December 2021

The Future of Arbitration under the Energy Charter Treaty

A legal briefing on the implications of the *Komstroy* decision for pending and future intra-EU investment disputes

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Contents

Introduction

The protection that bilateral and multilateral investment treaties afford to the fossil fuel industry presents a significant roadblock to climate mitigation action. Under these investment law frameworks, foreign investors benefit from a broad range of protections against the impacts of changes to a host State's regulatory regime. States are starting to take essential measures to reduce greenhouse gas emissions. As an example, they are phasing out coal and halting new licensing rounds for oil and gas leases. In turn foreign investors in the fossil fuel industry may seek compensation for lost returns on their investments through investor-State dispute settlement ('ISDS') under bilateral and multilateral treaties. The Energy Charter Treaty ('ECT') has proven to be the most used treaty in such investor-State arbitration, with 135 cases lodged to date.[1] Some of those costly proceedings have led to record-breaking damage awards. The mere threat of investor-State arbitration under the ECT, as well as the costs and outcomes of claims that are filed, could present a significant obstacle to more ambitious climate action.

As an example, the Dutch parliament adopted legislation in 2019 introducing a phased ban on the use of coal to generate electricity,[2] in order to reduce greenhouse gas emissions by 49% from 1990s levels before 2030 and meet targets under the Paris Agreement on climate change[3]. German energy companies Uniper and RWE initiated arbitration proceedings against the Netherlands[4] alleging that the government's plan to phase out coal by 2030 violated the ECT as they would have been *de facto* expropriated without adequate compensation.[5]

A recent landmark decision of the Grand Chamber of the Court of Justice of the European Union ('CJEU' or the 'Court') in Case C-741/19 *Republic of Moldova v. Komstroy*, however, effectively bars such arbitration proceedings between European investors and EU Member States.[6] The decision deals a blow to Uniper's and RWE's prospects of success, as well as that of the other 40+ pending intra-EU ECT based investment arbitration cases.[7] It also reinforces the strong message that within the EU -- the Union of countries where approximately 60% of all ISDS disputes under the ECT have arisen[8], and where 81% of the investments protected by the ECT are located[9]-- there is no space for ISDS.

This legal briefing explains how the *Komstroy* ruling, alongside other recent CJEU decisions, put another stick in the wheels of pending intra-EU ISDS claims. While the *Komstroy* decision may not, on its own, stop pending proceedings or prevent future investor-State disputes from arising in the EU, it does increase

[1] According to the Investment Dispute Settlement Navigator, UNCTAD, on 17 November 2021, accessible at https://investmentpolicy.unctad.org/investment-dispute-settlement/advanced-search.
[2] Wet van 11 december 2019, houdende Regels voor het produceren van elektriciteit met behulp van kolen ('Act prohibiting coal in electricity production'), accessible at https://www.eerstekamer.nl/9370000/1/j9vvkfvj6b325az/vl4kf9h8kewd/f=y.pdf.
[3] Wet van 2 juli 2019, houdende een kader voor het ontwikkelen van beleid gericht op onomkeerbaar en stapsgewijs terugdringen van de Nederlandse emissies van broeikasgassen teneinde wereldwijde opwarming van de aarde en de verandering van het klimaat te beperken ('Dutch Climate Act'), accessible at https://wetten.overheid.nl/BWBR0042394/2020-01-01.
[4] See *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22; *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4.
[5] As demonstrated in a legal opinion by ClientEarth, this type of claim is ill-founded and Uniper and RWE should not be entitled to compensation under the ECT. See ClientEart, Legal opinion on Uniper's legally misconceived ISDS threat to Dutch coal phase-out, 21 November 2019, accessible at https://www.documents.clientearth.org/wp-content/uploads/library/2019-11-26-clientearth-legal-opinion-isds-threat-uniper-ce-en.pdf
[6] CJEU, Judgment of the Court (Grand Chamber), Case C-741/19, *Republic of Moldova v. Komstroy*, 2 September 2021, accessible at https://curia.europa.eu/juris/document/document.jsf?text=&docid=245528&pageIndex=0&doclang=FR&mode=req&dir=&occ=first&part=1&cid=3161919.
[7] See UNCTAD Investment Dispute Settlement Navigator, UNCTAD Investment Policy Hub, accessible at https://investmentpolicy.unctad.org/investment-dispute-settlement.
[8] *Ibid*.
[9] See Y. Saheb, The Energy Charter Treaty (ECT), Assessing its geopolitical, climate and financial impacts, OPENEX, September 2019, accessible at https://www.openexp.eu/sites/default/files/publication/files/ect_rapport-numerique_0.pdf#:~:text=Furthermore%2C%2070%25%20of%20the%20known%20ISDS%20disputes%20under,by%20the%20ECT%20are%20investments%20in%20fossil%20fuels.

the barriers to recognition and enforcement of awards issued in intra-EU arbitration. More specifically, the briefing examines how these awards may be challenged following *Komstroy*, the potential obstacles to their enforcement in the EU, including the obligation of national courts to abide by EU law as set forth by the CJEU, and the possibility that EU state aid rules prevent payment of awards. It considers how investment arbitrators, ad hoc panels in charge of annulment proceedings before ICSID, or domestic courts in set aside or enforcement proceedings may react to recent EU case law. It also discusses what the *Komstroy* ruling leaves open - namely, the risk that intra-EU ECT awards could be enforced outside the EU - as well as the possibility that investor-State disputes continue to arise under the ECT regardless of recent CJEU jurisprudence.

Key findings

(1) **After *Komstroy*, intra-EU investment arbitration awards, including those rendered under the Energy Charter Treaty, will face systematic challenges to their validity and enforcement—both within and outside the EU.**

- According to the recent landmark *Komstroy* ruling, intra-EU ISDS breaches EU law and *obliges* EU Member States to challenge the validity of intra-EU arbitration awards systematically. Furthermore, it *requires* EU national courts to set aside (and/or not enforce) such awards, including intra-EU ECT awards.
- As EU Member States increasingly resist compliance with arbitral awards, investors will be compelled to pursue enforcement proceedings outside the EU.
- While enforcement of awards outside of the EU may be more successful, the issue has become political, as evinced by the active engagement of the European Commission as *amicus curiae* opposing enforcement of intra-EU awards by non-EU courts.

