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A New Chapter in the EU's Battle Against Intra-EU Arbitration: The Antin v. Spain Decision

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In a recent decision, the European Commission ("EC") concluded that any payment by Spain on the basis of the arbitration award rendered in 2018 and established under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID") in the case of *Antin v. Spain* (the "Award"), would constitute illegal state aid under EU law (the "Decision"). Although the Decision aligns with the EC's position in previous rulings over the years, the EC takes a decisive step in the long-standing debate on intra-EU investor-state arbitration. Not only did the EC declare that the payment of an arbitral award itself constitutes illegal state aid, but it also emphasised that all legal means should be taken to prevent the payment from being executed (Decision, paras. 284-286). This makes it even more challenging to enforce awards rendered in intra-EU arbitrations. Consequently, the Decision further complicates the quest for justice for intra-EU investors.

This Decision was not taken in isolation. Rather, it builds on a series of prior rulings, set against the backdrop of a long-standing movement against intra-EU arbitration that has evolved over the years. This blog post will first discuss historical context and the European Union's ("EU") stance on intra-EU investor-state arbitration, followed by an in-depth analysis of the Decision and the implications it holds for the future of intra-EU investor-state arbitration.

Background

The Decision is part of a broader policy movement within the EU against intra-EU investor-state dispute settlement. Already in the early 2000s, the EC had raised concerns that intra-EU BITs fragmented the market and created uneven conditions for investors. In the arbitration proceeding in *Eureko v. Czech Republic* (para. 177), the EC filed an *amicus curiae* brief where it observed that intra-EU BITs amount to an "anomaly within the EU internal market".

Since the 2009 Lisbon Treaty, which granted the EU exclusive competence over foreign direct investment, the EC intensified efforts to terminate these BITs, including launching infringement proceedings and using state aid law to prevent the enforcement of arbitral awards (discussed here).

The EC further explored state aid law as a tool to prevent the enforcement of arbitral awards, resulting in the EC decision in *Micula* in 2015.

In 2018, the judgment in *Achmea* by the Court of Justice of the European Union ("CJEU") followed, where the CJEU ruled that arbitration clauses in BITs between EU Member States are incompatible with EU law, since such clauses have an adverse effect on the autonomy of EU law. The CJEU concluded that investor-state arbitration clauses in intra-EU BITs violate Articles 267 and 344 of the Treaty on the Functioning of the European Union ("TFEU") by removing EU law disputes from the EU judicial system. The CJEU later extended this reasoning in *Komstroy* to intra-EU arbitrations under the Energy Charter Treaty ("ECT"). In May 2020, 23 Member States signed an agreement to terminate intra-EU BITs, citing *Achmea* as the legal basis.

The Decision

On 17 April 2019, Spain notified the EC pursuant to Article 108(3) of the TFEU of the Award. The Award required Spain to compensate Antin for alterations to a renewable electricity support measure, which were found to violate the ECT. The EC considered that the award is null as the proceedings that resulted in the award lacked a legal basis, given that the ECT does not apply to intra-EU investor-state arbitrations. The EC concluded that, even disregarding this fact, the Award cannot have any effect and cannot be enforced due to being incompatible with EU law (Decision, para. 263).

The EC reinforced the position that intra-EU investor-State arbitration mechanisms arising from BITs and ECT are incompatible with EU law, as established earlier by the CJEU in cases such as *Achmea*, *Komstroy*, and by the EC in the *Romatsa* order (see posts on *Achmea* here, *Komstroy* here).

While these cases primarily addressed the legal invalidity of intra-EU arbitral proceedings due to the principle of autonomy of EU law, the Decision went a step further by examining the economic consequences of the resulting awards and their compatibility with the internal market. The Decision categorised the outcome of intra-EU investor-state arbitrations – the Award – as illegal state aid under Article 107(1) of the TFEU (Decision, para. 236).

