State aid: Commission opens in-depth investigation into arbitration award in favour of Antin to be paid by Spain

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The European Commission has opened an in-depth investigation in order to assess whether an arbitration award, to be paid by Spain in favour of Antin as compensation for the foregone support following the modification of a renewable electricity support measure, is in line with EU rules on State aid.

The arbitration award in favour of Antin

In 2007, Spain established a scheme to support the production of electricity from renewable sources. This scheme was not notified to the Commission for approval under State aid rules.

In 2013, Spain modified the terms under which renewable installations could receive support. The modifications apply also to installations that had started to receive the support under the 2007 scheme. On 10 November 2017, the Commission adopted a decision (SA.40348) that found the 2013 support scheme for renewable electricity to be in line with EU State aid rules.

Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. (”Antin”), constituted in Luxembourg and the Netherlands, respectively, had invested in renewables installations in Spain, which benefitted from the 2007 support scheme. Following the modifications introduced by Spain with the 2013 scheme, Antin initiated an arbitration procedure in order to be compensated for the foregone support it would have received on the basis of the 2007 scheme.

An arbitral award of 2018 (Antin vs Spain) found that Spain had infringed the Energy Charter Treaty (”ECT”) when it modified the 2007 renewables support scheme and introduced a new support scheme in 2013 with lower amounts of support. The arbitral tribunal ordered Spain to compensate Antin for losses suffered as a consequence of the modifications of the 2007 scheme. The compensation amounts to €101 million, plus interests on this sum and a contribution to the costs of the arbitration proceedings.

The Commission’s investigation

At this stage, the Commission's preliminary view is that the arbitration award would constitute State aid, as it grants Antin an advantage equivalent to those provided for by the non-notified 2007 Spanish scheme.

In particular, the Commission's doubts concern:

- The compliance of the arbitration award with the principles of mutual trust and autonomy of EU Law. The basis of the award are the investor-to-State provisions of the ECT. In its judgment on the Achmea case (C-284/16), the Court of Justice of the European Union ruled that investor-to-State arbitration, when applied in an intra-EU context, undermines the system of legal remedies foreseen in the EU Treaties for resolving such disputes. It therefore poses a threat to the autonomy of EU law and the principle of mutual trust between the Member States.

- Whether the arbitration award could lead to discrimination among investors based on nationality and on their ability to access international arbitration, since Spanish investors are precluded from bringing an action before an arbitration tribunal for the modifications to the 2007 scheme.

- The compliance of the arbitration award with the Commission’s 2008 Guidelines on State aid for environmental protection and the 2014 Guidelines on State Aid for Environmental Protection and Energy. The renewables installations in which Antin had invested already benefit from the 2013 support scheme, which has been approved by the Commission under State aid rules. The Commission will investigate whether the additional support granted by the arbitration award is necessary for the development of an economic activity, has an incentive effect and is proportionate. The Commission will also investigate whether granting such support only to Antin could unduly distort competition.
The Commission will now carry out an in-depth investigation to determine whether its initial concerns are confirmed. The opening of an in-depth investigation provides all interested parties with an opportunity to comment on the measure. It does not prejudge in any way the outcome of the investigation.

**Background**

On 19 July 2018, the Commission issued a Communication on the protection of investments. The Communication explains that the Achmea judgment is relevant in that the investor-State arbitration clause in the ECT does not apply intra-EU, that is, between investors from a Member State and another Member State of the EU. As the Communication also clarifies, the ECT has only created rights and obligations between the EU and third countries and has not affected the relations between the EU Member States.

The non-confidential version of the decision will be made available under the case number SA.54155 in the State aid register on the Commission’s competition website once any confidentiality issues have been resolved. New publications of State aid decisions on the internet and in the Official Journal are listed in the Competition Weekly e-News.

Press contacts:

Arianna PODESTA (+32 2 298 70 24)
Maria TSONI (+32 2 299 05 26)

General public inquiries: Europe Direct by phone 00 800 67 89 10 11 or by email

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