(2) **EU State aid rules may prevent the payment of investment arbitration awards issued against EU Member States.**

- Member States may not grant an economic advantage to selected enterprises that distorts competition and trade in the internal market without authorization by the European Commission.
- Since the *Micula* case, the Commission considers that investment arbitration awards may constitute State aid, subject to prior review and approval by the Commission.
- After *Komstroy*, it is unlikely that the Commission would find intra-EU investment arbitration awards compatible with the internal market, because they are based on arbitration clauses that breach EU law.

(3) **Investors should reconsider pursuing arbitration against EU Member States given the expense and mounting obstacles to jurisdiction and enforcement.**

- It remains unclear how investment arbitration institutions or bodies in charge of annulment or set-aside proceedings of awards will react, since they have largely ignored the previous CJEU's *Achmea* ruling to date.
- Regulators, arbitrators, and national courts must be alert to attempts by investors to restructure their businesses or holdings outside of the EU in order to circumvent the *Achmea*, *Komstroy* and *PL Holdings* rulings and benefit from extra-EU bilateral investment treaties.

Section A - What is the *Komstroy* decision about?

The *Komstroy* decision follows a 2018 decision, the *Achmea* ruling,[10] in which the CJEU decided that ISDS provisions in bilateral investment treaties between EU countries ('intra-EU BITs') are incompatible with EU law because they sideline and undermine the power of EU courts.[11] At the time of *Achema*, the CJEU had not yet explicitly taken a position on multilateral treaties such as the ECT.

In its *Komstroy* judgement, the CJEU went one step further and clarified that the reasoning applied in *Achmea* extends to all intra-EU disputes under the ECT - despite the multilateral character of the ECT and the fact that it also governs relationships with non-EU countries. The Court concluded in very clear terms that the ISDS provision of the ECT "*must be interpreted as not applicable to disputes between a Member State and an investor from another Member State concerning an investment made by the latter in the first Member State*".[12] According to the CJEU, this is because the autonomy of the EU legal order and the specific character of EU law call for a consistent interpretation of EU law. The latter cannot be ensured by ISDS mechanisms involving private arbitrators rather than national courts, since arbitrators are not bound to apply EU law.

The *Komstroy* decision has provoked push-backs from some in the arbitration community. For example, the CJEU has been criticised for having "artificially constructed" an opportunity to express its views on the intra-EU applicability of the ECT ISDS provision in a case that did not actually concern an intra-EU dispute.[13] The Court's legal reasoning has also been called into question for not taking into consideration international law, namely the Vienna Convention on the Law of Treaties and its rules on treaty interpretation. The merits of those critiques are highly debatable and actively contested.[14] The focus of this briefing, however, is on the ruling's implications for future cases, not on the background or basis for the ruling itself.

The decision shows the eagerness of the Court to address the incompatibility of the ECT's intra-EU dimension and to foreclose a number of ongoing claims. It also provides a clear indication of what the Court should decide in Opinion 1/20, in which Belgium is seeking legal clarification on the compatibility with EU law of the intra-EU application of the ISDS provision in Article 26 the ECT. [15] It is expected to be decided in the course of 2022.

[10] CJEU, Judgment of the Court (Grand Chamber), Case C-284/16, *Slovak Republic v. Achmea*, 6 March 2018, accessible at https://curia.europa.eu/juris/document/document.jsf?docid=199968&doclang=EN.
[11] L. Ankersmit (ClientEarth), L. Hughes (CIEL), Implications of Achmea: How the Achmea Judgment Impacts Investment Agreements with Non-EU Countries, April 2018, accessible at https://www.documents.clientearth.org/wp-content/uploads/library/2018-04-19-implications-of-achmea-judgment-coll-en.pdf.
[12] CJEU, Case C-741/19, *op. cit*, para. 66.
[13] The Court clarified the issue as an obiter - i.e. these considerations as such are not necessary to directly answer the questions referred and interpret the ECT provisions. Indeed, the questions referred to by the French Court of Appeal concerned the interpretation of certain ECT provisions in an arbitration dispute between two non-EU members (Ukrainian investor Komstroy v. Moldova) and did not directly concern the question of compatibility between intra-EU investor-State dispute settlement and EU law.
[14] See for example L. Ankersmit, and C. Eckes, Komstroy: the beginning of the end for the Energy Charter Treaty, 4 October 2021, accessible at https://europeanlawblog.eu/2021/10/04/komstroy-the-beginning-of-the-end-for-the-energy-charter-treaty/.
[15] Belgium requests an opinion on the intra-European application of the arbitration provisions of the future modernised Energy Charter Treaty, Kingdom of Belgium, Foreign Affairs, 3 December 2020, accessible at https://diplomatie.belgium.be/en/newsroom/news/2020/belgium_requests_opinion_intra_european_application_arbitration_provisions. .

Section B - What are the practical consequences of recent EU case law for investors bringing disputes under the ECT?

The Court was very clear in *Komstroy* that Article 26 of the ECT does not apply to intra-EU disputes. It cannot serve as a legal basis for intra-EU arbitration proceedings and no new proceedings should be initiated. Instead, EU investors have to rely on domestic legal frameworks and claim their rights before national courts.[16]

Following *Komstroy*, the French Treasury Department drew the attention of French investors operating in the EU to the impact that this judgement may have, and urged them not to initiate arbitrations against EU Member States under the arbitration clause contained in the ECT.[17]

Arbitral tribunals hearing claims under the ECT derive their competence from Article 26. Yet, according to the *Komstroy* decision, tribunals appointed to hear ECT based claims in intra-EU disputes lack jurisdiction.

Despite the very clear terms of the Court in *Komstroy*, it remains uncertain whether arbitral tribunals will comply with this case law and refuse to exercise jurisdiction over intra-EU ECT claims. Indeed, despite efforts from respondent Member States and the European Commission to contest tribunals' competence, the *Achmea* ruling did not deter arbitral tribunals from continuing to hear intra-EU investment disputes. Arbitrators could follow the same path with respect to the *Komstroy* ruling even if that would be contrary to EU law.

