

**Settlement of “intra-European” investor-State disputes under the Energy Charter Treaty (Information for businesses, as of 19 December 2022):**

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. Through it, the CJEU 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 on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union”, adopted on 15 January 2019.

Not only are arbitral tribunals formed between EU Member States on the basis of Bilateral Investment Treaties (BITs) thus contrary to Union law (Achmea ruling), but also those formed on the basis of the multilateral ECT for intra-European investor-state dispute settlement procedures (Komstroy ruling).

The case law in the Komstroy judgment has been confirmed in the cases [PL Holdings \(C-109/20 of 26 October 2022\)](#) and [European Food SA and Others \(C-638/19 P of 25 January 2022, Micula case\)](#). 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 seized act without a legal basis. The enforcement of any arbitral awards in EU Member States will most likely become impossible. In its ruling *Romatsa* (case [C-333/19](#) of 21 September 2022), the CJEU found that these ICSID arbitral awards that are incompatible with Union law cannot be enforced. Enforcement is made more difficult outside the EU, as shown in the current interventions of the EU Member States affected, which are supported by the European Commission, not least those before national courts in the United States and Australia.

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

On 30 November 2022, the Federal Government decided to withdraw from the ECT and initiated the notification to the depositary.

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.