

# Investment Arbitration and the Conceptual Limits of EU State Aid Law

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## Abstract

This article revisits the uneasy junction where investment arbitration intersects with EU State aid law, examining whether, and in what circumstances, such arbitral awards and their payment or enforcement can fall within Article 107(1) TFEU. Using the Commission's decision in *Antin* as its central case study, it focuses on two elements of the notion of aid that have become particularly salient in this context: imputability and advantage. It argues that the Commission's reasoning is strained on both counts. Treaty accession, incorporation into national law, and voluntary compliance may involve sufficiently clear State conduct, but arbitral awards, judicial recognition, and involuntary enforcement sit far less comfortably within orthodox imputability analysis. Equally, compensation for loss does not become an advantage merely because the arbitral route is regarded as incompatible with EU law. Selectivity, in turn, is shown to suffer from the same issues stemming from definitional oscillation. The article also shows that *Antin's* remedial logic is vulnerable. By extending Article 108(3) TFEU towards a general anti-enforcement mandate, including with respect to third-country proceedings, the decision exposes a mismatch between the internal logic of EU State aid law and the external operation of the ICSID enforcement regime, undermining the very effectiveness the Commission champions.

**Keywords:** State aid; investment arbitration; ISDS; intra-EU ISDS; *Antin*; imputability; advantage; enforcement; extraterritoriality; Article 108(3) TFEU.

## A. Introduction

The collision of two rational systems does not produce clarity, but confusion. Few areas of law illustrate this better than the relationship between international investment arbitration and EU law, a relationship that has become one of the most contentious and unsettled in contemporary legal discourse. That confusion stems from the uneasy coexistence of two complex and in-themselves rational legal principles: on the one hand, the autonomy and supremacy of EU law; on the other, the international obligations freely undertaken by (Member) States under bilateral and multilateral investment treaties. The resulting friction creates a complicated landscape, involving not only doctrinal questions, but also issues of jurisdiction, authority, and enforcement.

When the European Court of Justice (ECJ) decided *Achmea*,<sup>1</sup> *Komstroy*,<sup>2</sup> and *PL Holdings*,<sup>3</sup> it did more than close the door on intra-EU bilateral investment treaties (BITs); it opened a new one into legal uncertainty, including in the relationship be-

1 ECJ, Case C-284/16, *Slowakische Republik v Achmea BV*, ECLI:EU:C:2018:158.

2 ECJ, Case C-741/19, *République de Moldavie v Komstroy LLC*, ECLI:EU:C:2021:655.

3 ECJ, Case C-109/20, *Republiken Polen v PL Holdings Sàrl*, ECLI:EU:C:2021:875.

tween investment arbitration and State aid law. The *Micula*<sup>4</sup> saga and the European Commission's decision in *Antin*<sup>5</sup> are among the first attempts to shed light into the darkness; but themselves require further contextualisation.

*Antin* concerns an International Centre for Settlement of Investment Disputes (ICSID) Convention<sup>6</sup> arbitral award rendered against Spain in favour of Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V., both Luxembourg-incorporated investors in two Spanish concentrated solar power plants developed under Spain's 2007 renewable energy support scheme (Royal Decree 661/2007). Between 2012 and 2014, Spain progressively modified and ultimately repealed that scheme through successive measures, culminating in a new regulatory regime predicated on a 'reasonable rate of return' benchmark.<sup>7</sup> The arbitral tribunal found Spain in breach of the fair and equitable treatment standard under Article 10(1) Energy Charter Treaty (ECT)<sup>8</sup> and awarded the claimants damages of approximately EUR 101 million plus interest.<sup>9</sup> By its Decision of 24 March 2025, the Commission classified the 'award and, in any event, its implementation' as unlawful State aid incompatible with the internal market, ordered Spain not to pay said award, and required it to prevent the claimants or any assignees from seeking recognition, enforcement, or execution of the award within the Union or in third countries.<sup>10</sup>

This article takes this decision and examines the relationship between investor-state dispute settlement (ISDS) arbitration and State aid, specifically analysing whether, and if so in what circumstances, such awards, or their payment or enforce-

4 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 L 232 of 4/9/2015, p. 43; ECJ, Case C-638/19 P, *European Food and Others v Commission*, ECLI:EU:C:2022:50, para. 135; GC, Joined Cases T-624/15 RENV and T-694/15 RENV, *European Food SA and Others v Commission*, ECLI:EU:T:2024:659, paras. 125-136.

5 Commission Decision (EU) 2025/1235 of 24 March 2025 on the State aid SA.54155 (2021/NN) implemented by Spain – Arbitration award to Antin, OJ L 1235 of 2025 (hereafter: *Antin*).

6 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) 575 UNTS 159.

7 Royal Decree-Law 9/2013 of 12 July 2013; Royal Decree 413/2014 of 6 June 2014; Ministerial Order IET/1045/2014 of 16 June 2014. See further *Pérez-Bernabeu*, EStAL 2025/3, p. 246.

8 Energy Charter Treaty (1994) 2080 UNTS 95.

9 *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award (15 June 2018).

10 *Antin*, Articles 1-4.

ment ('implementation'),<sup>11</sup> can constitute State aid within the meaning of Article 107(1) TFEU. Drawing on the reasoning in *Antin*, and the wider relevant case law, we examine whether different arbitration-related acts can qualify as aid, or satisfy the conditions of that notion, bearing in mind that the conditions of Article 107(1) TFEU are cumulative.<sup>12</sup> Rather than seeking to address all possible scenarios, we focus particularly on the sequence running from a Member State's voluntary agreement to enter into the ECT and the ICSID Convention, through the rendering of an ICSID/ECT award, to that award's payment, judicial recognition or enforcement, and execution against assets (whether voluntary or coercive). The analysis is organised around the two elements of the notion of aid that bear most of the analytical weight in this context, namely imputability (Section C.) and advantage (Section D.), with shorter treatment of selectivity (Section E.) and of the decision's remedial architecture, including its anti-enforcement reach (Section F.).

## B. Setting the Scene

Before delving into the main discussion, we will set out some points, which deserve to be addressed at the outset to provide the relevant context.

### I. The Measure

The first, and most important, of those points informs the approach and structure of this article as a whole and has to do with the determination of the actual measure being analysed under the prism of State aid. On this point, the *Micula* case law, which is a core element of the Commission's reasoning, is more layered than sometimes assumed. In its 2022 judgment, the ECJ held that aid must be regarded

11 It is important to note that the terminology in this area is not entirely straightforward: recognition, registration, declaration of enforceability, enforcement, execution against assets, payment, and voluntary compliance are not identical concepts. Under the ICSID Convention, the distinction is structural: Article 54(1) obliges each contracting state to recognise the award as binding and to enforce the pecuniary obligations it imposes as if it were a final judgment of its own courts, without any merits review; Article 54(3) then provides that execution against assets is governed by the law in force in the state in which execution is sought, including that state's rules on sovereign immunity. Recognition and enforcement in the Article 54(1) sense are thus juridical and declaratory steps – they domesticate the award and give it executory force – whereas execution is the subsequent physical compulsion, which turns on domestic law and remains beyond the ICSID Convention's harmonising reach. The Commission in *Antin* tends to use the broader language of 'implementation' so as to capture not only payment, but also the legal pathways through which payment may later be compelled (see, e.g., *Antin*, recitals 72-76, 243-248). In the context of the State-aid-centric analysis of this paper, we likewise use 'implementation' as a shorthand, but where precision matters we distinguish between payment or voluntary compliance by the Member State, judicial recognition or enforcement, and execution against assets.

12 See, e.g., ECJ, Case C-482/99, *France v Commission (Stardust Marine)*, ECLI:EU:C:2002:294, para. 68.

as ‘granted’ at the moment the beneficiaries are conferred the right to receive it – namely, upon adoption of the award – even where payment follows at a later stage.<sup>13</sup> After the case was referred back to it, the General Court (GC) in 2024 clarified that the Commission’s decision had identified the aid measure as the implementation of the award, i.e. the payment of the sums due by Romania, and not the award itself.<sup>14</sup> The result is a distinction between (i) the moment at which aid is to be regarded as granted for the purposes of Article 107(1) TFEU – linked by the ECJ to the award – and (ii) the measure properly so called, which the GC anchors in the payment. This distinction is particularly relevant, both in practical and doctrinal terms: what is assessed under the four conditions of Article 107(1) TFEU is the measure, whereas what must not be put into effect under Article 108(3) TFEU is its implementation. Nonetheless, both the GC and ECJ effectively stated that the aid measure is the payment of the sums owed under the award but explicitly *not* the award itself.<sup>15</sup> That was what the Commission, in its 2014 Decision, defined as the measure, and what the judicial saga has consistently treated as the measure.<sup>16</sup> This is despite the Commission, seemingly, attempting to expand that definition to include the award itself, perhaps as a single measure.<sup>17</sup>

Looking at the reasoning in *Antin*, this attempted expansion seems calculated; as does the attempt, within *Antin*, to collapse the *Micula* distinction. In *Antin*, the measure is defined as the award *and/or* its implementation.<sup>18</sup> This distinction, and the proper identification of the measure, is not a purely academic exercise, being significant both for the assessment as to the existence of aid, and for the enforcement of State aid law, provided aid actually exists. As shown below, the proper identification of the measure, and of its limits, is essential for the imputability, advantage, and selectivity analyses.

## II. Incompatible by Definition

A further important consideration is that, where an intra-EU investment arbitration award and/or its implementation is characterised as new aid arising from an intra-EU arbitral entitlement incompatible with EU law, such aid is liable to encounter significant, potentially insurmountable, difficulties as regards compatibility. In fact,

13 ECJ, Case C-638/19 P, *European Food and Others v Commission*, ECLI:EU:C:2022:50, paras. 124-125.

14 GC, Joined Cases T-624/15 RENV and T-694/15 RENV, *European Food SA and Others v Commission*, ECLI:EU:T:2024:659, paras. 125-136.

15 ECJ, Case C-638/19 P, *European Food and Others v Commission*, ECLI:EU:C:2022:50, para. 135; GC, Joined Cases T-624/15 RENV and T-694/15 RENV, *European Food SA and Others v Commission*, ECLI:EU:T:2024:659, paras. 125-136.

16 Commission Decision (EU) 2015/1470 of 30 March 2015, OJ L 232 of 4/9/2015, p. 43, part 3.

17 GC, Joined Cases T-624/15 RENV and T-694/15 RENV, *European Food SA and Others v Commission*, ECLI:EU:T:2024:659, para. 132.

18 The Commission itself tip-toes between ‘and’ and ‘or’; see, e.g., *Antin*, recitals 205, 230 and 235.

such aid is very likely by definition incompatible with the internal market, as it breaches the non-contravention principle of compatibility,<sup>19</sup> as a result of the *Achmea* reasoning. It also lacks, by definition, incentive effect and necessity, as it compensates for past events.<sup>20</sup> This impossibility of compatibility, while not affecting the assessment as to the existence of aid, underscores the importance of that assessment being watertight, as that assessment becomes the only justiciable part.

