

**Settlement of “intra-European” investor-State disputes under the Energy Charter Treaty (Information for businesses, as of 15 August 2023):**

Information on the legal consequences of the “Komstroy” ruling made by the Court of Justice of the European Union (CJEU) on 2 September 2021, concerning the intra-European application of the investor-State arbitration mechanism on the basis of the Energy Charter Treaty (ECT).

The CJEU (Grand Chamber) issued a ruling on 2 September 2021 in the [Komstroy case \(C-741/19\)](#) and decided that intra-EU arbitrations on the basis of the ECT are incompatible with EU law. The CJEU thereby confirmed and deepened the position it formed on arbitral tribunals in the [Achmea judgment \(C-284/16\) of 6 March 2018](#). Germany and the vast majority of Member States confirmed the Achmea ruling through the “Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection”.

Consequently, arbitration proceedings based on Bilateral Investment Treaties (BITs) between EU-Member States (Achmea ruling) as well as arbitration proceedings initiated on the basis of the multilateral ECT (Komstroy ruling) are contrary to Union law.

The case law in the Komstroy judgment has since been confirmed in the cases [PL Holdings \(C-109/20\) of 26 October 2022](#) and [European Food SA and Others \(C-638/19 P - Micula case\)](#) of 25 January 2022. During the proceedings, the Federal Government emphasised in written and oral statements that the ECT cannot be used to bring investment arbitration claims in intra-European constellations, as such arbitration proceedings are incompatible with Union law.

In the Komstroy ruling, the CJEU clarifies that Article 26(2)(c) ECT “must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State” (cf. Komstroy C-741/19, para. 66).

The arbitral tribunal in *Green Power K/S and Obton A/S v. Spain* also adopted the CJEU case law and dismissed the claim based on the ECT due to a lack of jurisdiction (SCC Case No. V 2016/135, Award 16 June 2022, para. 477).

In this context, the Federal Ministry for Economic Affairs and Climate Action again points out to German investors operating on the internal market and European investors operating in Germany that investor-state dispute settlement procedures that are brought against an EU Member State on the basis of BITs or the ECT are incompatible with EU law. It is clear from the CJEU case law that arbitral tribunals are acting without a legal basis.

Following the jurisprudence of the CJEU, the Federal Court of Justice (BGH) ruled on 27 July 2023 in three decisions ([I ZB 43/22](#), [I ZB 74/22](#) and [I ZB 75/22](#)) that national legal protection against intra-EU arbitration proceedings under the ICSID-Convention is possible before German courts. Accordingly, in the case of intra-EU arbitration proceedings that are contrary to EU law, the German civil courts have to declare the arbitration proceedings inadmissible according to §1032 para. 2 ZPO (Code of Civil Procedure). As a consequence, an arbitral award rendered in such an arbitration proceeding could no longer be enforced in Germany.

The enforcement of any arbitral awards will most likely become impossible not only in Germany, but also in the other EU Member States. In its ruling *Romatsa* (case [C-333/19](#)) of 21 September 2022, the CJEU found that ICSID arbitral awards that are incompatible with Union law, may not be enforced. Enforcement is also made more difficult outside the EU, as shown by the current interventions of the EU Member States affected, supported by the European Commission, before national courts in the United States and Australia, among others.

Together with the European Commission, the EU Member States are taking the necessary measures to ensure the effective implementation of the CJEU case law.

The Federal Government declared Germany's withdrawal from the ECT. The withdrawal will become effective on 21 December 2023.

The CJEU's Achmea ruling led to the conclusion of the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, which entered into force in Germany on 9 June 2021. In the meantime all BITs between the contracting States were terminated.