case, which commenced in 2017, concerns two agreements. The first agreement was made between 11 concrete manufacturers in 2015 to allocate sales territories, share market sensitive information and accept orders at a unified price (2015 Agreement). The second agreement was made to restrict output volumes (2017 Agreement). Neither of the agreements were implemented due to disagreements between the parties.

The question of limitation periods arises because Hangzhou Yuhang Hengli Concrete (HYHC) was involved only in the 2015 Agreement, but nevertheless received a fine of RMB100,000 (approximately £11,000). The 2015 Agreement would normally be considered to be outside the two-year limitation period for civil litigation in China. However, the fact that HYHC was fined, notwithstanding that Zhejiang AMR's investigation commenced more than two years after the 2015 Agreement was concluded, indicates that the limitation for civil litigation does not apply in the context of China's Anti-Monopoly Law infringements.

The antitrust regime in China, including the newly released consultation draft of revisions to the Anti- Monopoly Law, is silent on the limitation period for antitrust violations. This case offers some indication that the civil limitation period does not apply, but it remains unclear what (if any) limitation does apply to antitrust violations.

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