Drawing insights from the *Micula* case, where the CJEU for the first time upheld the qualification of an intra-EU arbitral award as state aid (see post on *Micula* here), the EC emphasised that the State is inherently 'involved' if it pays the compensation stipulated in an arbitral award (Decision, para. 191). A decisive factor was that any implementation of the Award would directly involve an autonomous decision by the Spanish authorities and that Antin had no pre-existing right to payment; any payment would solely arise from the Award itself, amounting to new aid (Decision, para. 238-239). Hence, the Award and its implementation are considered to fulfil the conditions for classification as state aid within the meaning of Article 107(1) of the TFEU. The EC noted that such a measure is prohibited unless it can be deemed compatible with the internal market pursuant to Article 107(2) or Article 107(3) of the TFEU (Decision, para. 249-250).

Referring to settled case law of the CJEU, the EC highlighted that state aid that violates EU law cannot be declared compatible with the internal market (Decision, para. 254). The EC underscored that international agreements cannot modify the allocation of powers established by the treaties or undermine the autonomy of Union law (Decision, para. 255). The EC further considered that specific characteristics of the EU legal system ensure the consistency and uniformity of Union law, which could be compromised if Member States agree to remove disputes related to EU law from

their own courts' jurisdiction (Decision, para. 256).

Drawing on the *Achmea* and *Komstroy* judgments, the EC stated that Article 19 of the TEU and Articles 267 and 344 of the TFEU, as well as the overarching principle of the autonomy of the EU legal order, prohibit any provision in an international agreement that permits an investor from one Member State to initiate proceedings against another Member State party before an arbitral tribunal, whose jurisdiction that Member State has agreed to accept (Decision, para. 257). The EC subsequently concluded that the payment of the Award cannot be deemed compatible with the internal market as it violates EU law, specifically the said articles of the TEU and TFEU alongside the general principle of the autonomy of the EU legal order (Decision, para. 253 and 264).

The EC reiterated that the Award constitutes a selective advantage that distorts competition and affects trade between Member States (Decision, para. 232 and 235). By linking the lack of valid arbitration to the resulting selective financial benefit to Antin, the EC brought compensation awarded in an intra-EU investor-state arbitration within the scope of Article 107(1) TFEU.

Comment

The Decision builds on an array of landmark cases by the CJEU and the EC's earlier decision in *Micula*. It represents a further step by EU institutions, further complicating the enforcement of awards rendered in intra-EU investor-state arbitrations.

In *Micula*, the EC ordered Romania to recover the payment of the award that had already been paid. In the Decision, the EC takes it a step further by ordering Spain to prevent implementation of the award by taking "all appropriate measures to prevent Antin (..) from seeking recognition, enforcement and execution of the award" (Decision, para. 284-285). The Decision, along with the *Micula* Decision, could have significant implications for awards in intra-EU investor-state arbitrations, as complying with such an award may now require the EC's prior approval, which is likely to be withheld given the EC's stance (also see).

Since *Achmea*, it has been evident that awards in intra-EU investor-state arbitrations could almost only be enforced if the seat of arbitration is outside the EU. In these cases, national courts can disregard *Achmea* and *Komstroy* and reject challenges to an intra-EU arbitral award, as the Swiss Supreme Court did in upholding *EDF v. Spain* award (discussed here).

However, the Decision could lead to situations where investors seeking to enforce an award outside the EU, despite non-EU national court judgements ordering enforcement of the award, will still be barred from enforcement. Member States might now nonetheless refrain from paying the award, as doing otherwise would amount to unlawful state aid. In this way, the Decision further enables the EU to extend the implications of *Achmea* and *Komstroy* beyond EU borders.

This creates tension between the obligation of the respondent States to comply with enforcement decisions of non-EU national courts of the parties to the New York Convention on the one hand, and the obligation to comply with EU law on the other hand. It remains to be seen how the EU Member States will reconcile these conflicting obligations.

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