But this is not without risks. Arbitral tribunals will face jurisdictional obstacles. This was confirmed on 26 October 2021 by the Grand Chamber of the CJEU in the *PL Holdings* judgement.[18] In this case, the Court ruled, among other things, that based on EU law (and as reflected by Article 7 of the EU Termination Agreement signed by twenty-three EU Member States following the *Achmea* ruling),[19] Member States are *obliged* to challenge the validity of arbitration agreements in intra-EU investment disputes, the jurisdiction of the tribunals, as well as the enforcement of any award that would have been adopted nonetheless.

As a result, claimants will experience longer, more expensive and more risky procedures. Indeed, such prospects recently led a Lithuanian investor to drop its claim against Denmark in a case based on an intra-EU BIT, because the *Achmea* judgment and the agreement by EU Member States to terminate their intra-EU BITs have "severely impeded" the arbitration and prospects for enforcement.[20] In this context, the investor's decision to withdraw its claim exemplifies the increasing assumption that intra-EU ISDS has become "practically inoperable".[21]

As discussed below, EU investors are likely to see their awards challenged (section 1), and face additional uncertainty with respect to the enforcement of their awards (section 2). This is the direct consequence of not only the *Komstroy* and *PL Holdings* judgements, but also of the likely application of EU State aid law to the payment of awards by Member States (section 3).

[16] Communication of the Commission and the Council, Protection of intra-EU investment , 19 July 2018, accessible at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018DC0547&from=en.
[17] Règlement des litiges investisseur-Etat « intra-européens » dans le cadre du Traité sur la Charte de l'Energie (informations à destination des entreprises), Direction générale du Trésor, 3 September 2021, accessible at https://www.tresor.economie.gouv.fr/Articles/2021/09/03/reglement-des-litiges-investisseur-etat-intra-europeens-dans-le-cadre-du-traite-sur-la-charte-de-l-energie-informations-a-destination-des-entreprises.
[18] CJEU, Judgment of the Court (Grand chamber), Case C-109/20, *Republic of Poland v. PL Holdings Sarl, 26 October 2021*, accessible at https://curia.europa.eu/juris/document/document.jsf;jsessionid=F902589413159979CB09FD40DEB98EE6?text=&docid=248141&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=26898314. See in particular para. 52-53.
[19] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, 29 May 2020, accessible at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01).
[20] Investor drops intra-EU claim against Denmark, Global Arbitration Review (GAR), on 21 October 2021.
[21] *Ibid*.

1. Could an investment arbitration award be annulled under ICSID or set aside by national courts?

Given the Court's ruling in *PL Holdings* that EU Member States are not just permitted but *obliged* to challenge intra-EU arbitral awards, an increasing number of similar challenges can be expected.

Depending on the applicable arbitration rules and the institution overseeing the proceedings, there are two possible outcomes. Either awards can be "annulled" by a designated arbitration body charged with reviewing challenges to the validity of awards, or they can be "set aside" by national courts in the seat (or locus) of arbitration. Annulment proceedings are available in arbitrations administered by the International Centre for the Settlement of Investment Disputes ('ICSID') based in Washington, DC. As of today, approximately ⅔ of all intra-EU ECT based ISDS cases are administered by ICSID. Because 'ICSID awards' fall within the scope of the self-contained regime created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 ('ICSID Convention'), ICSID awards are subject to a specific annulment procedure and cannot be judicially reviewed by domestic courts (see *infra*, section a).

Other arbitration proceedings that take place outside of the ICSID system are subject to different procedures. They may be administered by institutions such as the Stockholm Chamber of Commerce ('SCC'), the Permanent Court for Arbitration ('PCA') and the International Chamber of Commerce ('ICC'), or by *ad hoc* arbitral panels , which are often governed by the UNCITRAL Arbitration Rules. These 'non-ICSID awards' are subject to judicial review by the courts of the country where the arbitration takes place (*see infra*, section b).

An investment arbitration will be administered by an arbitral institution or will be *ad hoc* depending on (1) the terms of the arbitration agreement upon which the dispute is brought and (2) the choice of the parties, if the arbitration agreement provides the possibility for the parties to choose between different arbitral institutions or even an ad hoc proceeding.

a) Annulment of awards under the ICSID regime

The ability to seek annulment of arbitral awards rendered under the protection of the ICSID Convention is one of the key features of the ICSID regime. Either party to a dispute may seek the annulment of an ICSID award by filing an application with the ICSID Secretary General within 120 days of the date the relevant award was rendered. Once an application for annulment has been successfully registered, a three-member ad hoc committee is established.[22] Its decision is final and binding, and it is not subject to an appeal or further annulment proceedings.

The grounds for annulment listed in Article 52(1) of the ICSID Convention include, among others, that "the Tribunal has manifestly exceeded its powers".[23] To satisfy this ground, the challenging party must demonstrate : (i) lack of jurisdiction, (ii) failure to exercise jurisdiction when jurisdiction exists; and/or (iii) failure to apply the law applicable to the dispute.[24]

The use of this ground for annulment has increased significantly during the past few years, including in intra-EU objections to awards following *Achmea*. Over the past two years, it has been invoked in no less

[22] Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, Article 52(4).
[23] ICSID Convention, Article 52(1, b).
[24] See C. P. Moore, L. Achtouk-Spivak, Z. Bouraoui, ICSID Awards, in GAR Guide to challenging and enforcing arbitration awards, 2nd edition, p. 157.

than eight applications for annulment,[25] raising the number of annulment decisions addressing this ground to eighteen.