### III. Extraterritoriality

Arbitration under the ICSID Convention is, structurally, a transnational enforcement regime, not exhausted in or limited to EU fora. It is predicated on the principle that an award must be recognised and enforceable in any contracting state.<sup>21</sup> Indeed, intra-EU ICSID awards have been recognised in extra-EU courts.<sup>22</sup> That is of particular relevance, as the *Antin* decision itself expressly proceeds on the basis that enforcement steps have been, and may continue to be, taken outside the Union, including in the United States, Australia, and the United Kingdom.<sup>23</sup> Yet, those same proceedings expose the limits of the Commission's approach to *Antin*, and to the broader issue of ISDS and State aid. Under Articles 54(1), (3) ICSID Convention, the binding force of an award, as well as its recognition and enforcement, are treated separately from execution. While awards have binding force under Article 53(1), and contracting states must accord recognition and enforcement per Article 54(1) ICSID Convention, execution against assets must be guaranteed but remains subject to domestic rules per Article 54(3) ICSID Convention.<sup>24</sup>

This distinction between recognition, enforcement, and execution is important. Its tripartite nature has been affirmed in both Australia and the United Kingdom, where the courts have treated treaty accession as sufficient for recognition and enforcement, while preserving immunity from execution as a separate question.<sup>25</sup> The United States position is functionally similar, as the federal courts' task is to accord the award full faith and credit and enter an enforcement order tracking it, whereas any later resort to asset-directed measures remains a distinct matter of

19 ECJ, Case C-284/21 P, *Commission v Anthony Braesch and Others*, ECLI:EU:C:2023:58, para. 96; ECJ, Case C-204/97, *Portugal v Commission*, ECLI:EU:C:2001:233, para. 41; ECJ, Case C-594/18 P, *Austria v Commission*, ECLI:EU:C:2020:742, para. 45; ECJ, Case C-59/23 P, *Paks II*, ECLI:EU:C:2025:125, paras. 52-55.

20 See, e.g., ECJ, Case C-349/17, *Eesti Pagar AS*, ECLI:EU:C:2019:172.

21 Articles 53 and 54 ICSID Convention.

22 See, e.g., *Blasket Renewable Investments LLC v Kingdom of Spain* [2025] FCA 1028; *Blasket Renewable Investments LLC v Kingdom of Spain*, No. 23-7038 (D.C. Cir. 2024); *Infrastructure Services Luxembourg S.A.R.L. v Kingdom of Spain* [2025] US District Court, District of Columbia 18-1753.

23 *Antin*, recitals 72-76. See also Article 3.

24 ICSID Convention, Articles 53-55.

25 *Kingdom of Spain v Infrastructure Services Luxembourg* [2023] HCA 11, paras. 42-45, 66, 75; *Kingdom of Spain v Infrastructure Services Luxembourg* [2026] UKSC 9, [84]-[88], [91]-[95].

judgment execution and immunity.<sup>26</sup> Recognition and enforcement, in ICSID terms, give the award domestic legal effect and render its pecuniary obligations enforceable as if they were contained in a final domestic judgment, whereas execution refers to the distinct, subsequent coercive process directed against assets. Thus, the award and its binding force create the underlying pecuniary entitlement as between the parties; recognition and enforcement translate that entitlement into domestically enforceable form; and execution seeks, where necessary, to satisfy it through coercive measures against assets.

In the *Antin*-related proceedings, as in other Spanish renewables cases, third country courts have shown no real willingness to allow EU-law objections, including those framed in terms of State aid or comity, to displace the logic of the ICSID enforcement system.<sup>27</sup> In practical terms, that means that once recognition, enforcement, or execution is pursued outside the Union, the investor is no longer operating within a legal environment in which EU law is controlling (or even relevant); it is operating in one where the award is treated as presumptively enforceable and executable by virtue of treaty accession and domestic law.

That point is salient for this analysis, as what EU (State aid) law may regulate directly is the conduct of the Member State, and above all, whether it may pay, settle, voluntarily comply with the award, or otherwise place State resources at the disposal of the award creditor. What it cannot, however, directly regulate is the judicial act of a third-country court recognising or registering the award under its own legal order. That is why the extra-EU dimension creates a difficulty not merely of enforcement, but of legal characterisation. If recognition abroad is treated as though it were *itself* the implementation of aid, the concept of implementation is moved, and stretched, from the Member State's own conduct towards the independent conduct of foreign courts/states. Such a move may be understandable from the perspective of effectiveness, but it is difficult to square either with the ordinary logic of Article 108(3) TFEU or with the structure of the ICSID Convention or third States' autonomy.<sup>28</sup>

The same point also limits how far the primary law autonomy line, on which the Commission's reasoning heavily relies, can be pushed. Articles 4(3) and 19 TEU, and 267 and 344 TFEU, as well as the post-*Achmea* case law, may explain why the Union rejects intra-EU investment arbitration as a matter of internal constitutional

26 22 USC § 1650a; *Infrastructure Services Luxembourg SARL v Kingdom of Spain*, Memorandum Opinion and Order, Civil Action No. 18-1753 (LLA) (DDC, 12 August 2025), pp. 9-10, sec. B 'Full Faith and Credit'.

27 *Infrastructure Services Luxembourg SARL and another v Kingdom of Spain*, Memorandum Opinion and Order, Civil Action No. 18-1753 (LLA), United States District Court for the District of Columbia, 12 August 2025.

28 It was precisely the fact that third countries cannot be subject to EU State aid rules and precisely Article 108(3) TFEU that warranted the EU to create the Foreign Subsidies Regulation (Regulation (EU) 2022/2560), connecting to the economic behaviour of undertakings in the internal market. See *Hornkohl*, JECLAP 2023/3, pp. 137-151.

order.<sup>29</sup> They do not, however, by themselves transform EU courts into effective supervisors of third-country ICSID enforcement. Even if those provisions justify resistance within the Union to the legal effects of intra-EU awards, it does not follow that they create a broad, freestanding entitlement to halt recognition proceedings in foreign jurisdictions whose courts are applying their own treaty-implementation rules. In that sense, the extra-EU cases reveal not simply a practical obstacle, but a conceptual one, namely that the Commission's anti-enforcement model presupposes a degree of extraterritorial control that EU law does not, in fact, possess.<sup>30</sup> The pending challenge to Article 3 of the *Antin* decision, which deals precisely with that, only underlines that novelty and contestability.<sup>31</sup>

It is in this context that awards have already been granted to extra-EU investors; in at least one case, payment has already been made.<sup>32</sup> Specifically, Spain, in June 2025, satisfied a USA judgment enforcing an award,<sup>33</sup> stemming from the same core dispute as *Antin*. This raises a practical question, especially since reputable Spanish news sources reported that the Commission approved the payment,<sup>34</sup> following Spanish (Eurocontrol) assets being seized in Belgium, following a court order.<sup>35</sup> Since the Commission may have authorised Spain to pay, and at least implicitly acquiesced to that payment, a key question arises as to whether this is because no aid was ultimately considered to have been granted (given the extra-EU dimension), or because such aid was somehow treated as compatible. This factual pattern calls into question a core part of the Commission's reasoning. Given that dimension, and despite the Commission's pleas, the effectiveness of State aid law does not seem able to be safeguarded in practice; and thus, should not be used to buttress otherwise unconvincing argumentation. The relevance of the extraterritorial dimension, and the complications it can create especially in relation to State aid enforcement are further analysed in Section F.

29 *Achmea*, paras. 32-37, 42, 45-46, 56-60; *Komstroy*, paras. 42-52, 65-66; *PL Holdings*, paras. 47-56; cf. ECJ, Case C-333/19, *Romatsa*, ECLI:EU:C:2022:749, paras. 42-44.

30 On the growing role of extraterritorial EU law, see *Hornkohl*, in: Buxbaum (ed.), *Extraterritoriality in Comparative Perspective*, 2025, pp. 413-454.

31 *Antin*, Article 3; GC, Case T-365/25, *Antin v Commission*, pending.

32 *Blasket Renewable Invs., LLC v Kingdom of Spain*, 2024 WL 4298808 (D.D.C. Sept. 26, 2024); Reuters, Spain pays first arbitration award in long-running renewable subsidies dispute, available at: <https://www.reuters.com/sustainability/boards-policy-regulation/spain-pays-first-arbitration-award-long-running-renewable-subsidies-dispute-2025-06-05/24/4/2026>. See also Žižáková, *EStAL* 2025/3, p. 273.

33 *Blasket Renewable Investments LLC v Kingdom of Spain*, Notice of Satisfaction of Judgment, Civil Action No. 23-cv-2701 (RC), United States District Court for the District of Columbia, 4 June 2025.

34 Cinco Días, España afronta el primer laudo por el recorte de las renovables, available at: <https://cincodias.elpais.com/companias/2025-06-05/espana-afronta-el-primer-laudo-por-el-recorte-de-las-renovables.html> (24/4/2026).

35 *Blasket Renewable Investments LLC v Kingdom of Spain*, Judgment, Brussels Court of Appeal, 17th Chamber, role no. 2024/QR/30, 18 June 2024; Cinco Días, La justicia belga eleva de 32 a 80 millones el embargo a España por los laudos de las renovables, available at: <https://cincodias.elpais.com/companias/2024-07-25/la-justicia-belga-eleva-de-32-a-80-millones-el-embargo-a-espana-por-los-laudos-de-las-renovables.html> (24/4/2026).

#### IV. State Aid as a Defence and Moral Hazard

The final point we want to raise before beginning the analysis on the conditions and enforcement of State aid is that the aid regime is being used as a defence by Member States. This is nothing new;<sup>36</sup> and seems to an extent to apply in this context.<sup>37</sup>

Effectively, Spain in particular, is rewarded for not notifying the 2007 scheme which sits at the heart of *Antin*; and is using State aid law to shield itself from liabilities it incurred under investment treaties. In a detailed reading of *Antin*, this becomes even more pronounced, as, at every turn, Spain's position aligns with its interest to not pay the award: it does not dispute the characterisation of the 2007 scheme as unlawful aid<sup>38</sup> (even though it is almost certainly existing),<sup>39</sup> does not raise compatibility arguments, and in general seems to actively be deploying State aid as a shield. While this is in no way decisive as to existence or not of aid, or even, given the point made above, to its compatibility, Spain's behaviour seems, inadvertently, to have weakened the reasoning in the decision, by at the very least not allowing for a full appraisal of the 2007 scheme.

#### C. Imputability

Imputability effectively attributes a given measure to the State,<sup>40</sup> and it is one half of the State resources criterion (the other being a burden being placed on those resources).<sup>41</sup>

The Commission's reasoning in *Antin* is quite straightforward. It emphasised that the State's actions enabled and permitted the award, since Spain had voluntarily signed and ratified the ECT and the ICSID Convention, incorporating these treaties into its legal order.<sup>42</sup> By doing so, Spain consented to investment arbitration for ECT disputes; the award was rendered possible only by Spain's decision to enter these treaties.<sup>43</sup> Further, any act of complying with or paying the award would also be imputable, as, per the *Micula* reasoning, a State is necessarily involved if it pays compensation awarded by an arbitral tribunal;<sup>44</sup> a position buttressed by the *Achmea* and *Komstroy* derived incompatibility of the award with EU law, which

36 See, e.g., *Olykke*, EStAL 2016/4, p. 286.

37 *Pérez-Bernabeu*, EStAL 2025/3, p. 244.

38 *Antin*, recital 215.

39 *Pérez-Bernabeu*, EStAL 2025/3, pp. 249-251.

40 See, e.g., ECJ, Case C-482/99, *France v Commission (Stardust Marine)*, ECLI:EU:C:2002:294.

41 See, e.g., ECJ, Case C-189/91, *Petra Kirsammer-Hack v Nurhan Sidal*, ECLI:EU:C:1993:907.

42 *Antin*, recitals 187-188.

43 *Antin*, recitals 187-188.

44 *Antin*, recital 191; GC, Joined Cases T-624/15 RENV and T-694/15 RENV, *European Food SA and Others v Commission*, ECLI:EU:T:2024:659, paras. 201-221.

precludes any valid obligation to implement it.<sup>45</sup> This argumentation, however, is not as solid as it first may appear.

