



## **Commission finds that arbitration award ordering Spain to pay compensation in favour of Antin is illegal and incompatible State aid**

Brussels, 24 March 2025

The European Commission has concluded that an arbitration award, in which Spain is ordered to pay compensation to Antin for the modification of a renewable electricity support measure, constitutes illegal State aid.

In the decision, the Commission instructs Spain not to pay any compensation based on the arbitration award. The decision also requires Spain to ensure that no payment, execution, or implementation of the arbitration award otherwise takes place. The decision recalls the obligation for national judges to assist Spain to ensure compliance with the Commission's decision, including by taking all measures necessary to prevent the recognition, execution, or implementation of the arbitration award in third countries.

### **The Commission's investigation**

Spain notified the arbitration award, handed down in June 2018, to the Commission for assessment under the EU State aid rules.

In July 2021, on the basis of a preliminary finding that the arbitration award constituted State aid and doubts that that aid was compatible with the functioning of the internal market, the Commission opened an [in-depth investigation](#) into the matter.

The dispute leading to the arbitration award concerned changes to the legal framework applicable to investments in the energy sector.

In 2007, Spain established a scheme to support the production of electricity from renewable sources. This scheme was not notified to the Commission for approval under EU State aid rules.

In 2013, Spain modified the terms under which renewable installations could receive support. The modifications applied also to installations that had started to receive the support under the 2007 scheme. The modified support scheme was notified to the Commission. In 2017, the Commission [approved](#) the modified support scheme under EU State aid rules.

Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. ('Antin') had invested in renewables installations in Spain, which benefitted from the 2007 scheme. Following the modifications to the legal framework, Antin initiated an arbitration procedure claiming compensation for the support it would have received on the basis of the 2007 scheme, had it not been modified.

In 2018, an arbitral tribunal found that Spain had infringed the Energy Charter Treaty ('ECT') and ordered Spain to compensate Antin for losses allegedly suffered as a consequence of the modifications of the 2007 scheme. The compensation amounts to €101 million, plus interest. It is this award that was notified to the Commission.

After its in-depth investigation, the Commission has now concluded that the arbitration award, to be paid by Spain in favour of Antin, or any other entity that that has acquired or may acquire the award or any right thereunder, is incompatible aid under EU State aid rules.

The Commission considered that the arbitration award, and in any event, its implementation, payment, or execution, constitutes State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union ('TFEU').

State aid is prohibited unless it is approved by the Commission as compatible with the functioning of the internal market. A measure that breaches other provisions of EU law cannot be declared compatible under State aid rules. Intra-EU arbitration - a dispute brought against a Member State by

an investor from another Member State before an investor-State arbitration tribunal - violates fundamental rules of EU law on the ultimate jurisdiction of the Court of Justice of the European Union (CJEU) and the general principle of autonomy of the EU legal order. The dispute leading to the arbitration award was an intra-EU dispute: the two investors bringing the dispute against Spain are registered in Luxembourg and the Netherlands, respectively.

The proceedings were brought on the basis of the investor-State dispute resolution provisions of the ECT. However, the CJEU has ruled – in its *Komstroy* judgment (C-741/19) – that those provisions do not apply intra-EU and the proceedings therefore lack a legal basis. In addition, applying the arbitration clause to an intra-EU dispute and finding that the Member State in question has breached the rules laid down in the ECT undermines the system of legal remedies foreseen in EU law for resolving such disputes. It therefore poses a threat to the autonomy of EU law and the principle of mutual trust between the Member States, in the same way as the bilateral investment treaties examined by the Court of Justice in its judgment in the *Achmea* case (C-284/16).

The Commission considered that the arbitration award, and in any event, its implementation, payment, or execution, breaches Article 19(1) TEU and Articles 267 and 344 TFEU, as well as the general principle of autonomy of the EU legal order, and cannot be found to be compatible with the functioning of the internal market.

The Commission has found that although the arbitration award itself constitutes a grant, no State aid has been effectively paid and there is no need for recovery. Spain must continue to resist attempts to enforce the award, in addition to not voluntarily paying out on the award.

## Background

In March 2018, the CJEU ruled in the *Achmea* judgment (C-284/16) that intra-EU investor-State arbitration mechanisms based on Bilateral Investment Treaties are contrary to EU law.

On 19 July 2018, the Commission issued a [Communication on the protection of investments](#). The Communication explains that the *Achmea* judgment is relevant also in relation to the investor-State arbitration clause in the ECT. As the Communication also clarifies, the ECT has only created rights and obligations between the EU and third countries and has not affected the relations between the EU Member States.

On 15 January 2019, Member States signed a [declaration](#) on the consequences of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union. 22 Member States, including the Netherlands and Luxembourg, where Antin is headquartered, indicated already at that point in time the view that the same principles as set out in the *Achmea* judgment applied to the arbitration clause contained in the ECT.

In 2021, the CJEU in the *Komstroy* judgment ruled that the ECT is an integral part of EU law and that the ECT's arbitration clause cannot apply intra-EU. The Court recalled that the ECT was an integral part of Union law and found that – since another reading would contradict fundamental principle of Union law – the arbitration clause in the ECT had to be interpreted as not applying intra-EU, i.e. in a dispute brought by against a Member State by an investor established in another Member State. Arbitral awards in intra-EU situations continue to be handed down.

On 26 June 2024, the European Union and Member States signed a [declaration on the legal consequences of the judgment of the Court of Justice in Komstroy](#) and common understanding on the non-applicability of the ECT as a basis for intra-EU arbitration proceedings. The declaration reiterates, for the benefit of courts and arbitral tribunals, the interpretation of the Court of Justice to the effect that the arbitration clause contained in the ECT does not apply to relations between an EU investor and another Member State. In other words, the standing offer to arbitrate found in Article 26 of the ECT does not extend to investors from other Member States: Spain did not offer to arbitrate with investors from Luxembourg or the Netherlands.

Reliable and transparent provisions for supporting production of electricity from renewable energies are important to ensure investor confidence and enable investments necessary for the Clean Industrial Deal and to reach the Union's decarbonisation objectives. The fact that EU law precludes intra-EU investment arbitration under bilateral investment treaties or the ECT does not mean that investors do not enjoy investment protection in the EU. Actions by individual investors seeking the annulment of national measures or claiming financial compensation are in the competence of national courts. Investors from the EU enjoy the protection granted by EU law.

If an investor considers its investment is wrongly jeopardised by a Commission State aid decision, it may challenge the decision directly before the General Court. Finally, the Renewable Energy Directive (2018/2001) provides for an obligation of Member States to ensure that the support granted to renewable energy projects is not revised in a way that negatively affects the rights conferred to companies and undermines the economic viability of projects that already benefit from support. No such provision existed in 2013.

### **For more information**

The non-confidential version of the decision will be made available under the case number SA.54155 in the [State aid register](#) on the Commission's [competition](#) website once any confidentiality issues have been resolved. New publications of State aid decisions on the internet and in the Official Journal are listed in the [Competition Weekly e-News](#).

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