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PREFACE

This year's edition of *The Investment Treaty Arbitration Review* boasts a number of new chapters. The result is greater coverage and a resource that is even more useful to practitioners.

As before, this new edition provides an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments in investment treaty arbitration.

Although many useful treatises on investment treaty arbitration have been written, the relentless rate of change in the field rapidly leaves them out of date.

In this environment of constant change, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to those developments and the context behind them.

This eighth edition represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume.

Barton Legum
Honlet Legum Arbitration
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Chapter 38

THE IMPACT OF EU STATE AID DECISIONS ON INVESTMENT TREATY AWARDS

Richard Caldwell, José Antonio García and Benjamin Lawrence[1]

I EXECUTIVE SUMMARY

Several recent arbitral awards have deemed unlawful the withdrawal of subsidies by European Member States and have granted compensation. The *Antin* award[2] concerned a Spanish renewable investment, and the *Micula* award[3] concerned a Romanian food and drinks producer. According to the European Commission (the Commission), the compensation awarded constitutes state aid and, as such, requires the Commission's prior approval.

The Commission has expressed 'preliminary doubts' about the compatibility of the *Antin* award with state aid law (the 2021 Preliminary Decision).[4] It claims that the award does not benefit electricity production from renewable sources (RES), has no incentive effect, is not proportionate and may 'unduly distort competition and trade' between Member States.

This chapter analyses the Commission's preliminary doubts and considers them unfounded. It also considers the wider implications of the Commission's reasoning, in particular for continued investment in RES, which is critical for Europe to achieve its climate goals. In our view, a wider application of the Commission's reasoning could increase the risks and costs of achieving the European Union's ambitious climate goals.

II FACTUAL BACKGROUND

Spain attracted substantial RES investment through the provision of feed-in tariffs (FITs), defined by Royal Decree 661/2007of 25 May 2007 (the RD 661 Regime).[5] In July 2013, Spain dismantled the RD 661 Regime for existing RES facilities and replaced it with lower

1 Richard Caldwell and José Antonio García are principals and Benjamin Lawrence is an associate at The Brattle Group.

2 *Infrastructure Services Luxembourg Sàrl and Energia Termosolar BV (formerly Antin Infrastructure Services Luxembourg Sàrl and Antin Energia Termosolar BV) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018 (*Antin* award).

3 *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v. Romania*, ICSID Case No. ARB/05/20 (*Micula*), Award, 11 December 2013.

4 European Commission (the Commission), State Aid SA.54155 (2021/NN) – Arbitration Award to Antin – Spain: Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union, 5 November 2021 (the 2021 Preliminary Decision).

5 Law 54/1997 of 27 November 1997 (the Energy Law 54/1997) was the first attempt to define a specific regulatory regime for renewable sources (RES) in Spain. Other pieces of legislation governing the financial support to RES from 1997 to 2007 further include, among others, Royal Decree (RD) 2818/1998 of 23 December 1998 and RD 436/2004 of 12 March 2004.

financial support (the New Regime).[6] The retroactive changes imposed by Spain prompted a large number of investors to pursue arbitrations under the Energy Charter Treaty (ECT). Many investors, including Antin, have now won arbitration cases and substantial damages awards.

As numerous ECT arbitrations were pending, Spain notified the Commission of the New Regime for the purposes of state aid. The Commission found the New Regime to be compatible state aid in November 2017 (the 2017 decision).[7] Spain subsequently notified the Commission of the *Antin* award, and, in November 2021, the Commission published its 2021 Preliminary Decision expressing preliminary doubts about the *Antin* award's compatibility. At the time of writing, the Commission has never assessed the compatibility of the RD 661 Regime itself. This omission occurred, in part, because Spain and other Member States did not consider state aid notification necessary back in 2007.[8]

