SHEARMAN & STERLING

AUGUST 05, 2021

EUROPEAN COMMISSION CONTINUES TO UNDERMINE INVESTMENT PROTECTION IN EUROPE

Challenge to *Antin v. Spain* Arbitral Award

Key Takeaways

International investment protection is based on treaty obligations between sovereign states. State parties to those treaties enter into international obligations with one another for the protection of foreign investors and their investments—including the obligation to submit to binding investor-state dispute resolution mechanisms via arbitration. Under such treaties, the domestic legal arrangements of contracting states cannot typically undermine their international law obligations. Indeed, that is a central advantage of foreign investment protection via international treaties.

However, the European Commission and Court of Justice of the European Union (CJEU) consider EU law as “supreme”—not merely part of the domestic legal arrangements of contracting states. As such, both the Commission and CJEU have found it difficult to accept international law obligations of Member States insofar as these conflict with EU rules—and as a result have sought to limit or in effect undermine such international law obligations.

The latest manifestation of this trend is the Commission’s recent decision to open proceedings against Spain with respect to the arbitral award in *Antin v. Spain*, the payment of which the Commission says constitutes illegal State aid. The key takeaways are:

- The EU institutions will oppose arbitral awards that do not accord “supremacy” to EU law—even if doing so will undermine the international legal obligations of the contracting Member State.
- Investors should take great care before relying on investment protection treaties signed between EU Member States (intra-EU BITs).
- Investors can mitigate these risks by structuring investments in the EU via non-EU Member States, in order to secure the benefit of bilateral investment treaties signed between EU Member States and non-EU Member States (“extra-EU BITs”), although such an approach is still not risk-free.
- Investors with existing or planned investments in the EU should consider whether the Member State that hosts the investment has assets in non-EU Member States whose courts reliably enforce arbitral awards. The U.K., Switzerland and United States are obvious jurisdictions to consider.

Background to the Commission's Investigation into the *Antin v. Spain* Award

On July 19, 2021, the European Commission issued a press release announcing that it has launched an "in-depth investigation" to assess whether payment by Spain of the ICSID arbitral award in favor of Luxembourg and Dutch investors in *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain* ("*Antin v. Spain*") complies with EU rules on State aid.

The Commission's preliminary view is that Spain's payment of the *Antin v. Spain* award in favor of the investors in that case constitutes State aid. In plain English, this means that while Spain has an *unambiguous and final* legal obligation under international law to pay the arbitral award, the Commission is considering preventing Spain from complying with its obligation unless it first seeks the Commission's permission to do so—which as explained below—is likely not to be forthcoming.

The Energy Charter Treaty (ECT), the investment treaty pursuant to which the *Antin v. Spain* award was rendered, does not grant the Commission such power to prevent payment. The Commission has assumed such power for itself in reliance on the CJEU's judgment in *Slovak Republic v. Achmea* (C-284/16) ("*Achmea*"). In *Achmea*, the CJEU held that the Treaty on the Functioning of the European Union (TFEU) precludes provisions in bilateral investment treaties between EU Member States providing for arbitration between investors of one Member State and another Member State. The Commission's Press Release also restates the Commission's view that the *Achmea* judgment precludes the intra-EU application of the investor state arbitration provisions in the ECT, which is currently subject to modernization negotiations between its signatories.

The *Antin v. Spain* Dispute

In 2011, the Luxembourg and Dutch companies Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. (together, "Antin") acquired shareholding in two operational concentrated solar power plants in southern Spain. Antin made its investments pursuant to a 2007 framework in Spain offering regulated tariffs and special premiums for electricity produced through renewable energy. Beginning in 2013, Spain reformed this framework and significantly reduced the subsidies available to renewable energy generators. These changes prompted a wave of investment treaty claims against Spain by Antin and other investors.

In an award dated June 15, 2018, the arbitral tribunal held that Spain's reforms breached the fair and equitable treatment provision at Article 10(1) of the ECT and ordered Spain to pay Antin €112 million plus interest and costs, later reduced to €101 million plus interest and costs.

