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Whitepaper | 09.2021

Komstroy v. Moldova: The Energy Charter Treaty remains applicable

What is at issue?

On 2 September 2021, the European Court of Justice ("**ECJ**") issued its judgment in the *Komstroy* case (Case C-741/19) and also ruled on the disputed applicability of the Energy Charter Treaty ("**ECT**") in the European Union. The judgment was presented in the press as if the ECJ had ruled that the ECT was invalid. For example, Handelsblatt titled as follows: "*ECJ protects states from lawsuits by energy companies. Billions of euros in investments will become worthless due to the coal phase-out. If the ECJ has its way, the companies will be left with the damage.*" The FAZ wrote "Luxembourg overturns the Energy Charter". This is linked to statements by NGOs that the ECT is "*harmful to the climate*".

This is incorrect. However, given the complexity of the underlying legal issues, this misleading representation is not surprising. First of all, it should be noted that the ECT is not "harmful to the climate". The ECT is a multilateral treaty with currently 50 parties. It regulates trade in energy and investments in the energy sector – and in no way prohibits states from taking measures to protect the climate. What the ECT does prohibit are expropriations without compensation, breaches of legitimate expectations, violations of commitments entered into and unfair or discriminatory measures. In other words, the ECT requires legal certainty and the rule of law. If a state violates these obligations, it must pay compensation. Looking at the practice, in recent years alone, 47 ECT cases have been brought against Spain by investors in the renewable energy sector because Spain radically cut and changed the feed-in tariff for electricity in 2013/2014. In fact, the ECT is "climate neutral": It protects legal certainty and legitimate expectations, whether the investment is in gas, coal, oil, nuclear, solar or wind. In view of the billions of euros that will have to be invested over the next few years to achieve decarbonisation, legal certainty is essential for investors.

Those who construct a contradiction between the ECT and climate protection are in reality only dreaming Machiavellian dreams of confiscations, but are not considering who should pay for the new climate-neutral infrastructure. It is not the state that is building wind farms and electricity grids, but the private sector.

Irrespective of this, however, the judgment will only be of minor significance. There are two reasons for this. First, the ECJ has by no means declared the ECT inapplicable. The ECT gives a company three different options for enforcing claims for damages: before an individually agreed forum, before state courts or before an ECT arbitration tribunal. Only the last option, i.e. submitting the dispute to ECT arbitration, was considered incompatible with European law. Even after the *Komstroy* ruling, companies still have the option of bringing disputes before national courts and claiming damages there. It of course remains to be seen how effective this protection will be, especially as the ECJ has claimed the power to interpret the ECT for itself. Presumably, the first ten years will see numerous referrals from national courts, which will shape the scope of application of the ECT within the EU.

Secondly, arbitral tribunals will not be impressed by the ECJ's ruling. The ECJ considered the ECT to be European law, which in its view is technically correct. The EU has ratified the ECT, so that it has become part of Community law - just as an international treaty becomes part of German law once the Federal Republic has ratified it (and then the Federal Republic would be bound by it until it was effectively terminated). Accordingly, the ECJ has interpreted European law and its judgment only concerns European law. Arbitral tribunals, however, do not apply European law, but international law. As a judicial body of one of 50 contracting parties to the ECT, the ECJ cannot interpret the ECT in a binding manner under international law.

Under international law, the ECT is undisputedly applicable in its entirety between EU member states. This has been confirmed by 39 arbitral tribunals since the ECJ's *Achmea ruling* in 2018. The arguments that the ECJ is now making are neither new nor convincing. They have been rejected by these 38 arbitral tribunals, and will continue to be declared irrelevant.

The ECJ is aware of all of this. The judgment, the reasoning of which is in parts very goal-oriented and not always comprehensible, is a political signal: The ECJ wants to have the last word and does not allow other forums to possibly interpret EU law. In fact, *Komstroy* was not even an intra-EU case (i.e. a dispute between an EU member state and an EU investor), but an arbitration case of a Ukrainian claimant against Moldova, which took place in Paris. The Paris courts had to decide on the setting aside of the arbitral award and referred several questions to the ECJ on the interpretation of the ECT. The ECJ then expanded these questions to include the intra-EU question at the suggestion of several EU states that are defendants in ECT proceedings (including Germany, Italy and Spain). The relevant passages in the judgment are therefore only *obiter dicta*, i.e. they do not constitute the decisive grounds for the decision.

The almost egocentric attitude of the ECJ towards concurrent forums is unfortunately not new. As early as 2014, the ECJ stated in its opinion that the EU could not accede to the European Convention on Human Rights, as the European Court of Human Rights ("**ECtHR**") could then possibly rule on EU law and even on the actions of the ECJ. Currently, the dispute between the BVerfG and the ECJ over the ECB's bond purchases is simmering. Thus, investment arbitration is – unfortunately – in good company. It will almost certainly remain as unaffected by ECJ pressure as the BVerfG or the ECtHR.

Companies that are currently bringing ECT claims or are thinking about bringing them should therefore not be too concerned about the *Komstroy* ruling. However, ECT proceedings before state courts may also be an option. We will be happy to advise you regarding your claims and procedural options. In any case, even after the *Komstroy* ruling, companies are not defenceless against arbitrary state action.

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