The Commission has published guidelines for state aid assessments of RES investments. It published its first set of guidelines in 2001 (the EAG 2001)[9] following the adoption of the Kyoto protocol in 1997 and provided updates in 2008 (the EAG 2008),[10] 2014 (the EEAG 2014)[11] and 2022 (the EEAG 2022).[12] The economic compatibility of state aid is fundamentally a balancing exercise between potential distortions of trade and competition between Member States and positive effects such as the achievement of well-defined objectives of general interest. The EAG 2001 did not explicitly refer to a 'balancing test' but, in practice, the concept of balancing provided the basis for compatibility assessments at the time, which focused on avoiding overcompensation to RES investors.[13] The Commission explicitly incorporated the balancing test in the EAG 2008, the EEAG 2014 and the EEAG 2022.[14]

6 The New Regime is governed, among other pieces of legislation, by Royal Decree-Law (RDL) 9/2013 of 12 July 2013, Law 24/2013 of 26 December 2013, RD 413/2014 of 6 June 2014, Ministerial Order (MO) IET/1045/2014 of 16 June 2014, MO IET/1459/2014 of 1 August 2014, MO ETU/130/2017 of 17 February 2017, RDL 17/2019 of 22 November 2019, MO TED/171/2020 of 24 February 2020, RDL 6/2022 of 29 March 2022 and MO TED/1232/2022, of 2 December 2022.

7 Commission, State aid SA.40348 (2015/NN) – Spain: Support for electricity generation from renewable energy sources, cogeneration and waste, 10 November 2017 (the 2017 decision), Sections 3.3 and 5, citing Article 107(3)(c) of the Treaty on the Functioning of the European Union and the Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01) (the EEAG 2014).

8 For example, Austria implemented a RES scheme in 2003 without prior notification to the Commission. Austria eventually notified the Commission several years later, and the Commission authorised the scheme in 2006. Like Austria, Germany and the Czech Republic also failed to notify the Commission of their feed-in tariffs (FITs) schemes to promote RES investments. For additional details see the preamble of Section III of this chapter.

9 Commission, Community guidelines on State aid for environmental protection (2001/C 37/03), 3 February 2001 (the EAG 2001).

10 Commission, Community guidelines on State aid for environmental protection (2008/C 82/01), 1 April 2008 (the EAG 2008).

11 EEAG 2014.

12 Commission, Guidelines on State aid for climate, environmental protection and energy 2022 (2022/C 80/01), 18 February 2022 (the EEAG 2022).

13 See, e.g., EAG 2001, Paragraph 5. The Commission's approach in these guidelines comprises determining whether, and under what conditions, State aid may be regarded as necessary to ensure environmental protection and sustainable development without having disproportionate effects on competition and economic growth.

14 The EAG 2008 sets out the analytical framework in Section 1.3. The balancing test is also included in Section 3.1 of the EEAG 2014. Section 3.3 of the EAG 2022 refers to 'weighing the positive effects of the

The Commission's guidelines presume that financial support to RES is necessary to promote RES investments and overcome a well-known market failure.[15] They presume that financial support to RES has limited distortional effects if it meets three defined compatibility conditions:

a it must promote the production of electricity from RES;

b it must have an incentive effect to its beneficiary (i.e., change behaviour to increase the production of electricity from RES); and

c it must be proportionate (i.e., it must not overcompensate RES investors).

III ASSESSMENT OF THE RD 661 REGIME AND THE ANTIN AWARD

The Commission considers it necessary to assess the compatibility of the *Antin* award because it relates to the withdrawal of prior financial support, which had never been notified to the Commission and which the Commission consequently deemed unlawful. For the purposes of assessment, the 2021 Preliminary Decision assumes a granting date of July 2013 (the date of repeal of the RD 661 Regime) or June 2018 (the date of the award).[16]

The Commission's approach ignores the fact that many Member States, including Spain, did not consider it necessary to notify RES support schemes in 2007 when Spain introduced the RD 661 Regime.[17] For context, the notification of RES support schemes is the responsibility of the Member States, not of the investors.[18] It was common for Member States to either fail to notify the Commission of RES support schemes entirely or to do so only belatedly. Although the Commission often 'regretted' the failings of Member States to notify, the failure to notify has never itself resulted in a consequent failure of the Commission to authorise a RES scheme.[19]

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aid against the negative effects on competition and trade'.