### I. From Treaty Consent to Imputed Awards?

Before addressing the pitfalls of *Antin*'s reasoning, it is worth recalling *Stardust Marine*. There, the Court made clear that imputability cannot be inferred merely from the fact that a measure was taken by a public undertaking controlled by the State; even where the State is in a position to exercise dominant influence, actual involvement in the adoption of the measure cannot simply be presumed.<sup>46</sup> Instead, imputability must be inferred, if at all, from a set of indicators pointing to public involvement in the concrete measure at issue.<sup>47</sup> That basis is directly relevant in this context, as, even if one accepts that Spain's entry into the ECT and the ICSID Convention was itself imputable, *Stardust Marine* suggests that such original State involvement cannot, without further indicators, simply be projected forward onto the later award, its judicial recognition, or its coercive enforcement.

Further, in the context of arbitration, the ECJ has unequivocally ruled that *contractual* arbitration awards, and their judicial recognition, enforcement, or execution, cannot be seen as being imputable to the State; and neither can a court judgment on the award itself.<sup>48</sup> The same applies to compliance with them, absent a further discretionary State act. What, in turn, can be imputable in such situations is the *choice* of a Member State to enter into the arbitration, and the conclusion of such an arbitration agreement.<sup>49</sup> The ECJ caveated this, stating that the outcome 'could' have been different, if the arbitration procedure in its entirety was imposed by the Member State as a scheme to circumvent State aid,<sup>50</sup> and tried to distinguish between contractual and investment arbitration.<sup>51</sup> Specifically, the distinction was predicated on the fact that the latter does not reflect the freely expressed wishes of the parties.<sup>52</sup> The ECJ even seems to suggest that because of that original voluntary

45 *Antin*, recitals 195-196.

46 ECJ, Case C-482/99, *France v Commission (Stardust Marine)*, ECLI:EU:C:2002:294, paras. 51-52.

47 ECJ, Case C-482/99, *France v Commission (Stardust Marine)*, ECLI:EU:C:2002:294, paras. 55-56.

48 ECJ, Case C-701/21 P, *Mytilinaios v DEI and Commission*, ECLI:EU:C:2024:146, paras. 113-114.

49 ECJ, Case C-701/21 P, *Mytilinaios v DEI and Commission*, ECLI:EU:C:2024:146, paras. 113-114, 119.

50 ECJ, Case C-701/21 P, *Mytilinaios v DEI and Commission*, ECLI:EU:C:2024:146, para. 114.

51 ECJ, Case C-701/21 P, *Mytilinaios v DEI and Commission*, ECLI:EU:C:2024:146, paras. 106-111, 114.

52 ECJ, Case C-701/21 P, *Mytilinaios v DEI and Commission*, ECLI:EU:C:2024:146, para. 109.

act, the award and its content should not be analysed under the lens of State aid, meaning that that voluntary agreement was the only analysable element.<sup>53</sup>

Yet, in *Antin*, the Commission bases the construct of imputability upon Spain's original agreement to enter into investment treaties, and, bearing in mind how the ECT operates, the investors themselves *chose* arbitration;<sup>54</sup> it was not imposed upon them. Equally, it is difficult to argue that in the context of investment arbitration the arbitral route is 'imposed'; if it were, defences as to the appropriateness of forum<sup>55</sup> or cooling off periods could not exist.<sup>56</sup> Especially in the context of Spanish renewables, given the 2019 measure which was predicated upon investors dropping the arbitral proceedings,<sup>57</sup> both the non-imposition of arbitration as a scheme, and the free will of the parties as to the path to follow are evident.

Beyond this, it is important to examine the nature of court judgments within imputability. In *DOBELES*, the ECJ explicitly stated that the establishment as such of State aid cannot result from a judicial decision, as establishing aid effectively requires (a series of) positive actions outside the scope of judicial authority.<sup>58</sup> Where national law confers a right entailing State aid – for example, a right to a higher payment for electricity generated from renewable energy sources – proceedings seeking full entitlement to that right do not constitute a request for the court to grant aid, but rather a claim for the unpaid portion of that aid.<sup>59</sup> The analysis of the ECJ clearly suggests that the effect of such a judgment is purely declaratory;<sup>60</sup> it does not create or grant aid, it merely states that one party is entitled to receive a sum which may correspond to aid, and requires the other party to pay it.<sup>61</sup> Thus, sums allocated by a court cannot be aid distinct from any original advantage;<sup>62</sup> the court merely confirms the existence of such a right and is called to define it.<sup>63</sup>

The Commission's reasoning in *Antin* seems to disregard this notion, arguing that the judicial recognition of an award would be imputable,<sup>64</sup> even though that recognition would simply be a recognition of an entitlement, and not its creation. Bearing in mind *DEI*,<sup>65</sup> and the commentary on it, as well as *DOBELES*,<sup>66</sup> it would

53 ECJ, Case C-701/21 P, *Mytilinaios v DEI and Commission*, ECLI:EU:C:2024:146, para. 119.

54 See, e.g., *Cameron*, pp. 196-222.

55 See, e.g., *Blackaby/Partasides/Redfern*, para. 11.130.

56 *Cameron*, p. 212.

57 *Pérez-Bernabeu*, EStAL 2025/3, p. 246.

58 ECJ, Joined Cases C-702/20 and C-17/21, *DOBELES HES and Sabiedrisko pakalpojumu regulēšanas komisija*, ECLI:EU:C:2023:1, para. 76.

59 ECJ, Joined Cases C-702/20 and C-17/21, *DOBELES HES and Sabiedrisko pakalpojumu regulēšanas komisija*, ECLI:EU:C:2023:1, para. 79.

60 *Žižáková*, EStAL 2025/3, pp. 263-265; *Zöchling*, in: Jaeger/Haslinger (eds.), *Beihilferecht – Jahrbuch 2025*, pp. 393-394.

61 *DOBELES*, para. 75.

62 *DOBELES*, para. 78.

63 *Biagioni*, *European Papers* 2022/2, p. 540.

64 *Antin*, recital 190.

65 ECJ, Case C-701/21 P, *Mytilinaios v DEI and Commission*, ECLI:EU:C:2024:146, para. 114.

66 *DOBELES*, paras. 74-79.

seem that an investment arbitration tribunal cannot, by analogy, itself create or grant aid;<sup>67</sup> but only confirm the existence of a right to it.<sup>68</sup>

The Commission, in substance, argues that the tribunal in *Antin* did not grant aid to which the applicants were entitled, but rather compensated the investors for loss of profit caused by the 2013 modification (and eventual repeal) of the 2007 scheme.<sup>69</sup> On this reading, the award does not confirm a pre-existing entitlement under national law; it compensates for the withdrawal of an (alleged) advantage. Two things must be said in response to this argument. First, as a matter of imputability, the point is not dispositive. Whether the award compensates for wrongdoing or confirms an underlying right, it does not *create* that underlying legal position *ex nihilo*, as it would have to do in order to constitute an act attributable to the State. Second, and more importantly, the Commission's argument is only internally coherent if the 2007 scheme itself constitutes unlawful aid, because only then can compensation for its withdrawal be treated as the reinstatement of unlawful aid, thereby removing the case from the scope of *Asteris*.<sup>70</sup> That characterisation is itself, however, doubtful and insufficiently substantiated in the Decision, as discussed at length in Section D.III. For the purposes of imputability, what matters is that the Commission's own framing confirms what we argue here: the award does not create an entitlement out of nothing, but confirms and operationalises a compensatory claim grounded in (alleged) State wrongdoing. Therefore, a court judgment's confirmation of an arbitral award cannot itself be imputable.

The GC in its latest *Micula* judgment (under appeal), implicitly, seems to also recognise that reasoning, stating that the independence of the tribunal is irrelevant because the measure is not the award, but its implementation.<sup>71</sup> This conclusion is further reinforced by the possibility of such a judgment in a State different from the respondent, as, in such a situation, a judgment of, *e.g.*, a UK or French court would be imputable to, *e.g.*, Spain. This is where the Commission's reasoning becomes relevant: it treats Spain's original, voluntary acceptance of investment treaties as the basis for imputability, effectively attributing a foreign judgment to the Spanish State. Arguably, however, this interpretation stretches the notion of imputability to its limits.<sup>72</sup> This is especially true bearing in mind that the courts of ICSID contracting states can indeed recognise and enforce an award; yet the idea of a USA, Australian, or British court's judgment being somehow attributable to an EU Member State is untenable.

This overall complicated situation is compounded by the unclear construction of the measure. If the aid only comes into existence by virtue of the issuance of the

67 *Zöchling*, in: Jaeger/Haslinger (eds.), *Beihilferecht – Jahrbuch 2025*, pp. 393-395.

68 *Biagioni*, *European Papers* 2022/2, p. 540.

69 *Antin*, recitals 208-215.

70 See below, Section D.III.

71 GC, Joined Cases T-624/15 RENV and T-694/15 RENV, *European Food SA and Others v Commission*, ECLI:EU:T:2024:659, para. 220.

72 *Fabner*, *ICSID Review* 2022/3, p. 682; *Pérez-Bernabeu*, *Intertax* 2023/3, p. 224; *Fabner*, *LIEI* 2021/4, p. 345.

award, which is the position clearly stemming from *Micula* and *Antin* (even if the measure itself is different, it is still borne of the award itself) as that is the point where the right to compensation crystallises,<sup>73</sup> then the same imputability problems follow through to every subsequent step. However, as argued, such an award is difficult to impute to the State; and the same applies to the judicial recognition or enforcement of the award, especially in non-domestic contexts, and to its execution.

## II. 'Original Sins' and the Limits of Imputability

From the Commission's reasoning in *Antin*, it follows that something further is imputed, and that this imputability is effectively carried through to the award of an independent tribunal, one with no connection to the State, and even to the involuntary execution of that award. This element is the State's original entering into an international investment treaty, from which all other events stem; 'but for' that original choice, there would be no right to compensation confirmed by an arbitral award, and there would be no award to comply with, enforce, or execute.<sup>74</sup> However, for that attribution to be even remotely acceptable, the measure cannot be *just* the award or its execution/implementation;<sup>75</sup> the aid measure has to be the entirety of the scheme, to borrow from *DEI*, of ISDS arbitration, or in other words the underlying investment protection agreement. Nonetheless, the 'but for' argument seems to collapse, since the award (and therefore also its judicial enforcement or execution) confirm rights which exist not solely because of the entry into investment treaties, but also due to the State's wrongdoing within the context of those treaties. In relation to *Antin*, e.g., the argument that 'but for' the ECT and ICSID being applicable there would be no rights can also be formulated as 'but for' the repeal of the 2007 scheme there would have been no rights; or 'but for' the form of the repeal there would have been no rights.

Even if implicitly, *Antin* seems to confirm this in its attempts to establish imputability, effectively stating that the only reason why the award was even possible was Spain's entering into the ECT and ICSID Convention, meaning, by extension, that the original imputability of that action decades ago suffices to impute all of that action's results and consequences. Interestingly, the Commission invokes the 'effectiveness' of State aid law to make that extension of imputability, arguing that unless this 30-year-old chain is recognised, State aid law can be circumvented. As noted above, however, the effectiveness of EU law in this context already seems endangered, and stretching imputability not just normatively but also temporally will not change that. If anything, the Commission's implied insistence on a two-tier regime vis-à-vis intra- and extra-EU situations, only serves to *weaken* that effectiveness.

73 ECJ, Case C-638/19 P, *European Food and Others v Commission*, ECLI:EU:C:2022:50, para. 124.

74 *Antin*, recitals 187-188, 193-195.

75 *Zöchling*, in: Jaeger/Haslinger (eds.), *Beihilferecht – Jahrbuch 2025*, pp. 393-395.