We are not aware of any award annulled on the ground of Article 52(1)(b) of the Convention for an invalid constitution of the tribunal in light of EU case law. However, **annulment applications are piling up at ICSID since the *Achmea* decision. And the European Commission has recently adopted an active and ambitious role as *amicus curiae* petitioner seeking annulment of intra-EU arbitration awards and uniform application of EU law.[26]**

It remains to be seen how ICSID ad hoc annulment committees will look at jurisdictional objections in the future. Recently, the committee in *Antin v Spain*[27] suggested continued reluctance to disclaim jurisdiction based on the *Achmea* decision. Given that *Komstroy* goes one step further than *Achmea*, future committees may be forced to reconsider this stance.

b) Set-aside of awards by domestic courts

When an award is rendered by a non-ICSID tribunal (i.e. a territorialized tribunal), the losing party can try to annul the award by seeking to have it set aside by the courts of the State of the seat of arbitration.[28]

The applicable legal framework governing annulment proceedings of non-ICSID awards depends on the law in the seat of arbitration. However, the grounds on which awards are set aside have been converging[29] around those grounds identified in the UNCITRAL Model Law,[30] and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('New York Convention'). The grounds provided for in Article 34 of the Model Law and in Article V of the New York Convention[31] focus on the following main topics:

(i) The validity as to the form and substance of the arbitration agreement;
(ii) The regularity of the arbitral tribunal's constitution;
(iii) The arbitral tribunal's compliance with the mandate conferred to it by the parties;
(iv) Public policy.

Following *Komstroy*, EU Member States may seek to set aside awards against them by relying on the ground (provided by both the UNCITRAL Model Laws and the New York Convention) that an award may

[25] *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Decision on Annulment (21 November 2018); *Bolivarian Republic of Venezuela v. OI European Group B.V.*, ICSID Case No. ARB/11/25, Decision on the Application for Annulment of the Bolivarian Republic of Venezuela (6 December 2018); *Suez Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Argentina's Application for Annulment (14 December 2018); *Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Argentina's Application for Annulment (8 May 2019); V*ictor Pey Casado and Foundation President Allende v. Republic of Chile,* ICSID Case No. ARB/98/2, Decision on Annulment (8 January 2020); *Eiser v. Spain; Carnegie Minerals (Gambia) Limited v. Republic of the Gambia*, ICSID Case No. ARB/09/19, Decision on Annulment (7 July 2020).
[26] See for example *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Spain*, ICSID Case No. ARB/13/36.
[27] *Infrastructure Services Luxembourg S.a.r.l. and Energia Termosolar B.V. v. Spain*, ICSID Case No. ARB/13/31, Decision on Annulment (30 July 2021).
[28] It is generally recognised that, in the absence of an agreement between the parties, the annulment of an award cannot be sought in a jurisdiction other than the place, or seat, of arbitration. See e.g. U.S. District Court for the Northern District of Texas - 288 F. Supp. 2d 783 (N.D. Tex. 2003), *Gulf Petro v. Nigerian Petroleum Corp*, 23 October 2003.
[29] T. Giovannini, What are the grounds on which awards are most often set aside?, The institute for Transnational Atbitation's eleventh annual workshop, 15 June 2000.
[30] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.
[31] In this context, because the New York Convention primary's objective is to maximise the circulation of foreign arbitral awards by providing a set of rules to recognise and enforce awards. The New York Convention does not directly address the grounds for setting aside an award. However, it establishes a limited number of grounds for refusal to recognise or enforce an arbitral award, referenced to set aside awards.

be set aside if *the* [arbitration] *agreement is not valid under the law to which the parties have subjected it"*[32] or, failing any indication thereon, under the law of the country where the award was made.

States may also rely on public policy grounds.[33] In addition to their domestic laws, the CJEU has taken the firm position that EU Member states must consider EU law in determining what constitutes public policy within their legal order.[34] The exact contours of EU public policy remain undefined. CJEU jurisprudence to date suggests, however, that depending on "the nature and importance" of the public interest underlying an EU legal norm, it could trigger the public policy exception.

In practice, two scenarios may arise in ECT cases post-*Komstroy* depending on where the seat of arbitration is located. If the seat of arbitration is within an EU Member State,the possibility to set aside awards will be dictated by EU law. If the seat of arbitration is outside the EU. EU law will not control the outcome.

With regard to setting aside awards within EU Member States, the CJEU confirmed the relevant rule recently in the *PL Holdings* decision mentioned above[35]: National courts are "*obliged to set aside an arbitral award made on the basis of an arbitration agreement that infringes EU law*"[36] and similarly do not enforce those awards if requested by intra-EU investors before them. In light of this clear line of argumentation, **intra-EU awards have been stripped of their effect within the territories of EU Member States.** Since domestic courts of the Member States are (i) bound by EU law, including CJEU's judgments, and (ii) under the obligation to set such awards aside, **application for setting aside intra-EU awards before EU domestic courts would be successful** on one or both grounds (invalidity of the arbitration agreement or a public policy violation).

Even where an award is set aside in accordance with the law of the seat of arbitration, investors may still try to enforce it in another jurisdiction where the losing State has assets. It remains to be seen whether and how domestic courts outside of the EU will apply the *Komstroy* ruling, especially as EU Member States seem to be expanding their efforts to challenge intra-EU awards across the borders of the EU. As reiterated by *PL Holdings*, EU Member States are under an obligation to request to courts of *any* country reviewing an intra-EU investment arbitration award either to set it aside or refuse to enforce it.

2. What are the legal obstacles to the recognition and enforcement of an award?

In addition to actively challenging intra-EU awards, EU Member States will increasingly resist any compliance with these awards. This will force investors to embark on long-fought enforcement proceedings, to try to seize assets of the State and obtain the payment of their compensation. This section details the *Komstroy* ruling's far-reaching implications in relation to the enforceability of ICSID awards (section a) and non-ICSID awards (section b).

[32] UNCITRAL Model Laws, 2006, Article 34 (2)(a)(i); New York Convention, Article V.
[33] UNCITRAL Model Laws, 2006, Article 34 (2)(b)(ii). Neither the Model Law (on which many jurisdictions have based their domestic arbitration laws) nor the New York Convention provide a definition of public policy. Article V(2)(b) of the New York Convention refers to the public policy of that country indicating a determination on the meaning of public policy to be made from the perspective of the jurisdiction where recognition or enforcement is sought. The Model Law offers the same formulation in Article 34(2)(b)(ii) and 36(1)(b)(ii), both referring to the public policy of the state in which a set-aside application has been lodged and where recognition or enforcement is sought. Accordingly, States have adopted and developed their own formulations of public policy in legislation or thought jurisprudence. they generally refer to the core values of their legal systems of their own local domestic standards of morality, justice and public interest.
[34] Judgment of the Court (First Chamber), Case C-168/05, *Mostaza Claro v. Centro Mobil Milenium SL*, 26 October 2006, para. 38.
[35] CJEU, Case C-109/20, *op. cit.*.
[36] CJEU, Press release No 190/21, 26 October 2021, Judgment in Case C-109/20 (PL Holdings), accessible at https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-10/cp210190en.pdf.

a) Obstacles to enforcement of ICSID awards

Enforcement of ICSID awards is governed by the ICSID Convention. Article 54(2) of the ICSID Convention provides that a party seeking recognition and enforcement of an ICSID award must provide the competent court in the State in which enforcement is sought with a copy of the award certified by the ICSID Secretary-General. No further specification as to the enforcement procedure is provided by the ICSID Convention.

