



Opinion 1/20: Belgium's request is inadmissible but CJEU still confirms its decision in Komstroy that intra-EU ECT arbitration is incompatible with EU law

On 16 June 2022, the Court of Justice of the European Union (“CJEU”) published [Opinion 1/20](#), concluding that Belgium’s request for an opinion on the draft modernised Energy Charter Treaty’s (“ECT”) compatibility with EU law is inadmissible. The Court’s Opinion was in response to Belgium’s request for an opinion submitted on 2 December 2020, in which Belgium had asked whether the draft modernised ECT is compatible with EU law.

Although refusing to opine directly on Belgium’s questions, the Court highlighted that it had already answered the question of the compatibility of Article 26 of the ECT with European Union (“EU”) law in disputes between investors of one EU Member State and another EU Member State (“intra-EU disputes”). In doing so, the CJEU effectively confirmed its earlier judgment in Case C-741/19, [Republic of Moldova v. Komstroy LLC](#) (see our client alert [here](#)) which had – even if as an *obiter dictum* – expressly dealt with the arbitration provisions in the ECT as currently in force.

Background

In May 2020, the European Commission, having been given a Council mandate to negotiate a modernised ECT, published its [text proposal](#) for a modernised draft of the treaty.

In its proposal, the European Commission proposed, *inter alia*, to modify Article 26 of the ECT, which deals with the settlement of disputes between an investor and a Contracting State to the ECT (investor-State dispute settlement or “ISDS”). However, the [topics](#) for negotiations between the ECT Contracting Parties for the modernisation of the ECT do not include amendments to the dispute resolution mechanism in Article 26 of the ECT.

Article 218(11) of the Treaty on the Functioning of the European Union (“TFEU”) permits EU Member States and EU institutions to obtain the Opinion of the CJEU on the compatibility of an envisaged international agreement with the EU Treaties. In accordance with that provision, in December 2020, Belgium asked the CJEU for an Opinion on the following questions which had arisen as a result of the draft modernised ECT:

“Is the draft modernised Energy Charter Treaty compatible with the Treaties, and in particular Article 19 TEU and Article 344 TFEU:

- i. so far as concerns Article 26 of that agreement, if that article may be interpreted as allowing the intra-EU application of the dispute settlement mechanism?*
- ii. in so far as, if Article 26 of that agreement were to be interpreted as allowing the intra-EU application of the dispute settlement mechanism, that agreement does not lay down a specific, express rule or an explicit disconnection clause, in particular in the definitions of investment and investor in Article 1 of the envisaged agreement, providing for the non-applicability of the general mechanism of Article 26 between the Member States?”*

The CJEU had already dealt expressly with the compatibility of arbitration in intra-EU disputes in its 2018 judgment in Case C-284/16 *Achmea* (see our [client alert](#)) and appeared to answer the same question on the compatibility of intra-EU arbitration under the ECT in the 2 September 2021 judgment in Case C-741/19 *Komstroy* (even if it was strictly obiter), which was issued after Belgium had already made its request for an Opinion. In both judgments, the CJEU took the view that intra-EU arbitration was incompatible with EU law, and in particular the principle of autonomy of EU law.

The request for an Opinion is inadmissible because there is insufficient information on the content of the draft modernised ECT

The CJEU found that Belgium's request for an Opinion on the compatibility of the draft modernised ECT with EU law is inadmissible because the text of the draft modernised ECT was not available at the time the request was made.

The CJEU recalled that the purpose of the Article 218(11) TFEU procedure is to forestall any complications resulting from legal disputes concerning the compatibility of an international agreement with the EU Treaties. While noting that it is not a precondition for an Opinion of the CJEU under Article 218(11) of the TFEU that a final text has been agreed, the CJEU requires that the subject matter of the envisaged agreement is known, even if there is not yet full agreement on the exact text and a number of proposed alternatives are still under discussion. By contrast, where a request for an Opinion relates to the allocation of competences, the CJEU might be more inclined to issue an Opinion.

The CJEU explained that when the request for Opinion 1/20 was submitted, there was no document setting out the text of the draft modernised ECT as a whole or of the draft modernised Article 26 of the ECT. The CJEU considered it possible that Article 26 of the ECT might be amended. Hence the content of Article 26 of the modernised ECT was not sufficiently clear at the time the request was made.

The CJEU added that no modernised text for Article 1 of the ECT (relating to the definition of the concepts "investment" and "investor" which are relevant to the scope of the disputes to be settled under Article 26 of the ECT) has been adopted and, in any case, the impact of amendments to Article 1 on the dispute settlement mechanism could not be assessed if the rules governing the dispute resolution mechanism are uncertain.

The CJEU thus concluded that "[i]n the light of those uncertainties, the Court does not have sufficient information on the content and, more particularly, on the scope of Article 26 which will appear in the modernised ECT".

The CJEU confirms that intra-EU arbitration proceedings under Article 26 of the ECT are incompatible with EU law

The CJEU in Opinion 1/20 unequivocally confirmed that it has already ruled that Article 26(2)(c) of the ECT does not apply to intra-EU disputes.

Most EU Member States (with the exception of Hungary) considered that the CJEU should issue an opinion under Article 218(11) TFEU to "eliminate any ambiguity in the interpretation of Article 26 of the ECT". According to those Member States, this is especially relevant because (i) not all EU Member States interpret Article 26 of the ECT as not applying to intra-EU disputes and (ii) tribunals constituted in ECT intra-EU arbitration cases systematically refuse to find that they have

no jurisdiction.

The CJEU disagreed. It simply confirmed its earlier judgment in *Komstroy*. In any event, according to the CJEU, an Article 218 TFEU Opinion procedure is not the appropriate context for solving those issues raised by most EU Member States. In essence, that procedure is designed to prevent complications prior to the conclusion of an international agreement, not to address problems relating to the application a provision of an agreement that is already in force.

Conclusions and commentary

Opinion 1/20 is unlikely to advance the debate either as to the level of intra-EU investment protection currently available under the ECT or as to prospects for reform of the ECT.

By declaring the request for an Opinion to be inadmissible, the CJEU declined to provide either any further guidance as to the incompatibility of Article 26 of the ECT with EU law (beyond confirming *Komstroy*) or any new guidance as to how the incompatibility of Article 26 of the ECT with EU law could be resolved by amending the text. The CJEU's position seems to be that it is for the negotiators to decide on amendments, if any, and that then the CJEU may consider the matter.

Negotiations for the modernisation of the ECT still continue and with the 14th negotiation round having concluded earlier this month it has already been agreed that informal consultations will continue before a meeting on 23 June 2022 to prepare a further meeting of the Energy Charter Conference for an agreement in principle on 24 June 2022. Whether that agreement in principle will be achieved within this time frame is another question. The continued absence of an agreement risks the EU abandoning its attempts at reform and may result in the EU withdrawing from the ECT (as repeatedly demanded by a number of EU Member States).

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