Nonetheless, the implication that the conclusion of international investment treaties constitutes a necessary element of, and precondition for, the eventual imputability of the award, its enforcement, and its execution reveals a further key point: namely, the need to incorporate that original choice into national law.<sup>76</sup> This process of incorporation makes those international treaties part of the normal applicable national regime and it is absolutely necessary for the construct of imputability, in the Commission's reasoning, to stand. The theorisation of the entering into the investment treaties as part of the aid measure is therefore vital for the synthetic measure's characterisation as aid. In other words, for the Commission's argument regarding imputability to work, there would need to be a series of occurrences, starting with the imputable entering into the underlying ISDS scheme and culminating in the award and/or its implementation (enforcement, payment, execution), with the original event imbuing all subsequent ones with imputability, and all those events sandwiched between them disregarded.

However, this does not appear to be the Commission's reasoning – the entering into the investment treaties is not treated as part of the aid measure.<sup>77</sup> Further, looking at the relevant case law, it would be virtually impossible to construe this chain of events, or even measures, as being so closely linked that they cannot be separated,<sup>78</sup> especially since the subject-matter, context, and nature of those various measures,<sup>79</sup> or the foreseeability of the subsequent ones,<sup>80</sup> does not tie them together.<sup>81</sup> Yet, somehow, imputability is carrying through.

Put differently, the analysis presupposes a form of 'original sin'. That initial defect is then said to taint subsequent events. Returning to the declaratory nature of judicial decisions, no distinct basis has been advanced for the imputability of arbitral awards. Rather, their imputability is derived from, and interconnected with, the underlying ISDS framework, as well as the compensatory character of arbitral proceedings. In those circumstances, it is arguable that the award is itself declaratory in nature. It confirms a right arising from the initially imputable decision to establish the ISDS mechanism, together with a series of subsequent acts. The award, while formally giving rise to the aid by crystallising the right to compensation, is also regarded by the Commission as a conduit for the rights and obligations embodied in the investment treaties, which are themselves imputable to the State.

Yet, the rights it confirms stem from other measures, which are not self-contained in or created by the award. This situation also highlights an incongruity between the ECJ and GC in *Micula*. The former unequivocally held that aid must be regarded as granted at the moment of the adoption of the award, meaning that the adoption of

76 *Antin*, recitals 186-191.

77 *Antin*, part 5.

78 GC, Case T-565/19, *Oltchim SA v Commission*, ECLI:EU:T:2021:904, paras. 94-95, 137; ECJ, Joined Cases C-399/10 P and C-401/10 P, *Bouygues SA and Bouygues Télécom SA v Commission*, ECLI:EU:C:2013:175, paras. 103-104.

79 GC, Case T-1/12, *France v Commission*, ECLI:EU:T:2015:17, paras. 45-48.

80 GC, Case T-732/16, *Valencia Club de Fútbol, SAD v Commission*, ECLI:EU:T:2020:98, para. 169.

81 See also *Žižáková*, EStAL 2025/3, pp. 264-265.

the award creates the aid or grants the aid at that moment (even if the actual aid is the payment, as the adoption of the award establishes the right to said payment).<sup>82</sup> The GC, analysing imputability when the case was referred back to it, instead focused on the execution itself, confirming that the Commission, in its decision, had framed the measure as the implementation of the award, rather than the award itself.<sup>83</sup> The result is that, to make the award imputable to the State, it is necessary either to look back at the enactment of the ISDS scheme or to look forward to actions taken to implement; but not to locate imputability in the award itself. Notably, the Commission's own reasoning in *Antin* implicitly acknowledges this, as it does not seek to anchor imputability in the payment viewed in isolation, but in the combined chain of treaty accession and incorporation, the resulting award, and the (eventual) implementation. That chain, however, is precisely the 'original sin' construct examined above, with all the difficulties it entails.

For the imputability of compliance with the award, whether voluntary or coercively pursued, the same basic logic permeates the argument: that imputability exists by virtue of that original sin. Voluntary compliance or payment, absent a court order, nonetheless, still contains within it a further, positive, action on behalf of the State, thusly making it likely imputable. However, this logic does not seem to follow when it comes to judicial recognition or enforcement and to (coercive) execution against assets. Execution is a mechanical consequence of *res judicata* and of separation of powers, in line with the ECJ's case law.<sup>84</sup> Where the judiciary has no discretion to arbitrarily confer benefits (e.g., ICSID Convention Article 54(1)'s 'as if final judgment' obligation, similar to national judgments), any resource outflow results from the adjudicative path, not from State policy. Execution therefore contains no level of discretion, while voluntary compliance can be imputable, since the choice to comply with international law obligations, especially since those lack a valid basis in the eyes of EU law, can in itself be deemed imputable.<sup>85</sup>

Any order or action taken by courts merely recognises and confirms an *existing* right; a right whose existence, in the form of the award, is not itself imputable. This chain is further strained if we consider execution in non-domestic, even non-EU, courts, and moves against assets held abroad, as has already happened. Thus, the argument that coercive execution is imputable hinges on two elements: the imputability of the original enactment of the scheme, and the lack of lawful basis for any rights under EU law. The lack of a legal basis is effectively what, in the Commission's eyes, imbues voluntary implementation, and even domestic court execution, with an imputable character; despite the latter element being questionable given the nature of such proceedings. The Commission claims that not taking steps

82 ECJ, Case C-638/19 P, *European Food and Others v Commission*, ECLI:EU:C:2022:50, para. 124.

83 GC, Joined Cases T-624/15 RENV and T-694/15 RENV, *European Food SA and Others v Commission*, ECLI:EU:T:2024:659, para. 220.

84 *DOBELES*, paras. 75-78.

85 *Fahner*, ICSID Review 2022/3, pp. 672-686.

to prevent such forced execution is also, in itself, imputable,<sup>86</sup> which stretches the notion beyond its logical conclusion. This point has not, however, been examined by the Union Courts. In *Micula*, the General Court did not treat coercive execution as ‘voluntary’, *inter alia* dismissing the foreign-seizure scenario as irrelevant because it had not materialised at the time of the contested decision.<sup>87</sup> Despite this being a hypothetical in *Micula*, the Commission seeks to use that part of the judgment to bolster its claims.<sup>88</sup> What was still hypothetical in *Micula*, is no longer so in the post-*Antin* enforcement landscape, with the Brussels Court of Appeal authorising third-party attachment against amounts owed by Eurocontrol to Spain, and Spain subsequently satisfying the USA final judgment enforcing the award.<sup>89</sup> That sequence underlines the relevance of the distinction being made here; once third-country courts and third-state enforcement machinery intervene, the path from award to payment is no longer reducible to a single act of the Member State, and the claim that failure to prevent such coercive enforcement is itself imputable becomes even more strained, as such coercive execution can no longer be avoided. In other words, it seems logically impossible to impute a court judgment or order in another State, or any actions by that State’s courts to give effect to such an order, as being imputable to a given Member State.

### III. A Few Words on State Resources

Before concluding on imputability, a brief point ought to be made on its twin sub-criterion of placing a burden on State resources. The reasoning of the Commission, that *Antin* is seeking to enforce the award, therefore creating a serious risk that Spain will have to invest State resources in the payment of the award, and that such risk suffices for the finding of the presence of State resources,<sup>90</sup> is circular, and clashes with the determination of the measure itself. In the absence of ‘implementation’, the award cannot then, in the Commission’s logic, be aid. Implicitly, the Commission falls into the position, necessarily, that it is the ‘implementation’ that constitutes aid, not the award.

However, fact that a payment would ultimately draw on resources attributable to the State does not by itself establish that the measure by which the payment is brought about is imputable in the sense required by Article 107(1) TFEU. In other words, judicial recognition, enforcement and execution are rather difficult to deem imputable; and the award by itself is virtually impossible to theorise as

86 *Antin*, recital 190.

87 GC, Joined Cases T-624/15 RENV and T-694/15 RENV, *European Food SA and Others v Commission*, ECLI:EU:T:2024:659, paras. 213–219.

88 *Antin*, recital 190.

89 Brussels Court of Appeal, Judgment of 18 June 2024, role no. 2024/QR/30; *Blasket Renewable Investments LLC v Kingdom of Spain*, Notice of Satisfaction of Judgment, Civil Action No. 23-cv-2701 (RC) (DDC, 4 June 2025).

90 *Antin*, recital 200.

placing a burden on State resources. Therefore, the Commission seems to rely on a combination of the two as the aid measure, obfuscating the modalities of either.

#### IV. Conclusion on Imputability

In short, imputability in the investment arbitration context is not a unitary question, but one that depends on the specific act under examination. Treaty accession, incorporation into national law, and voluntary compliance may involve sufficiently clear State conduct; arbitral awards, judicial recognition, and coercive enforcement much less so. The weakness of *Antin* lies precisely in its attempt to bridge that divide by projecting the original State act of entering the treaty framework onto later adjudicative and enforcement acts that are not, in themselves, acts of the Member State. This underscores the importance of the precise determination of the measure.

#### D. Advantage

Nonetheless, even assuming the award and/or its implementation can be deemed to be imputable, their classification as aid would, likely, stumble upon the advantage criterion.<sup>91</sup> Advantage refers to any benefit received outside the course of normal market conditions,<sup>92</sup> or the mitigation of costs normally borne.<sup>93</sup>

#### I. Normal Market Conditions and the Reference Framework

First off, the concept of normal market conditions must be, even if briefly, discussed. Normal conditions are not some metaphysical concept; rather they are derived from the relevant frame of reference in the national legal regime. This means that the potentially beneficial application of normal rules does not necessarily create or confer an advantage.<sup>94</sup> Therefore, the concept does not apply to a duty to pay or repay sums; or the normal, standard application of a rule in line with market conditions.<sup>95</sup> Equally, the existence of a statutory system which lays down such a framework is not in itself a departure from normal market conditions either, if the

91 Opinion AG Wahl, Case C-15/14 P, *Commission v MOL Magyar Olaj- és Gázipari Nyrt.*, ECLI:EU:C:2015:32, para. 47.

92 ECJ, Case C-39/94, *SFEI and Others v La Poste and Others*, ECLI:EU:C:1996:285, para. 60.

93 ECJ, Case C-387/92, *Banco Exterior de España v Ayuntamiento de Valencia*, ECLI:EU:C:1994:100, para. 13.

94 ECJ, Case C-200/97, *Ecotrade v Altiforni e Ferriere di Servola*, ECLI:EU:C:1998:579, para. 36; ECJ, Case C-480/98, *Spain v Commission*, ECLI:EU:C:2000:559, para. 18.

95 ECJ, Case 61/79, *Amministrazione delle finanze dello Stato v Denkavit italiana*, ECLI:EU:C:1980:100, para. 31.

payment of sums is an inherent feature of that system.<sup>96</sup> Effectively, the core of the enquiry is the situation absent a specific State intervention.<sup>97</sup>

Since the Commission's position, as shown above, hinges on the incorporation into the normally applicable (in the relevant circumstances) national legal frameworks of investment treaties, it can be argued that the provisions of those treaties are indeed part of the normal market conditions; especially since the intervention assessed is the award and/or its implementation. Indeed, in *Antin*, the Commission seems to define those conditions as the award not being handed down on the basis of Spain's ratification of investment treaties.<sup>98</sup> However, this reasoning depends on treating that ratification as an intervention, and arguably a continuous one, as opposed to as part of normally applicable legal provisions in that legal and factual context. The award, and/or its implementation, are the logical, inherent consequences of that ratification and incorporation. Effectively, if a Member State introduces a general law, and that law is applied normally, it is difficult to see where the departure from normal market conditions occurs. In *Antin*, even if implicitly, it seems that a core determinant of this departure is the incompatibility of those legal provisions with EU law, and the fact that, per the *Achmea* and *Komstroy* reasoning, they are deemed to have never actually existed.

## II. The Compensatory Nature of Investment Arbitration Awards

There is, however, a much more fundamental question in relation to the concept of advantage, especially with reference to *Antin*. This question relates to the nature of the compensation ordered by the award, and the fact that damages for wrongdoing generally do not constitute an advantage for the purposes of State aid.<sup>99</sup> Quite clearly, this is a corollary of the analysis in the preceding paragraphs; and one that deserves significant attention, if we bear in mind the nature of investment arbitration proceedings and awards.