Importantly, pursuant to Article 54(1) of the ICSID Convention, ICSID awards are automatically enforceable within the territories of the parties of the Convention, without judicial review by domestic courts. In practice, contracting States of the ICSID Convention have enforced ICSID awards.[37] Yet, similar to set aside proceedings, enforcement of awards will largely depend on the jurisdiction where enforcement proceedings are engaged (i.e. if they are brought before a jurisdiction of a EU Member State or not). Since EU courts are bound by EU law and the case law of the CJEU, and are required to set aside intra-EU awards, **in principle EU investors trying to enforce even their ICSID awards within the EU will have no chances of success.** Intra-EU ECT awards governed by ICSID are more likely to remain enforceable before non EU courts.

b) Obstacles to enforcement of non-ICSID awards

As explained above, enforcing non-ICSID awards has become more challenging in light of recent developments. Under the New York Convention, which governs the enforcement of non-ICSID arbitral awards, the following grounds for refusing enforcement are of particular relevance to intra-EU ECT awards: (i) article V(1)(a), which gives courts where enforcement is sought discretion to refuse the recognition and enforcement of an award because of the incapacity of the parties or the invalidity of the arbitration agreement "*under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was mad*e"[38]; (ii) article V(2)(a), which gives such courts *ex officio* discretion to refuse enforcement if the subject matter of the dispute is not capable of settlement by arbitration under the law of that country; and (iii) article V(2)(b), which gives such courts *ex officio* discretion also to refuse enforcement of an award if they find that such an award would be contrary to the public policy of that country.

As already discussed, **enforcement of an intra-EU award within the EU is now severely impeded** since national courts are under the obligation not to enforce arbitral awards rendered in respect of intra-EU ECT claims.

However, when the seat of arbitration and/or enforcement is outside the EU, the enforcement authorities are not bound by EU law and may apply *Komstroy* and *PL Holdings* differently. Nevertheless, the intra-EU objections still seem to present an obstacle in the execution phases outside of the EU. **Ever since *Achmea*, respondent EU Member States have been systematically challenging the awards** through ICSID annulment proceedings and setting aside proceedings, **with both direct and indirect effects on enforcement beyond EU borders.** Courts in the United States, for example, have been reluctant to enforce intra-EU ECT awards before issues regarding the intra-EU objections have been clarified.[39]

[37] See E. Gaillard, I. Mitrev Penusliski, State Compliance with Investment Awards, ICSID Review (2021), pp. 1 to 55.
[38] New York Convention, Article V(1)(a).
[39] See e.g. the preliminary questions sent by the Swedish Supreme Court to the CJEU in *Novenergia II. v. Italy*. While enforcement proceedings were initiated in the US, the respondent State (Kingdom of Spain) requested setting aside of the award before the Svea court of appeal. Because the setting aside was requested, the D.D.C. court stayed the enforcement proceeding. The D.D.C. finally ordered to stay the enforcement proceedings out of interests of comity. It stated: *Here, comity considerations favor a stay: the Swedish proceedings were initiated before this action, the Swedish court has already acted to prohibit enforcement of the arbitral award, and the issue is of importance to the EU and better suited for initial review in their courts. While this delays confirmation proceedings, the risk of inconsistent results and the interest in*

The issue seems to have surpassed the strict boundaries of law and become rather political, as evidenced by the participation of the European Commission as *amicus curiae* in enforcement proceedings outside of the EU.[40]

3. How can EU State aid law prevent payment of compensation to foreign investors?

Challenges to the validity and enforcement of arbitral awards are not limited to those discussed above. The European Commission, acting pursuant to a Member State notification, *ex officio*, or upon complaint from a third party, can also intervene to halt the payment of awards to EU investors based on EU State aid law.

Article 107 of the Treaty of the Functioning of the European Union ('TFEU') prohibits State aid measures that distort or threaten to distort competition between EU Member States. Financial advantages such as grants, guarantees, or tax benefits that EU Member States provide to certain companies that enhance the competitive position of the aid beneficiaries, may qualify as prohibited State aid measures. They can be authorised under certain circumstances after a case-by-case assessment. Still, they usually need to be notified to the European Commission first, before being paid by the Member State. If the State grants the aid regardless of this "standstill obligation," the aid would be deemed unlawful and should be recovered in full, plus interest.

A number of investors' claims under Article 26 of the ECT relate to changes in national aid regimes where the investors see their level of support being reduced or cancelled. Interestingly in such cases, **the European Commission considers that damages amounting to reinstatement of an old aid regime can constitute new State aid subject to the Commission's scrutiny.**

Indeed in at least four State aid decisions, the European Commission took the strong stance that "*any compensation which the Arbitral Tribunals were to grant would constitute in and of itself State aid. However, the Arbitral Tribunals are not competent to authorise the granting of State aid. That is an exclusive competence of the Commission. If they were to award compensation, they would violate Article 108(3) TFEU, and any such award would not be enforceable, as that provision is part of the public order*."[41] In these four cases - *Micula*[42] (2015), the *Czech renewables scheme*[43] (2016), the *Spanish renewable scheme*[44] (2017) and *Antin*[45] (2021) - investors obtained damages under arbitration awards for the

international comity outweigh the interest in a quick resolution of this case", United States District Court for the District of Columbia, Civil Action No. 18-cv-01148 (TSC), 27 January 2020.

[40] See for example, *RENERGY S.à r.l. v. Spain*, ICSID Case No. ARB/14/18, Brief of the European Commission on behalf of the European Union as amicus curiae in support of the Kingdom of Spain (14 December 2020).