Antin subsequently commenced proceedings to enforce the award against Spain in the United States, Australia and the European Union. In parallel, Spain filed for annulment of the award under the applicable procedures of the ICSID Convention. On June 15, 2021, an ICSID ad hoc annulment committee hearing Spain's application declared its proceedings closed. On July 30, 2020, the ad hoc committee upheld the award. It notably dismissed Spain's objections that the tribunal had manifestly exceeded its powers in assuming jurisdiction over the intra-EU dispute, and that it had seriously departed from a fundamental rule of procedure by refusing to admit evidence that would have resulted in a proper interpretation of EU law, namely the Commission's 2017 Decision concerning the award or the CJEU's ruling in Achmea.

The Commission's Views on the *Antin v. Spain* Award

In its July 19 Press Release, the Commission expressed the preliminary view that payment by Spain of the *Antin v. Spain* award would constitute State aid, as it would grant Antin an advantage equivalent to those provided by the 2007 regulatory framework in Spain for renewable energy generators. The Commission noted that Spain had never sought approval of the 2007 framework under EU State aid rules.

The Commission's Press Release raises three particular doubts concerning the *Antin v. Spain* award:

- *First*, referring to the *Achmea* judgment, it states that compliance with the award "poses a threat to principles of mutual trust between the Member States" and to the "autonomy" of EU law—despite the fact that Spain entered into the ECT as a sovereign state.
- *Second*, it questions whether the award could lead to discrimination among investors based on nationality and their ability to access international arbitration. The Press Release notes that "Spanish investors are precluded from bringing an action before an arbitration tribunal for the modifications" to the 2007 regulatory framework, although that is true for any contracting party to the ECT.
- *Third*, it questions the award's compliance with the Commission's State aid guidelines on environmental protection and energy, despite the fact that such guidelines are not referred to in the ECT and are irrelevant to a determination under it. The Press Release notes that the renewables installations in which Antin invested "already benefit" from the 2013 Spanish regulatory framework, which the Commission had approved under State aid rules. It further states that the Commission will investigate "whether the additional support granted by the ... award is necessary for the development of an economic activity, has an incentive effect and is proportionate."

The Press Release states that the Commission will proceed with an in-depth investigation. Although the outcome is effectively a foregone conclusion—for the reasons explained below—such investigation could still take up to 18 months before a decision is given.

Consequences of the Commission's Investigation

In our view, the Commission is highly likely to find that compliance with the award constitutes prohibited State aid under EU law.

- The Press Release notes that the renewables installations in which Antin invested "already benefit" from the 2013 Spanish regulatory framework, which the Commission had approved under State aid rules.
- Having approved that the level of support, it is difficult to see how a higher level of support for the same investments generates so-called "incentive effect"—*i.e.* that the increased level of support was necessary to provoke investment.
- Indeed, the Press Release states that the Commission will investigate "whether the additional support granted by the ... award is necessary for the development of an economic activity, has an incentive effect and is proportionate."

Such a finding would further frustrate efforts by Antin, and creditors of other intra-EU arbitral awards, to enforce their awards against EU Member States. National courts of the Member States have a duty of sincere cooperation under

Article 4(3) Treaty on European Union to facilitate the achievement of the EU's tasks and to refrain from any measure which could jeopardize the attainment of the EU's objectives. As such, national courts are reluctant to take action that would risk inconsistency with decisions of the Commission or the EU Courts. Where the Commission has expressed the (albeit preliminary) view that the *Antin v. Spain* award constitutes State aid and has opened a formal investigation, this is likely to create a significant obstacle to enforcing the award in the EU. The Commission has already intervened in enforcement proceedings both within and outside the EU to prevent enforcement of the *Antin v. Spain* award, and other intra-EU awards, on the ground that it would infringe EU State aid rules.

Therefore, although Article 54(4) of the ICSID Convention places an obligation on its contracting States (including those EU Member States who are party to the ICSID Convention) to recognize and enforce an arbitral award rendered pursuant to the ICSID Convention as if it were a judgment of its own court, an EU court could hold that its EU law obligation to stay enforcement of such award has an overriding effect on its ICSID Convention obligation.