Arbitral awards are, including in the present context, compensatory in nature and substance, and seek to redress treaty breaches and to compensate the injured party for the (alleged) wrongdoing of the other party. They are remedies (or damages) for the State's breach of international legal obligations. In the ICSID context, tribunals are limited to awarding compensation commensurate with the actual loss or damage suffered; they do not have the power to grant punitive damages. From the perspective of the tribunal, which is the entity competent to adjudicate the dispute, there has indeed been a wrong committed that is made whole with the award;<sup>100</sup> even if that wrong is no longer recognised by EU law. The wrong consists of the violation of the commitments undertaken and guarantees issued under international law

96 *Ecotrade*, para. 36; *Spain v Commission*, para. 18; *Denkavit italiana*, para. 31.

97 *SFEI*, para. 60.

98 *Antin*, recital 207.

99 ECJ, Joined Cases 106 to 120/87, *Asteris*, ECLI:EU:C:1988:457, paras. 23–26.

100 *Bungenberg*, ZEuS 2018/4, p. 506; *Fahmer*, ICSID Review 2022/3, pp. 681–682.

obligations.<sup>101</sup> This distinction constitutes a central element of the Commission's reasoning<sup>102</sup> and appears to follow from its expansive approach to imputability, read in light of *Achmea*. On that view, since no right existed as a matter of EU law, the tribunal's recognition and operationalisation of that right is both imputable to the State – by virtue of the original enactment – and capable of conferring an advantage.

This argument seems to be drawing a line under the *Asteris* case law, and arguing that while the compensation distinction does indeed exist, it can only exist in relation to compensation awarded on the basis of national law, and not to compensation awarded on the basis of international law.<sup>103</sup> However, this does not appear to constitute the normatively relevant dividing line. Rather, in light of *Asteris* and general principles of EU and Member State liability law, the decisive criterion lies in the effects of the damages. Compensation does not place the recipient in a better position, but restores them to their prior condition (*restitutio in integrum*), such that the injured party is returned to the position it would have occupied in the absence of the wrongful conduct. A reading of the case law that defines compensatory damages not by virtue of their effects, but by virtue of their basis,<sup>104</sup> not only misreads *Asteris* and misunderstands basic concepts of damages law, but also, more fundamentally, is at odds with the objective and effects-based conception of State aid,<sup>105</sup> which the Commission itself underscores and relies upon.<sup>106</sup> Further, on top of wrongdoing, for the purposes of the tribunal, existing, the legal basis itself was valid at the time the claim was lodged and the award issued, in the context of *Antin*. As such, it is difficult to accept that the validity of the compensation, and its characterisation as damages, is dependent on the legal basis; what matters is whether the payment is compensatory in nature and whether it follows from wrongdoing.

At this point, an important distinction exists between the substantive existence of a compensatory claim and the procedural mechanism through which that claim is pursued. *Antin* appears, at least at points, to slide between the two; part of its broader oscillatory nature. On one reading, the objection is primarily procedural. Intra-EU ECT arbitration is treated as incompatible with EU law, and the arbitral route is therefore denied legitimacy within the Union legal order.<sup>107</sup> On another, more far-reaching reading, the decision seems effectively to deny the substantive relevance of the wrong itself, and to treat the monetary content of the award as a freestanding economic advantage.<sup>108</sup> Those are, of course, not the same. Even if EU law rejects the arbitral mechanism as the appropriate route through which the claim is enforced, it does not follow, without further analysis, that the resulting payment ceases to be compensatory in nature. That is precisely why *Asteris* remains

101 *Bungenberg*, ZEuS 2018/4, p. 506; *Fabner*, ICSID Review 2022/3, pp. 681–682.

102 *Antin*, recitals 208–211.

103 *Antin*, recitals 209–211.

104 *Antin*, recitals 208–211; *Fabner*, ICSID Review 2022/3, pp. 682–683.

105 ECJ, Case C-638/19 P, *European Food and Others v Commission*, ECLI:EU:C:2022:50, para. 122.

106 *Antin*, recital 204.

107 *Antin*, recitals 260–264, 278.

108 *Antin*, recitals 208–219.

relevant. The decisive question is not whether the claim was articulated through international rather than national law, but whether the payment restores a loss or instead preserves or reinstates an unlawful aid position.<sup>109</sup> In that respect, the mere incompatibility of the arbitral route cannot, by itself, do all the work of the advantage analysis.<sup>110</sup> Despite its distinguishing differences, the judgment in *DEI* points in the same methodological direction: the arbitral context does not dispense with the need to identify carefully the relevant measure, the relevant benchmark, and the actual source of any putative advantage.<sup>111</sup>

If one accepts that point, a further consequence follows. Even assuming, *arguendo*, that the eventual payment of the award could under certain conditions raise Article 107(1) concerns, that question still arises at the level of *payment*, not at the level of recognition abroad as such. The practical enforcement dilemma<sup>112</sup> therefore confirms, rather than displaces, the compensatory analysis. Where third-country courts act independently under their respective ICSID regimes, the decisive question becomes whether compensation is paid, and on what legal basis, rather than the mere use of an arbitral mechanism. That is why the advantage enquiry cannot be cleanly separated from the anti-enforcement problem present in *Antin*, and from the broader core issue of the measure itself not being clearly defined.

### III. When Compensation Reflects Unlawful Aid

Following from this analysis, the characterisation of the award's nature becomes key. Therefore, as the GC argues in *Micula*,<sup>113</sup> and as the Commission does in *Antin*,<sup>114</sup> in an almost subsidiary manner, the focus must shift to the actual characterisation and analysis of the award's content as to its compensatory nature. Of course, the view of the tribunal itself is not sufficient for that, in the eyes of EU law.<sup>115</sup> The core of this analysis is whether the damages compensate for the withdrawal of unlawful State aid,<sup>116</sup> and whether they are effectively claims under legislation as opposed to claims rooted in wrongdoing, which removes them from the scope of *Asteris*.<sup>117</sup> This argument hinges, effectively, on the unlawfulness or incompatibility of the underlying aid, meaning that only those awards related

109 *Asteris*, paras. 23-26. See also *DOBELES*, para. 60; ECJ, Case C-119/05, *Lucchini*, ECLI:EU:C:2007:434, para. 63; *Pérez-Bernabeu*, Intertax 2023/3, p. 219.

110 *Antin*, recitals 216-219. See also below, Section D.III.

111 ECJ, Case C-701/21 P, *Mytilinaios v DEI and Commission*, ECLI:EU:C:2024:146, paras. 96-99, 105-106, 109-110, 113-114.

112 See above, Section B.III, and below, Section F.

113 GC, Joined Cases T-624/15 RENV and T-694/15 RENV, *European Food SA and Others v Commission*, ECLI:EU:T:2024:659, paras. 170-190.

114 *Antin*, recitals 208-212.

115 GC, Joined Cases T-624/15 RENV and T-694/15 RENV, *European Food SA and Others v Commission*, ECLI:EU:T:2024:659, para. 177.

116 *Pérez-Bernabeu*, Intertax 2023/3, pp. 219-231.

117 *Asteris*, paras. 23-26; *DOBELES*, paras. 61-65.

to damages stemming from such aid would lose their damages character.<sup>118</sup> The Court has stated that this applies only where the underlying national legislation actually grants aid.<sup>119</sup> An interesting question, in the context of *Antin*, is what this underlying legislation which grants aid actually is: the incorporation of the ECT and ICSID, or the 2007 scheme itself? Based on the Commission's reasoning, it is clearly the 2007 scheme.<sup>120</sup>

Effectively, in the context of *Antin*, the Commission's position is a dual argument. The primary claim is that it does not matter whether the 2007 scheme was aid, because the Commission does not recognise any wrongdoing or any basis for compensation, so the compensation is aid. The secondary, fallback claim is that even if the characterisation of the 2007 scheme did matter, that scheme was actually unlawful aid, so the award only compensates for its loss, and is not genuine compensation.<sup>121</sup> This approach follows from *Micula*,<sup>122</sup> with one, fundamental, difference: the characterisation of the underlying unlawful aid. In *Micula*, the situation is relatively clear; yet, in *Antin*, it is not.

That divergence goes to the heart of the *Asteris* analysis. In *Micula*, the underlying tax incentive scheme had been formally characterised as State aid, and its repeal had been required by the Commission as part of Romania's pre-accession alignment with the *acquis*. The arbitral award compensated the claimants for the withdrawal of those previously qualified incentives. Consequently, enforcement of the award would have entailed the reintroduction of incompatible aid. The *Asteris* limitation applied in that context almost by its own force, as compensation tracked, in substance, the reinstatement of unlawful aid. In *Antin*, however, none of those premises is established at the outset. The analytical sequence is therefore reversed, as a result of the factual distinction. Rather than characterising the underlying scheme as aid, and then applying the *Micula/Asteris* logic to the award, the Commission characterises the award as aid and, in order to sustain that characterisation, retrospectively qualifies the 2007 scheme as unlawful aid. Whether that retrospective qualification can actually be sustained therefore becomes the pivotal question, to which we now turn.

The 2007 scheme was never investigated by the Commission until the *Antin* award was notified to it by Spain. Even when assessing its successor scheme, the 2007 scheme was not analysed.<sup>123</sup> The first, and only, analysis of it comes therefore in the *Antin* Decision, and consists of barely a page. As pointed out by *Pérez-Bernabeu*, this analysis is not only terse and potentially insufficient; it also speaks

118 *Pérez-Bernabeu*, Intertax 2023/3, pp. 219–231.

119 *DOBELES*, paras. 61–65; GC, Joined Cases T-624/15 RENV and T-694/15 RENV, *European Food SA and Others v Commission*, ECLI:EU:T:2024:659, paras. 173–174.

120 *Antin*, recitals 213–215.

121 *Antin*, recitals 213–215.

122 GC, Joined Cases T-624/15 RENV and T-694/15 RENV, *European Food SA and Others v Commission*, ECLI:EU:T:2024:659, para. 186.

123 Commission Decision C(2017) 7384 final of 10 November 2017 on State aid SA.40348 (2015/NN) – Spain – Aid for electricity production from renewable energy sources, cogeneration and waste, OJ C 442 of 22/12/2017, p. 1.

volumes as to the motivations behind declaring the 2007 scheme to be unlawful aid: to transform the *Antin* award into aid itself.<sup>124</sup>

Beyond those motivations, and Spain's complicity, there are further, more substantive issues with the Commission's reasoning.<sup>125</sup> The most glaring issue is the determination of the advantage. The Commission does not in fact determine whether, or to what extent, the compensation rate exceeds normal returns; an impermissible omission, given its obligation to state reasons within the framework of the notion of advantage. An advantage must be demonstrated; it cannot be assumed, presumed or theorised.<sup>126</sup> Yet, the excessive nature of the compensation is not addressed in any substantive manner, beyond a mere declaration. The Commission also clearly did not take all available information into account, as it is obliged<sup>127</sup> in order to meet the burden and standard of proof,<sup>128</sup> and generally seems to have conducted a very brief analysis for the sole purpose of declaring the *award* in *Antin* an advantage. The remainder of the analysis on the 2007 scheme is not particularly developed or convincing either.<sup>129</sup>

The Commission's analysis on the 2007 scheme, especially in relation to the notion of state resources, creates a conflict, between *PreussenElektra*<sup>130</sup> and *Elcogas*.<sup>131</sup> That conflict is also relevant in terms of the characterisation of aid as unlawful; as under Article 1(b)(v) of Regulation 2015/1589,<sup>132</sup> or its predecessor Regulation 659/1999,<sup>133</sup> aid which when enacted was not aid but which subsequently became aid due to the evolution of the internal market without having been altered, is

124 *Pérez-Bernabeu*, EStAL 2025/3, pp. 249-256.