[41] This view has been confirmed in the Opinion of Advocate General Szpunar of 1 July 2021 in Case C-638/19 P, *Commission* v. *European Food and Others* (*Micula* case), accessible at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62019CC0638.

[42] Commission Decision of 30 March 2015 in SA.38517 (2014/C) (ex 2014/NN) implemented by Romania - Arbitral award Micula v Romania of 11 December 2013, accessible at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D1470&from=EN.

[43] Foreign investors were arguing that the new Czech renewable support scheme, reducing the level of support compared to the previous scheme, was notably violating their right to a fair and equitable treatment under the ECT and the German-Czech BIT. See Commission decision of 28 November 2016 in SA.40171 (2015/NN) - Czech Republic Promotion of electricity production from renewable energy sources, accessible at https://ec.europa.eu/competition/state_aid/cases/260911/260911_1866872_294_2.pdf.

[44] Commission decision of 10 November 2017 in SA.40348 (2015/NN) - Spain Support for electricity generation from renewable energy sources, cogeneration and waste, accessible at https://ec.europa.eu/competition/state_aid/cases/258770/258770_1945237_333_2.pdf.

[45] On 19 July 2021, the European Commission opened an in-depth investigation in the Antin case seeking to conclude whether the EUR101 million in damages (plus interests and procedural costs) that the arbitral tribunal ordered Spain to pay to Luxembourgish renewable energy producers for having reduced, in 2013, the feed-in premiums that RES operators could receive from 2007 for selling RES electricity on the market, constitutes a State aid incompatible with EU law. The investors' claim originated from amendments, in 2013, to the Spanish State aid regime that reduced the amount of support they were entitled to receive since 2007 for the sale of their renewable electricity on the market. See Commission opening decision of 19 July 2021 in SA. 54155 (2021/NN) – Arbitration award to Antin - Spain, accessible at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021AS54155.

reduction or cancellation of an aid regime from which they benefited.[46] The CJEU has not yet ruled on this question.[47]

We explain below why the Commission may find that arbitral awards can qualify as a State aid measure even if the award is not linked to reducing or cancelling an aid regime. In light of the Commission's strong stance and pending a judgement from the Court, any intra-EU award is actually likely to be subject to an investigation by the Commission. Moreover, if the Commission finds that an award amounts to State aid incompatible with the single market, it would prohibit its payment and the investor would then be obliged to reimburse all sums already received.

Hence, Member States would be well-advised to notify damages awards to the Commission for legal certainty[48] and refrain from paying the award before the Commission authorises it (as per their 'standstill' obligation). Under State aid law, and regardless of the *Achmea* and *Komstroy* cases, the duty of sincere cooperation (Article 4(3) TFEU) obliges EU national courts to refuse to enforce an award that the Commission considers unlawful or incompatible State aid[49], and they must communicate the matter to the Commission.[50]

The Commission must in principle adopt a decision within two months of a notification but it may prolong its investigations until it deems the file complete[51], or may open a formal investigation like in the *Micula* and *Antin* cases. A decision should then be reached within eighteen months in principle but extensions are not uncommon. The Commission's final decision is authoritative and binding on an EU Member State so that, in principle, there should not be a need to go back to national courts to obtain a judgement denying the enforcement of the award.

In addition to the above risks and obstacles, these steps are likely to delay enforcement proceedings significantly.

In the below section, we explore the likelihood that the Commission finds an intra-EU award constitutes State Aid (section a) and is incompatible with EU law (section b).

[46] In the DEI case though, the Commission was defending that the award of an arbitral tribunal constituted under the auspices and pursuant to the regulations of the Greek Energy Regulator (RAE) would not be imputable to the State because the parties (a state-owned electricity producer and its industrial client) voluntarily submitted their dispute to arbitration and the tribunal was entrusted with the mandate to fix the disputed contractual electricity tariff. It is unclear why this scenario substantially differs from investor-State arbitrations under investment treaties. Before the GC, the Commission seemed to defend itself from having taken that position back in 2004 - perhaps due to posterior change in its approach. For the Commission's argumentation, see Judgement of the General Court Joined Cases T-639/14 RENV, T-352/15 and T-740/17, Dimosia *Epicheirisi Ilektrismou AE (DEI) v. European Commission*, 22 September 2021, para. 16.

[47] The General Court annulled the Commission's decision in Micula on the ground that the repeal of the regional measure scheme at issue arose before Romania's accession to the EU and therefore, the Commission was not competent - but the General Court did not confirm whether an arbitral award can be a State aid measure. See Judgement of the General Court, Joined Cases T-624/15, T-694/15 and T-704/15, *European Food and Micula v. Commission*, 18 June 2019. The Commission's appeal to the Court of Justice is pending (Case C-638/19).

[48] Meanwhile, the investors cannot, in principle, entertain a legitimate expectation as to the lawfulness of aid (thus, of the awarded compensation) that has not been notified to the Commission. See Judgement of the Court in Cases C-24/95, *Land Rheinland-Pfalz .v Alcan Deutschland*, 20 March 1997, paras. 13-14; and C-169/95, *Spain v. Commission,* 14 January 1997.

[49] See e.g. Cour de Cassation du Grand-Duché de Luxembourg, n° 157/2019 of 21 November 2019, *Micula v. Romania and European Commission et al.* , CAS-2018-00113 and CAS-2019-00033; and Decision of the Nacka District Court in Stockholm, *Micula v. Romania (I)*, 23 January 2019.

[50] Communication from the Commission C/2021/5372, Commission Notice on the enforcement of State aid rules by national courts , 30 July 2021, p. 1, paras. 131-132.

[51] Given the consistent and nearly systemic involvement of the Commission into arbitration procedures by amicus curiae, it is not unlikely that the Commission would have sufficient information about an award before it is officially notified; or it should be able to open an investigation promptly after the award is released.

a) Could the payment of an investment arbitration award be considered State aid?

As mentioned above, an intra-EU award would likely qualify as State aid, particularly when it indemnifies an investor for a reduction or cancellation of an aid regime.

Traditionally, a measure constitutes State aid when (i) the State grants (ii) through its resources (iii) an economic advantage to (iv) selected (v) enterprises that (vi) may distort competition and trade on the internal market.