The Commission's behavior with respect to the *Antin v. Spain* award, and related developments in EU courts, has not yet affected enforcement of intra-EU awards outside the EU. For instance, in a February 19, 2020 decision, the U.K. Supreme Court held that the award creditors in *Ioan Micula, Viorel Micula and others v. Romania (1)* ("*Micula v. Romania*"), rendered pursuant to the Romania-Sweden BIT, could enforce their ICSID arbitration award in the U.K. The Supreme Court held that Romania's request to stay the enforcement of the award was incompatible with the obligation of U.K. courts under the ICSID Convention, as the U.K. was bound by the ICSID Convention prior to its accession to the EU, so EU law could not override that obligation.

The Wider Context of the Commission's Investigation

The Commission's State aid investigation into the *Antin v. Spain* award is not the first investigation of this kind. It also forms part of a wider effort by the Commission and certain EU Member States to preclude investor state arbitration under intra-EU BITs, as well as intra-EU arbitration under the ECT. Notably:

- On March 30, 2015, the Commission issued a Decision enjoining Romania from complying with the *Micula* award. After the CJEU annulled this Decision, the Commission brought an appeal before the CJEU's Court of Justice (ECJ). This appeal is pending adjudication by the ECJ.

- On May 5, 2020, 23 EU Member States signed an Agreement terminating their intra-EU BITs (the "Termination Treaty"), including the sunset clauses in those treaties that would protect investments made prior to the termination of the treaties for a certain period. The Termination Treaty does not cover intra-EU arbitrations based on the ECT, which are to be addressed at a later stage. Four EU Member States did not sign the Termination Treaty: Austria, Finland, Ireland and Sweden. The U.K. also did not sign the Termination Treaty, such that its existing BITs with EU Member States will remain in force.

- On December 3, 2020, Belgium announced that it submitted a request to the CJEU for an opinion on the compatibility of the EU Treaties with the intra-EU application of the arbitration provisions of the future modernized ECT.

Notwithstanding the significance of recent developments, it is noteworthy that, following the *Achmea* judgment, all arbitral tribunals constituted under intra-EU BITs have to date continued to rule in favor of their own jurisdiction. It is encouraging that the arbitral tribunals are so far rightly ignoring the pressure from the European Commission and CJEU to relinquish jurisdiction or read domestic/EU law obligations into contracting states' obligations under international investment treaties.

Next Steps for EU-Based Investors

The Commission's investigation into the *Antin v. Spain* award confirms that EU-based investors will continue to face legal hurdles when bringing claims and enforcing awards against EU Member States under intra-EU BITs and the ECT.

In light of these uncertainties, EU-based investors who plan to, or have already, invested in other EU Member States should review their investment protection coverage. In order to maximize their investment protections, and their ability to enforce any eventual arbitral award rendered against an EU Member State, such investors should consider interposing one or more subsidiaries based outside the EU in their investment structure. This could grant access to the protections of one or more extra-EU BITs signed between the subsidiary's State of incorporation and the EU Member State. The jurisdiction of arbitral tribunals under extra-EU BITs, and the enforcement of awards rendered under them, are not expressly affected by the *Achmea* judgment, although such a strategy is still not risk-free, as neither the Commission nor the EU Courts have directly addressed the issue of compatibility with EU law in this scenario.

Ideally, such review is done at the time of investment planning, at which time an investor can consider the potential tax, foreign investment protection, and other consequences of various proposed structures. However, notwithstanding that no strategy is risk-free, EU investors who have already invested in EU Member States may still be able to mitigate risk by restructuring their investments to seek to rely on the protections of one or more extra-EU BITs, provided that the facts or circumstances giving rise to a dispute have not arisen or become foreseeable.

Where possible, EU-based investors should also seek to enter into contractual arrangements with EU Member States that include agreements to arbitrate disputes outside of the EU. This will provide investors with protection under international law and access to arbitration that is currently unaffected by domestic developments within the EU.