125 *Antin*, recital 213.

126 ECJ, Joined Cases C-331/20 P and C-343/20 P, *Volotea and easyJet*, ECLI:EU:C:2022:886, para. 132.

127 ECJ, Joined Cases C-331/20 P and C-343/20 P, *Volotea and easyJet*, ECLI:EU:C:2022:886, para. 113; ECJ, Case C-300/16 P, *Frucona Košice*, ECLI:EU:C:2017:706, paras. 29, 60-61, 71, 74-75.

128 ECJ, Case C-367/95 P, *Sytraval*, ECLI:EU:C:1998:154, para. 63; ECJ, Case C-37/13 P, *Nexans*, ECLI:EU:C:2014:2030, paras. 31-32.

129 The selectivity analysis of the 2007 scheme is extremely terse and relies on an artificially narrow definition of the reference framework, while regarding imputability, the Commission completely failed to examine the margin of discretion of the Spanish authorities, as the 2007 measure was implementing an EU Directive (Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, OJ L 283 of 27/10/2001, p. 33), making it potentially non-imputable. In relation to the deployment of State resources, it based its analysis on a reading of the sub-criterion, which at the time of the measure was not plausible, and on case law which did not yet exist.

130 ECJ, Case C-379/98, *PreussenElektra AG v Schleswag AG*, ECLI:EU:C:2001:160.

131 ECJ, Case C-275/13, *Elcogas SA v Administración del Estado and Iberdrola SA*, ECLI:EU:C:2014:2314.

132 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248 of 24/9/2015, p. 9.

133 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83 of 27/3/1999, p. 1.

to be considered as existing aid. This evolution, as interpreted by the ECJ,<sup>134</sup> includes a change in the legal framework, something which clearly occurred between *PreussenElektra*, which the 2007 scheme was designed to mirror,<sup>135</sup> and *Elcogas*, with which it was analogised *ex post facto*.

The question of existing aid is of particular relevance and may likewise be determined by reference to the limitation period laid down in Regulation 2015/1589.<sup>136</sup> In this case, more than ten years elapsed between the acquisition by the Andasol plants<sup>137</sup> of the rights associated with the scheme – which constitutes the relevant date<sup>138</sup> – and the initiation of any Commission action in respect of the 2007 scheme in July 2021. At the latest, that period lapsed in June 2019, that is two years before the Commission acted. This would make the aid existing, and therefore not unlawful or incompatible. As such, even if there was indeed aid in the 2007 scheme, its character as existing aid would not preclude compensation for it.<sup>139</sup>

Therefore, the determination of the 2007 scheme as (unlawful) aid, is, on its face, doubtful. In any case, the Commission cannot be said to have met its obligation to state reasons in relation to that scheme or met the standard and discharged the burden of proof. As a result, the Commission's argument centred around the unlawfulness of the 2007 scheme in relation to limiting the *Asteris* principle cannot be seen as valid, since its core premise is not substantiated.<sup>140</sup> Thus, since the 2007 scheme likely cannot be seen as aid, and has definitely not been proven to be aid, there are no issues with compensating for the damage suffered by Antin as a result of its repeal.

#### IV. Illegality Is Not Advantage

A final point that ought to be made in relation to the notion of advantage in *Antin* relates to an overly general statement made by the Commission, namely that “*since the Award is contrary to Union law for the reasons explained in Section (10.4.1), the Award has not been granted under normal market conditions. Therefore, irrespective of the qualification of the 2007 Scheme as State aid, the Award and in any event its Implementation, constitutes an advantage*”.<sup>141</sup>

This point is extremely general, and potentially dangerous, also if generally applied beyond the ISDS context. It states, with no explanation or elaboration, that

134 ECJ, Case C-89/08 P, *Commission v Ireland*, ECLI:EU:C:2009:742, para. 71; ECJ, Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416, para. 71.

135 *Pérez-Bernabeu*, EStAL 2025/3, pp. 253-254.

136 Regulation 2015/1589, Article 17(2).

137 *Pérez-Bernabeu*, EStAL 2025/3, p. 251.

138 *European Commission*, Commission Notice on the recovery of unlawful and incompatible State aid, OJ C 247 of 23/7/2019, p. 1, para. 57.

139 See, by analogy, ECJ, Case C-653/23, *Karaman*, ECLI:EU:C:2025:517.

140 GC, Joined Cases T-624/15 RENV and T-694/15 RENV, *European Food SA and Others v Commission*, ECLI:EU:T:2024:659, para. 216.

141 *Antin*, recital 216.

any measure which contains elements which are illegal under EU law (and, by analogy, almost certainly national law) must be seen as conferring an advantage. Taken outside the context of arbitration, the breadth of this assertion becomes (even more) problematic. Consider, *e.g.*, a national measure that is found to breach the Services Directive or a fundamental freedom. Under the Commission's *Antin* reasoning, the economic effects of that measure on any undertaking benefiting from it would, by that fact alone, constitute an advantage for the purposes of State aid, irrespective of whether the measure actually places the undertaking in a position better than normal market conditions. That result sits uneasily with the objective, effects-based conception of advantage that the Commission itself claims to apply.<sup>142</sup>

Thus, this approach completely disregards the objective nature of State aid, and the Commission's obligation to identify an advantage, and to state reasons. It is just a blanket statement. It is also not rooted in any plausible authority. The Commission does cite the GC's latest *Micula* judgment,<sup>143</sup> but the paragraph cited to merely reproduces the Commission's decision in *Micula*, and has no bearing on the actual, general point being made. That paragraph states that granting compensation is an advantage, and that interest payments confer a separate advantage. Yet it is inherently limited by and to the facts of *Micula*. Neither it, nor the surrounding paragraphs of the GC's judgment address the issue of illegality transforming a measure into an advantage. Illegality under Union law is not discussed in general terms in relation to investment treaties; and how could it, since the *Micula* decision predates *Achmea* by a few years. This point seems almost like a broad refutation of the *Asteris* principle, effectively taking it and flipping it on its head, and stating that illegality not only removes the benefit of that principle, but also automatically equates to an advantage.

The broad illegality statement is not supported, either in case law, or in the logic of the concept of advantage. Bringing in the ECJ's reasoning in *Paks II*, the Commission's argument here would require it to enter into a detailed analysis of all the potential elements which could have a relevance in the determination of conformity with EU law at the existence of aid stage,<sup>144</sup> and, since it has engaged with those elements, also at the compatibility stage.<sup>145</sup> Yet, the ECJ did not make any comments at all about illegality and advantage. If anything, the Commission's reasoning here appears to sidestep the analysis in *Paks II*: the ECJ effectively held that even in the context of compatibility (where the non-conformity rule actually applies and is of paramount importance) only certain core aspects are to be assessed.<sup>146</sup> By contrast, on the Commission's own reasoning, and in light of its duty to state reasons in relation to the concept of advantage, it would be required to assess *all* elements relevant to the potential illegality of that advantage, irrespective

142 *Antin*, recital 204.

143 *Antin*, fn 129.

144 Due to the nature of the obligation to state reasons and the standard of proof associated with identifying an advantage.

145 ECJ, Case C-59/23 P, *Paks II*, ECLI:EU:C:2025:125, paras. 75-78, 113-116.

146 *Paks II*, paras. 61-64, 68-69, 75-76.

of whether they are indissolubly linked to the State aid measure. Taking this at face value would also mean that any advantage thusly identified would not be able to be compatible. The Commission's illegality assertion, therefore, sits contrary to the *Paks II* judgment, as the Court never suggested that a breach of procurement law would, *ipso facto*, transform the contract award into an economic advantage within the meaning of Article 107(1) TFEU. The Commission's position in *Antin*, thus, effectively does what the Court in *Paks II* declined to do, but one step earlier in the analysis, treating a (presumed) breach of EU law as establishing the existence of an advantage, not merely as informing the compatibility assessment.

In practical terms, and by analogy with the fundamental freedoms point made above, such reasoning would imply that any directly awarded contract alleged to infringe procurement rules automatically confers a State aid advantage, irrespective of whether its price or terms deviate from market conditions. Such a conclusion is irreconcilable with orthodox advantage analysis, has not been endorsed by the Court, and is implicitly rejected by the Commission in its 2016 Notice on the Notion of aid.<sup>147</sup> Equally, such a statement is deeply problematic in terms of the division of competences between the Commission and the CJEU, as the CJEU alone has the jurisdiction to find that a Member State has failed to fulfil an obligation under the EU Treaties, and the Commission's views cannot be decisive for the purpose of determining whether the national legislation or the national measure that was the subject of those proceedings is consistent with EU law.<sup>148</sup> Yet, this pronouncement by the Commission in *Antin* seems to give it the power to do so, as part of its State aid assessment. For instance, would this mean that any measure which appears to the Commission, who lacks competence to actually reach such a final decision, to not be in line with free movement automatically transforms into an advantage? Such a position cannot be supported; by the logic of the concept of advantage, by the case law, or by the division of competences between the CJEU and the Commission. Thus, the Commission's illegality argument, if accepted, would effectively transform Article 107(1) TFEU into a residual competence for policing any Treaty or legislative breach with economic consequences; while also being incompatible with the concept of aid itself.

## V. Conclusion on Advantage

In short, advantage in this context cannot be inferred merely from the existence of a pecuniary award or from the incompatibility of the arbitral route with EU law. The decisive issue remains whether the relevant payment places the recipient in a better position than normal market conditions would allow, or instead compensates for loss caused by a legally cognisable wrong. *Antin* overstates the extent to which

147 *European Commission*, Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU, OJ C 262 of 19/7/2016, p. 1, points 89-96; *Sanchez-Graells*, in: Hancher/Piernas López (eds.), *Research Handbook on European State Aid Law*, 2021; *Ølykke*, *EStAL* 2016/4, pp. 508-526; *Pelekis*, *EStAL* 2025/4, pp. 358-369.

148 *Paks II*, para. 105.

illegality can substitute for that effects-based enquiry. That overreach reappears, in a different form, in the decision's selectivity analysis and, ultimately, in its remedial logic.

### E. Selectivity

At this juncture, a brief point on selectivity, stemming from the preceding analysis, is warranted. Selectivity is, in many ways, the crux of the notion of State aid,<sup>149</sup> and relates to the limitation of the advantage.<sup>150</sup> It is, in other words, the necessary element of the notion of aid which delineates between general measures and aid measures, as general measures, or the secondary selective effects of general measures, fall outside the scope of Article 107(1) TFEU.<sup>151</sup> This very purpose of selectivity, as well as its normative centrality to the notion of aid, helps explain why the Commission declined to commit to a precise determination of the measure and sought to avoid characterising the underlying ISDS scheme as part of it. If it had done so, the measure would have come close to being general in nature, rendering its classification as aid more difficult. In other words, while the underlying ISDS scheme and the State's voluntary introduction of it are essential to the imputability analysis, they are kept outside the scope of the measure for the purposes of selectivity; most likely because their inclusion would render the measure general and reduce any advantageous effects arising from its normal operation to mere secondary economic effects.

It is notable that, in both *Antin* and *Micula*, the selectivity analysis remains relatively underdeveloped and appears to struggle to delineate the relevant measure without engaging with the underlying scheme. In *Micula*, for instance, the argument was that the BIT conferred a right to compensation, but that this was not a general rule, as it applied only to the signatories of that BIT.<sup>152</sup> Hence, the BIT framework formed part of, at the very least, the selectivity analysis. However, in *Antin*, this line of reasoning is less persuasive. At the time *Antin* lodged its claim and initiated arbitral proceedings, all EU Member States and the Union itself were parties to the ECT; as such, the argument does not hold, at least within the relevant sectors.