Criteria (ii), (iv), (v) and (vi) are easily met for our purpose. First, as the State would pay the award, it would use State resources (usually State budget) to do so. Second, since the award benefits only a limited number of beneficiaries (the successful claimants), it is arguably selective. In this respect, the Commission adds in the cases mentioned above that not all investors have access to arbitration, notably not domestic ones, so awards cannot be deemed to be available to all enterprises on the market. Third, there is no question that investors falling under the scope of the ECT or a BIT are "undertakings" or enterprises, since they are active on the market. Fourth, when that market is the energy market, the Commission systematically considers that a measure is likely to distort competition and trade, given that it is a liberalised market within the EU.

However, the criteria of (i) imputability of the grant of damages to the State and of (iii) advantage to the beneficiaries are more controversial.

In our analysis, more than the award (decision) of the arbitral tribunal, it is the enforcement (payment) thereof that can constitute State aid. Even though the obligation for the Member State to pay damages in ISDS procedures results from an award ordered by an arbitral tribunal,[52] one may argue that any payment by the State would be voluntary because it does not stem from a valid obligation (since *Achmea* and *Komstroy* make clear that intra-EU ISDS procedures breach EU law). Hence it is arguable that any payment would be imputable to the State.

As for the criteria of granting an advantage to the beneficiary, there is long-standing case law of the CJEU (*Asteris* case) indicating that damages that a State is required to pay to a company for harm caused, such as an illegal act of the State or an expropriation, are not State aid because they do not give an advantage to the company but rather repair a damage suffered.[53] That case law explicitly applies to damages awarded by national courts. and, to the best of our knowledge, there is no case law yet on damages awarded by private arbitral tribunals. Nevertheless, national court awards can constitute State aid if they allocate damages by mistake or for amounts that exceed what is normally acceptable under national law.[54] This reasoning may apply to payments by a State pursuant to an award that grants excessive or unjustified damages to an investor.

b) Could the payment be found incompatible with the internal market?

Next, the Commission is likely to find that intra-EU awards qualify as *incompatible* State aid.

[52] For a comparison with the rule that a measure is not imputable to a State when it stems from an obligation under Union law, see Judgment of the Court of First Instance, Case T-351/02, *Deutsche Bahn AG v. Commission*, 5 April 2006, paras. 45-49.
[53] Judgment of the Court, Joined Cases 106 to 120/87, *Asteris AE and others v Hellenic Republic and European Economic Community*, 27 September 1988, para. 23
[54] Judgment of the Court, Case C-302/97, *Klaus Konle v Republik Österreich,* 1 June 1999, para. 62

Importantly in *Antin*, the Commission relies[55], rightly so in our opinion, on the *Hinkley Point C* case according to which **an aid that violates EU law cannot be found compatible with the internal market**.[56] Furthermore, as national investors do not have the option to use Article 26 of the ECT against their home State, the Commission found that the **ISDS procedure may amount to a discrimination based on nationality, and thus breach EU law.**[57]

Since the *Komstroy* ruling makes clear that awards from intra-EU ISDS procedures under Article 26 of the ECT are invalid, any aid paid pursuant to such an award cannot be authorised.

Hinkley Point C, combined with *Achmea, Komstroy* and *PL Holdings* thus support the conclusion that intra-EU ISDS awards and aid derived therefrom are incompatible with EU law. Although the Commission always performs case-by-case assessments, this reasoning should be sufficient to forbid, in general, the payment of aid under intra-EU ISDS awards.

To provide a comprehensive analysis, the Commission may consider other criteria based on the particularities of the case. The criteria of incentive effect for developing an economic activity, of absence of overcompensation, and of absence of undue distortion of competition, are "common compatibility assessment criteria" that are verified in all State aid cases.

In *Antin*, for example, the Commission continued its analysis by assessing whether reinstating the 2007 Spanish renewable scheme to the benefit of *Antin* would be compatible with the internal market. The Commission expressed serious doubts that such a new aid (the award) could have any "incentive effect" for the development of the economic activity of the investor[58], particularly because it had continued its activity in Spain regardless of the reduction of the old aid regime. The Commission also suggested that receiving the compensation under the award in addition to aid for its renewable energy production under the most recent aid regime, could amount to overcompensation (as the rate of return would be inflated), which is also prohibited.[59] Finally, the Commission considered that since other beneficiaries of the Spanish State aid schemes could not have access to arbitration (e.g. Spanish utilities) or would not be guaranteed to receive the same amount of compensation (since arbitral tribunals use different calculation methods and there is no consistent practice), the award could also create undue distortion of competition.[60]

These statements in the *Antin* decision - even if preliminary - can easily be extrapolated to future awards compensating investors for cancellation or reduction of aid measures.

Section C - What obstacles could the RWE and Uniper investment arbitration cases face?

In light of the above, a number of significant obstacles could impede RWE's and Uniper's quest for compensation before arbitral tribunals for the closure of their Dutch coal plants.

[55] Commission opening decision of 19 July 2021 in SA. 54155 (2021/NN) - Arbitration award to Antin - Spain, para. 96.
[56] CJEU, Judgment of the Court (Grand Chamber), Case C-594/18P, *Austria v. Commission*, 22 September 2020, paras. 44-45 and 100.
[57] Commission opening decision of 19 July 2021 in SA. 54155 (2021/NN) - Arbitration award to Antin - Spain, para. 101.
[58] To be found compatible with the internal market under Article 107(3)(c) of the TFEU, an aid measure must aim at developing an economic activity and the Commission requires, through its guidelines and consistent practice, that the aid has an incentive effect i.e. that the beneficiary's activity or investments (e.g. the activity to produce electricity renewable sources in Spain) would not have happened absent the granting of the aid.
[59] Commission opening decision of 19 July 2021 in SA. 54155 (2021/NN) - Arbitration award to Antin - Spain, para. 124.
[60] *Ibid*, para. 130.