Instead, in *Antin*, the Commission relies on the presumption that in instances of individual aid the identification of the advantage suffices to (rebuttably) establish

149 Opinion AG *Maduro*, Case C-237/04, *Enirisorse SpA v Sotacarbo SpA*, ECLI:EU:C:2006:21, para. 49.

150 See, e.g., ECJ, Joined Cases C-78/08, C-79/08 and C-80/08, *Paint Graphos*, ECLI:EU:C:2011:550.

151 ECJ, Case C-156/98, *Germany v Commission*, ECLI:EU:C:2000:467, para. 22; Opinion AG *Jacobs*, Joined Cases C-52/97, C-53/97 and C-54/97, *Viscido and Others*, ECLI:EU:C:1998:78, para. 16; *European Commission*, Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU, OJ C 262 of 19/7/2016, p. 1, paras. 115-116.

152 GC, Joined Cases T-624/15 RENV and T-694/15 RENV, *European Food SA and Others v Commission*, ECLI:EU:T:2024:659, para. 196.

selectivity.<sup>153</sup> The Commission applies this presumption,<sup>154</sup> since, by theorising the measure as the award and/or its implementation, that measure appears inherently individual. Interestingly, however, in substantiating its analysis, the Commission submits that, notwithstanding the multiplicity of awards, each constitutes a distinct and individual aid measure, conferring separate and autonomous legal rights on its beneficiaries. It further maintains that, in any event, not all beneficiaries would be capable of obtaining identical or comparable awards.<sup>155</sup> The Commission here comes very close to acknowledging the pivotal role of the underlying scheme by explaining that there are multiple such awards, yet carefully omits to state that they all stem from the original incorporation of investment arbitration into the national legal regime. Equally, while the specific rights are distinct, the underlying right of investment protection (or, the normal standard) from which they stem is the same. The effect of the Commission's argument is that differentiated compensation for differentiated harm under the same law makes the compensation completely independent and standalone, disregarding the basis for the compensatory rights in question.

Further, to determine whether a measure confers a selective advantage, it is necessary, and congruent with the case law, to look at the relevant context holistically.<sup>156</sup> In *Dirk Andres*, the Court and AG confirmed that a measure cannot be meaningfully assessed in isolation from the regulatory environment that defines its normal operation and effects, and thus that the selectivity analysis must be anchored in a careful delineation of the legal framework as a whole, rather than in the narrow inspection of an isolated provision.<sup>157</sup> The same applies, by analogy, to the identification of the measure more broadly: one cannot analyse the award in isolation while treating its underlying legal basis as the decisive anchor for imputability, and then disregard that same basis when it becomes inconvenient for the selectivity analysis. The Commission's approach instead artificially separates the consequences of the existence of rights from the very existence of those rights themselves. It treats the right to investment protection as unrelated to its manifestation in a compensatory award – akin to treating a tax deduction as unrelated to the tax measure that creates the entitlement,<sup>158</sup> or to suggesting that contractual damages are unrelated to the contract itself.

153 ECJ, Case C-15/14 P, *Commission v MOL Magyar Olaj- és Gázipari Nyrt.*, ECLI:EU:C:2015:362, para. 61. See however also paras. 91-98 for the difficulties this presumption can run into in situations where the advantage is not truly and absolutely individual, as is arguably the case here.

154 *Antin*, recitals 229-230.

155 *Antin*, recital 231.

156 ECJ, Case C-203/16 P, *Dirk Andres v Commission*, ECLI:EU:C:2018:505, paras. 91-93, 103; Opinion AG Wabl, Case C-203/16 P, *Dirk Andres v Commission*, ECLI:EU:C:2017:1017, paras. 98-99, 109.

157 ECJ, Case C-203/16 P, *Dirk Andres v Commission*, ECLI:EU:C:2018:505, paras. 91-93, 103; Opinion AG Wabl, Case C-203/16 P, *Dirk Andres v Commission*, ECLI:EU:C:2017:1017, paras. 98-99, 109.

158 A position the Court squarely rejected in *Dirk Andres*.

Especially in the context of *Antin*, the wider context methodology cuts against the Commission's approach. The award cannot be assessed in isolation from the legal framework that defines its normal operation and effects; yet that is precisely what the Commission does. For instance, the 2019 Spanish law seems to, at the very least implicitly, tie together the multitude of investment arbitration claims, linking them to the same (injurious, from the perspective of energy investors) event, *i.e.*, the 2013 scheme.<sup>159</sup> This underscores that the Commission is indeed separating parts (the award/implementation) of a 'whole' (the ECT ISDS scheme, and the relevant Spanish laws) to assess them in isolation, as opposed to assessing that 'whole' itself; or that it is separating causes from their effects and specific occurrences from their context, making them appear isolated. The Commission's approach seems steeped in formalism and refuses to engage with the wider relevant context. It must be emphasised that the point is not that, under the Commission's chosen (albeit arguably problematic) characterisation of the measure, the award cannot be selective. Rather, the difficulty lies in the fact that the definition of the measure for the purposes of selectivity – aside from appearing artificially narrow – cannot be reconciled with the considerably broader definition adopted for the purposes of imputability and advantage.

Thus, the Commission's analysis is very much dependent on the definition of the measure; an issue that matters especially in the arbitral context. If the measure is the arbitration award and/or its implementation, the selectivity analysis becomes *ad hoc* – the award benefits the successful claimant(s), but this analysis suffers from inconsistencies with reality. If, by contrast, the measure is treated as (part of) the underlying scheme, the relevant comparator becomes who can access the legal pathway that is capable of generating the pecuniary benefit; and thus the overall analysis hinges on an institutional asymmetry. Foreign-incorporated investors with access to the ECT/ICSID pathway can obtain a pecuniary benefit that domestic investors, or investors lacking that pathway, cannot obtain in the same manner. This makes selectivity turn on access to a particular remedial architecture rather than on economic differentiation within a regulatory reference framework. That blurs the line between a selective economic advantage and the consequences of a contested jurisdictional arrangement; namely, intra-EU ECT arbitration post-*Achmea* and *Komstroy*. Effectively, the Commission's reasoning turns selectivity into a proxy for the legality of the dispute resolution mechanism itself.

Ultimately, in relation to selectivity, the Commission's own analytical selectivity becomes apparent. While the underlying scheme is necessary in relation to imputability, in order to taint any subsequent event as itself imputable, it is also, for the purposes of selectivity (and of advantage), separated from the award and/or its implementation. In other words, the measure's exact limits seem to shift depending

159 *Pérez-Bernabeu*, *EStAL* 2025/3, p. 246. See Royal Decree-Law 17/2019 of 22 November 2019, adopting urgent measures for the necessary adaptation of remuneration parameters affecting the electricity system and responding to the process of cessation of activity of thermal power plants; Royal Decree-Law 9/2013 of 12 July 2013, adopting urgent measures to ensure the financial stability of the electricity system.

on the Commission's analysis, or the needs of that analysis. A conclusion appears to have been reached first and then reverse-engineered onto the conditions of the notion of aid. Selectivity in *Antin* is an (other) indicator that the decision oscillates between an *ad hoc* award-as-measure frame and an underlying scheme (or even past decisions to sign and ratify the ECT and ICSID Convention) frame. The incongruency of the overall analysis arguably shows that the Commission's intervention can be construed as not purely State aid control in the orthodox sense, but as also simultaneously being a form of system-management of intra-EU arbitration outcomes, conducted through State aid vocabulary. This can be corroborated by the breadth of the standstill remedy demanded in the decision's operative part (including anti-enforcement injunctions extending to third countries) which tracks, and indeed depends upon, that definitional oscillation.

Selectivity in *Antin* is therefore not merely a checklist element satisfied at the end of the inquiry (on the basis of a presumption); rather, it is a window into the decision's internal coherence and into the external compliance demands that coherence is being made to bear.

## F. National Courts, Standstill, and Anti-Enforcement

Beyond the issues analysed above in relation to the characterisation of arbitration-related acts as aid, the operative parts of the decision, placed in the context of the extra-EU dimension of the arbitration-State aid nexus, create further uncertainty and complications, especially when taking into account the roles of Member States and foreign courts eventually faced with enforcement decisions.

Article 2 requires Spain to not pay out any of the aid identified in Article 1 and to ensure that no such payments are effected from the date of the decision. Article 3 goes further, requiring Spain to take all appropriate measures to prevent *Antin*, and any assignee of the award or rights under it, from seeking recognition, enforcement, or execution of the award, whether within the Union or in third countries. Article 4 then requires recovery of any payment of that aid, expressly including payments resulting from forced execution arising in third countries.<sup>160</sup> Read together, those provisions show that *Antin* is not merely a decision about the classification of the award under Article 107(1) TFEU; it is also a decision about the remedial consequences of that classification, and in particular about whether the standstill logic of Article 108(3) TFEU can be projected outward into an anti-enforcement mandate with extraterritorial reach.

In remedial and enforcement terms, the real difficulty lies not in repeating the familiar proposition that Article 108(3) TFEU has direct effect, but in identifying what precisely must be restrained. The case law requires national courts to draw the consequences of unlawful implementation, including suspension, interim relief, and,

<sup>160</sup> *Antin*, Articles 2-4; recitals 285-286.

where appropriate, recovery.<sup>161</sup> Yet the ordinary object of those remedies is the act by which the Member State puts aid into effect. In the present context, that object would be payment, settlement, or some other genuinely voluntary act by which State resources are made available to the award creditor. It cannot, however, be the prior third-country recognition, registration, or declaration of enforceability of the award by itself as the implementation of aid – the Commission cannot order this vis-à-vis a third state. Where Commission proceedings are pending, the task of the national court is not necessarily to determine conclusively whether the compensation constitutes aid and whether it is compatible with the internal market, but rather to preserve the practical effect of Article 108(3) TFEU pending the Commission's decision.

This is an important distinction, and follows, necessarily, from Article 108 TFEU. A foreign court's recognition or registration of an ICSID award is not an act of the Member State, nor is it, in itself, a transfer of State resources. It is, rather, the juridical precondition for possible later execution by a third state. The eventual payment may indeed be capable of amounting to implementation within the meaning of Article 108(3) TFEU. But treating recognition abroad as itself the implementation of aid collapses two analytically distinct steps: on the one hand, the independent judicial act of a non-EU court acting under its own ICSID implementing regime; and on the other hand, the subsequent disbursement of State resources. In that respect, the Commission's approach in *Antin* appears to extend the notion of implementation beyond its normal object, precisely because it seeks to capture not only payment, but the legal pathways through which payment may later be compelled.<sup>162</sup>

A further structural puzzle arises from the notification duty itself. If, as the Commission contends (following *Micula*), the aid must be regarded as granted at the moment of the adoption of the award, the standstill obligation under Article 108(3) TFEU is effectively foreclosed before it can actually be complied with. The award is issued by a tribunal whose timing and substance the Member State does not, and cannot, control, and whose proceedings are by definition adversarial to the State in question. The investor cannot notify, as the notification duty lies with the Member State, not the beneficiary; and by the time the Member State could act, i.e., after the award, the aid measure is, on the Commission's own logic, already in place. Any attempt to pre-empt the difficulty by notifying at an earlier stage (the arbitration, the treaty incorporation, the scheme underlying the claim) runs into the problem that, on the Commission's own framing, none of those earlier steps is 'the aid'. The result is a notification obligation without a clearly notifiable object, and a standstill obligation that the Member State is institutionally incapable of honouring

161 ECJ, Case 120/73, *Gebrüder Lorenz GmbH v Germany and Land Rheinland-Pfalz*, ECLI:EU:C:1973:152; ECJ, Case C-354/90, *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon v France*, ECLI:EU:C:1991:440; ECJ, Case C-39/94, *SFEI and Others v La Poste and Others*, ECLI:EU:C:1996:285; ECJ, Case C-275/10, *Residex Capital IV CV v Gemeente Rotterdam*, ECLI:EU:C:2011:814.