First of all, the recent CJEU judgments in *Komstroy* and *PL Holdings* are expected to influence the decision of the Higher Regional Court of Cologne (Germany), seized by the Dutch government on the admissibility of the claims and the competence of both arbitral tribunals. Given the obligation of EU domestic courts to apply EU case law, it would seem logical that the Cologne court decides that both ISDS claims are inadmissible due to the lack of jurisdiction of both arbitral tribunals under the ECT. Such expectation is further reinforced by another similar case recently brought before the Higher Regional Court of Frankfurt by Croatia earlier this year. There, the court applied the reasoning in *Achmea* and declared the arbitration procedure inadmissible.[61]

The Netherlands is also obliged to challenge the jurisdiction of the tribunals within the arbitration procedure following *Achmea* and *Komstroy*. Even if the arbitral tribunals dismiss these jurisdictional objections (brought both before the German courts and the arbitral tribunals), the Netherlands will then be obliged to seek annulment of any award against them at ICSID.[62] The European Commission is also expected to support these challenges as *amicus curiae* petitioner, as they have done in the past.

In parallel, the Dutch government will be under an obligation to refuse the payment of the awards, forcing investors to embark on long-fought enforcement proceedings outside of the EU, hoping to find a national court willing and able to enforce their award.

But even then, EU State aid law could be a way to halt the payments or limit their amount. In our opinion, the Commission's consistent assessment of arbitration awards against State aid rules in other cases should lead RWE and Uniper to reconsider their chances of success in the ongoing arbitrations. Despite the fact that their claims relate to the government's refusal to create a new aid measure (a compensation for closing down coal plants), as there was no pre-existing regime from which the operators used to benefit that was cancelled. This equally raises State aid issues, albeit more complex ones.

Following the Commission's reasoning in the *Micula* and *Antin* cases, one could consider that damages (or part thereof) that the Netherlands would be ordered to pay to RWE and Uniper by arbitral tribunals would constitute State aid that should be subject to the Commission's control. The Commission could reach such

conclusion if the amount of damages exceeds the one usually available under national law to any damaged party in the same situation. Whether a recipient benefits from an advantage in such a case

[61] OLG Frankfurt, Case 26 SchH 2/20, decision of 11 February 2021 – Case 26 SchH 2/20.
[62] See Declaration of the representatives of the governments of the Member States of 15 January 2019 on the legal consequences of the judgment of the court of justice in *Achema* and on investment protection in the European Union.

requires a complex economic assessment, and the Commission and arbitral tribunals may not be using the same methodologies to determine the amount of adequate compensation.

To sum up, in light of the above, any compensation awarded to RWE and Uniper could be deemed incompatible with EU law for several reasons. First per *Komstroy* and *Hinkley Point C*, these intra-EU ISDS proceedings based on the ECT breach EU law. Second, because such a procedure may amount to discrimination based on nationality (since Dutch operators would not have had the same chances). Thirdly, the compensation awarded may also breach the new aid regime for the closure of coal plants, proposed in the draft revised State aid guidelines for climate, environment and energy (CEEAG).

Draft revised State aid guidelines for climate, environment and energy (CEEAG)

While the final CEEAG would enter into force in January 2022, the draft released in June 2021 indicates under which circumstances the Commission is likely to consider that aid for the closure of coal plants is acceptable or not.

Based on the draft CEEAG, if the plants are deemed profitable, foregone profits and "additional costs of closure" (excluding dismantling costs) could be eligible for aid. If the plants are deemed uncompetitive, only "exceptional costs" related to the closure of the plants such as some costs for rehabilitation of sites (subject to respecting the polluter pays principle), or to workers, can be indemnified.

Analysis demonstrates that 76% of European coal-fired power stations are currently loss-making. In particular, the economic value of coal-fired plants in the Netherlands is expected to decrease dramatically because of the further growth of renewable energy and the concomitant rise of CO2 prices, especially with the introduction of a CO2-tax as currently proposed by the Dutch Government. It is thus highly unlikely that Uniper's and RWE's power plants would have any remaining economic value and would be profitable post-2030 in the light of evolving regulation and market conditions.[63] Since those plants are unprofitable, there is no question about indemnifying foregone profits. One would therefore need to verify if the award indemnifies the operators only for the eligible costs listed in the relevant annex of the future CEEAG, and in a proportionate manner.

Conclusion

Just like the earlier CJEU's *Achmea* ruling , the Court's *Komstroy* and *PL Holdings* judgments may not be sufficient by themselves to prevent EU investors from making use of the ECT to challenge government regulatory action and put pressure on policy space that responds to the climate emergency. Nor will they necessarily stop arbitral tribunals from proceeding with intra-EU claims - as arbitrators often do not consider themselves bound by CJEU rulings and EU law in general. If the EU and its Member States want to effectively prevent the ECT from allowing investors to circumvent EU law and jeopardise EU climate policies and objectives, the best way forward is to terminate the ECT (by obtaining consensus of all Contracting Parties, including non-EU states) or withdraw from it.

Komstroy goes a long way towards blunting the impact of ECT investor-State arbitration on climate action, as it renders the enforcement of awards particularly complicated. The inapplicability of Article 26 of the ECT to intra-EU disputes and the increased difficulties for investors to enforce their rights under investment treaties in intra-EU disputes, do not, however, deprive EU investors operating in EU Member States of any

[63] See EEFA, Ember and SOMO economic analysis on the value and profitability of RWE and Uniper plants, accessible at https://www.somo.nl/compensation-for-stranded-assets/.

protection at all. They continue to enjoy the same rights as local investors under EU law. The *Komstroy* and *Achmea* rulings create an opportunity to restore a level playing field between EU economic actors.

As the Commission acknowledged in its 2018 Communication on the Protection of intra-EU investment, the EU legal framework, along with the EU Courts' case-law, "provides investors with a high level of protection". This Communication offers clear and sufficient guidance on the EU investment regulatory framework, which applies equally across all Member States. The EU provides for an advanced and complete legal order, where Member States are required to offer a reliable judicial system for investors to seek remedies in case of damage caused by public authorities.

Finally, investors must not be able to restructure their investment outside of the EU in order to circumvent the *Achmea*, *Komstroy* and *PL Holdings* rulings and benefit from extra-EU bilateral investment treaties. Such practices should neither be facilitated by legal and financial advisors, nor condoned by regulatory authorities. An investor's choice to enter a country carries a responsibility to abide by domestic laws and institutions, including regional law, such as EU law, that binds the State.

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