162 *Antin*, Article 3; recitals 72-76, 243-248.

in the manner contemplated by Article 108(3) TFEU and the case law. That internal inconsistency follows directly from the Commission's oscillation between treating the award and/or its implementation as the measure, and it further underscores how uneasily *Antin's* substantive characterisation sits with its remedial architecture.

Equally, despite the decision's operative part, it is by no means obvious that Article 108(3) TFEU, taken on its own, confers an individual right or protected legal position on a Member State to restrain recognition, enforcement, and execution proceedings abroad. In other words, it is not clear that the Member State is the 'beneficiary' of the standstill obligation. Based on the case law and Commission guidance, the direct effect of the standstill obligation is ordinarily framed as protecting 'individuals' or 'affected parties' against the unlawful implementation of aid, above all competitors and other third parties whose position may be harmed by unnotified aid.<sup>163</sup> At the same time, Article 108(3) TFEU also structures the division of labour (and competences) between national courts and the Commission. National courts are accordingly required to draw the appropriate consequences of a breach so as to safeguard those interests, while the Member State remains, in the ordinary structure of Article 108(3) TFEU, the bearer of the notification duty rather than the holder of the corresponding right.<sup>164</sup> That does not exclude the possibility that, in an unusual setting such as *Antin*, a Member State may invoke Article 108(3) TFEU in support of interim relief designed to avoid being compelled to pay potentially unlawful aid.<sup>165</sup> But if such a position exists, it is best understood as indirect and instrumental, deriving from the effectiveness of the standstill obligation and from the need to preserve the Commission's exclusive competence on compatibility, rather than as evidence that the Member State is itself the primary beneficiary of the standstill rule in the same way as affected competitors or other third parties.<sup>166</sup>

163 ECJ, Case C-354/90, *FNCE*, ECLI:EU:C:1991:440, para. 12; ECJ, Case C-39/94, *SFEI*, ECLI:EU:C:1996:285, paras. 40-43; *European Commission*, Commission Notice on the enforcement of State aid rules by national courts, OJ C 305 of 30/7/2021, p. 1, paras. 24-25. At a broader structural, systemic level, it can indeed be said that the standstill regime also protects other Member States, since Article 107(1) TFEU is directed to distortions of competition and effects on trade between Member States, and State aid control seeks to preserve a level playing field across the internal market. That wider systemic function does not, however, mean that other Member States occupy, in national standstill litigation, the same position as competitors or other directly affected parties relying on Article 108(3) TFEU. Other Member States can thus benefit from the standstill obligation, but they are not the direct beneficiaries of it, having other avenues of recourse than private affected parties.

164 Council Regulation (EU) 2015/1589, Articles 2-3 and recital 5; ECJ, Case C-39/94, *SFEI*, ECLI:EU:C:1996:285, paras. 41-42; ECJ, Case C-275/10, *Residex*, ECLI:EU:C:2011:814, paras. 26-29.

165 *Antin*, Articles 2-4 and recitals 285-286; *European Commission*, Commission Notice on the enforcement of State aid rules by national courts, OJ C 305 of 30/7/2021, p. 1, paras. 24-25, 67-68.

166 ECJ, Case C-39/94, *SFEI*, ECLI:EU:C:1996:285, paras. 41-43; ECJ, Case C-275/10, *Residex*, ECLI:EU:C:2011:814, paras. 26-29; *European Commission*, Commission Notice on the enforcement of State aid rules by national courts, OJ C 305 of 30/7/2021, p. 1, paras. 67-68.

Thus, even though the Member State is ordinarily the bearer of the notification duty and not the holder of a claim against the beneficiary, the approach endorsed by *Antin* seems to, at least implicitly, create such a claim.

The primary law autonomy provisions point in a similar, but not identical, direction. Articles 4(3) and 19 TEU, read with Articles 267 and 344 TFEU and the post-*Achmea* line of case law, explain why Member State courts must resist giving intra-EU arbitral arrangements full effect within the Union legal order. Yet those provisions do not obviously create, by themselves or in combination with Article 108 TFEU, a freestanding private law cause of action enabling a Member State to restrain third-country proceedings. Their more plausible role is indirect; not converting EU courts into supervisors of foreign ICSID enforcement but rather informing the EU-conforming interpretation of national interim relief rules where there is a sufficient Union nexus.

The strongest argument for this would be one of effectiveness; if private enforcement abroad would compel a Member State to pay potentially unlawful aid, the State must be able to seek temporary relief so as not to be forced into a breach of EU law. That argument has force, especially where proceedings within the Union are concerned. But once extended to third-country litigation, it becomes unstable, and unmoored. The practical problem is obvious and has been rendered even clearer by extra-EU judgments. EU law may require the Member State not to pay, but it cannot require US, Australian, or UK courts not to apply their own ICSID enforcement or fully-domestic execution regimes.

For the same reason, the role of national courts should be framed carefully. They can, and where necessary must, adopt interim measures in order to preserve the practical effect of the standstill obligation while Commission proceedings are pending. They may also be able, through the ordinary techniques of national procedural law interpreted in conformity with EU law, to grant anti-enforcement relief where there is a sufficient EU nexus. But that is a very different proposition from saying that national courts must guarantee, through anti-suit or anti-enforcement orders, the suspension of third-country ICSID proceedings as such. At that point, the logic of standstill risks becoming symbolic rather than effective, undermining the very effectiveness the Commission centres in its approach. That approach, in practice, seeks to preserve Union legality by controlling processes which lie, institutionally and juridically, outside the Union legal order. That, in essence, is why the anti-enforcement logic showcases the problems with *Antin*, as it reveals both the internal tension of the Commission's reasoning and the practical impossibility of fully realising it in a transnational enforcement environment.

The more disciplined position is therefore that Article 108(3) TFEU may justify restraining the Member State's own conduct, and it may justify narrowly framed interim measures designed to preserve the effectiveness of pending State aid control. What it does not justify is the reconstitution of the Member State as the holder of a broad private law entitlement to halt foreign enforcement proceedings wher-

ever they arise. The pending challenge in *Antin* is telling in that respect.<sup>167</sup> The contested novelty is not simply that the Commission opposes payment, but that the Commission seeks, through Article 3 of the decision, to project the standstill obligation outward into an anti-enforcement mandate with third-country reach. That is, however, the point at which the actual effectiveness of State aid law, and the standstill obligation, become most vulnerable.

## G. Conclusion

In conclusion, the current decisional and judicial trajectory does not establish any general proposition that investment arbitration awards, or their payment, enforcement, or execution straightforwardly constitute State aid. Even if the conclusions reached by the GC in *Micula*, still to be confirmed by the ECJ, are accepted in full, they remain inherently limited to and by the factual patterns of that specific case; patterns meaningfully divergent from *Antin*.<sup>168</sup> *Antin* was an attempt to generalise from that foundation; and an innovative one. But it is also, on examination, fragile.

The fragility begins with the difficulty in determining the measure itself, which bleeds into imputability. Imputability in the investment arbitration context is not a unitary question, but rather it varies with the specific act and element under examination. Some elements may involve sufficiently clear State conduct to be deemed imputable, but those elements related to the award and its implementation (except in the case of voluntary payment) are much harder to pin on State action. This is especially so where those elements involve adjudicative actors – tribunals or foreign courts – operating without discretion, or acting under their own legal orders entirely outside the Union’s reach. *Antin* papers over that distinction by anchoring imputability in the original voluntary act and then projecting it forward across the entire subsequent sequence. That reasoning is, however, strained. The voluntary enactment cannot indefinitely taint acts which, in themselves, contain no element of State agency beyond the Member State’s position as a respondent.

The advantage analysis compounds those difficulties rather than resolving them. Compensation for harm caused by a legally cognisable wrong does not become an economic advantage merely because the mechanism through which it is obtained is regarded as incompatible with EU law. The decisive question is whether the payment places the recipient in a better position than normal market conditions would allow. In *Antin*, that question is not adequately answered, as the elements relating to

167 GC, Case T-365/25, *Antin v Commission*, pending.

168 *Micula* concerned an intra-EU BIT and an underlying tax incentive scheme that had been formally characterised as aid, whose repeal was mandated by the Commission as a condition of Romania’s accession, and the award compensated for the withdrawal of those previously qualified incentives. *Antin*, by contrast, rests on the multilateral ECT, in force throughout Spain’s EU membership, and on a 2007 scheme never subject to a formal State aid finding until the *Antin* decision itself, and of which the characterisation is both terse and doubtful (see Section D.III). Transposing *Micula*’s reasoning directly to *Antin* therefore does considerably more work than the Commission’s decision acknowledges.

the underlying 2007 scheme are not established with the clarity required to render the compensation itself illegitimate. The Commission's broader proposition that illegality is, in effect, a sufficient proxy for advantage also fails, when read in light of *Asteris* and *DOBELES*. The overall analysis also sits in some tension with the imputability analysis, as the very incorporation into national law that is relied upon to establish State conduct simultaneously points towards a framework that operates, as regards compensation, within conditions recognisable as 'normal'.

Selectivity does not mitigate those weaknesses; it reflects them. The measure's exact contours shift depending on which condition of Article 107(1) TFEU is being addressed. The underlying ISDS scheme is invoked for imputability, creating an 'original sin', yet it is suppressed for the purposes of selectivity and advantage, where its inclusion would risk transforming the measure into a general one, or the relevant conditions into 'normal' ones. That oscillation is revealing. It suggests that the Commission separated consequences from their legal basis, and parts of a whole from the whole itself, in a manner that is formally coherent only if one does not press the analysis across all three conditions simultaneously. Selectivity in *Antin* is, therefore, a window into the decision's internal coherence (or lack thereof).

Looking at the decision overall, it seems more like a confirmation of a preconceived position, namely that there is indeed aid, rather than an open analysis; with different elements of the measure and of the notion of aid being stretched to accommodate that conclusion. The central difficulty, in other words, is not that no arbitration related act could ever result in State aid, but that the acts which most readily engage State involvement are not necessarily those that most readily confer an advantage; while the acts that most obviously crystallise pecuniary consequences, the award, judicial recognition and enforcement, and involuntary execution, are precisely those that sit least comfortably within an imputability analysis. *Antin* tries to bridge that gap by stretching measure definition, advantage, and selectivity in the same direction. That is why its reasoning has novel elements, and also why it remains fragile.

At the remedial level, the same structural tension that underpins the aid analysis surfaces in a more acute form. The standstill obligation was built to discipline the Member State; it was not designed to equip it with a transnational veto over foreign enforcement proceedings. Once the standstill logic is projected outward into anti-enforcement mandates with third-country reach, seeking to govern the independent acts of non-EU courts applying their own ICSID-implementing regimes, the logic of standstill risks becoming symbolic rather than effective, undermining the very effectiveness that the Commission champions. That, in essence, is why the anti-enforcement dimension of *Antin* showcases the decision's underlying problems: it exposes both the incoherence at the heart of the Commission's reasoning and the limits of its operational reach once the dispute moves beyond the EU's own legal order.

This overall structural weakness can be traced back to the effectively dual purpose of *Antin*; jumping off from its core nature as a State aid decision into a form of system-management of intra-EU arbitration outcomes, conducted under

the prism and through the vocabulary of State aid control. Through that lens, the oscillations identified across the determination of the measure, its characterisation as aid, and the reach of the remedial consequences cease to appear as analytical errors and begin to appear as something closer to structural choices. Nonetheless, the result is a decision that is simultaneously overreaching in its remedial ambition and unconvincing in its core legal reasoning and doctrinal foundations.

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