15 See, e.g., EEAG 2022, Paragraph 65.

16 In the Commission's view, in arbitration cases, the relevant granting moment would be the adoption (or execution) of the award. Consistent with this view, the Commission assesses the compatibility of the *Antin* award under the 2014 EEAG since the *Antin* award was adopted in June 2018. However, the Commission further notes that the General Court considered in the *Micula* judgment that the relevant granting moment should be the time of repeal of the original scheme. In the present case, this would be the time of the modification of the RD 661 Regime in July 2013. Based on the General Court ruling, the Commission further assesses the compatibility of the *Antin* award under the EAG 2008. The 2021 Preliminary Decision also considers the date of the execution of the *Antin* award as a third potential alternative for the granting moment of the aid. For additional details, see 2021 Preliminary Decision, Preamble, Paragraphs 94 and 154.

17 The Commission has now called into question legitimate expectations based on the obligation to notify RES support schemes. According to the Commission, an investor cannot have legitimate expectations from state aid until the Member State has notified the Commission of the aid and the Commission has authorised the aid (see 2017 Preliminary Decision, Paragraph 158).

18 Investors cannot notify the Commission; they can only assess whether a support scheme is lawful in relation to the EU state aid rules based on EU case law and evidence from support schemes in other countries.

19 For example, Austria implemented a RES scheme in 2003 without prior notification to the Commission. It eventually notified the Commission several years later, and the Commission authorised the scheme in 2006 (see State Aid NN162/A/2003 and State Aid N 317/A/2006 – Austria: Support of electricity production from renewable sources under the Austrian Green Electricity Act (feed-in tariffs), 4 July 2006). Other examples include Germany (State Aid SA.33995 (2013/C) (ex 2013/NN) – Germany: Support for renewable electricity and reduced EEG-surcharge for energy-intensive users, 18 December 2013) and the

The Commission's approach also ignores the economic characteristics of RES investment: large, upfront capital costs creating long-lived facilities with low (if not zero) operating costs. The promise of financial aid is necessary to induce the necessary upfront capital investments in the first place; however, once sunk and facilities completed, RES investors are vulnerable to the withdrawal of promised aid. Withdrawal will not significantly impact production levels of operational plants, since the sun will continue to shine and the wind will continue to blow. Withdrawal will materially reduce or eliminate capital returns.

The Commission's approach treats the *Antin* award as wholly new aid granted in 2013 or 2018, ignoring the fact that the RES facilities at issue were already in operation by 2013 and 2018, and that the award compensates for the withdrawal of previously promised aid, without which the RES facilities at issue would never have been built. A meaningful economic assessment should focus on May 2007 as the granting date, since this is the date when Spain enacted the RD 661 Regime and induced the investment in the RES facilities at issue.

The Commission has avoided assessing the RD 661 Regime under the applicable guidelines in 2007.[20] If it had done so and found the RD 661 Regime to be compatible, it would also have had to conclude that the *Antin* award is compatible. This is because the *Antin* award compensates for the withdrawal of the promised RD 661 FITs and, as a result, necessarily forms part of the support granted under the RD 661 Regime.

We show below that the RD 661 Regime itself satisfies the 'balancing test' and is, therefore, compatible aid from an economic perspective. A subsequent section assesses the *Antin* award under the Commission's assumption of an aid granting date in 2013 or 2019.

i The RD 661 Regime was compatible

We consider the RD 661 Regime to satisfy the Commission's three compatibility conditions. In other words, the Regime:

a did not distort competition, rather it resolved a market failure in which insufficient investment would go to RES technologies in the absence of the financial support;

b induced a substantial amount of RES investment after 2007, increasing the production of electricity from RES and enabling Spain to satisfy its long-term RES targets in 2010; and

c did not overcompensate RES investors.

The implication is that both the RD 661 Regime and the *Antin* award are compatible aid, given that the RD 661 Regime satisfies the Commission's three compatibility conditions and that, on this view, the *Antin* award is just compensation for the withdrawal of compatible aid.

Czech Republic (State Aid SA.35179 (2015/NN) – Czech Republic: Promotion of electricity production from renewable energy sources, 11 June 2014). In the July 2006 Decision concerning the FIT scheme in Austria (pp. 11–12), the Commission recognised that Member States could predict the outcome of a Commission assessment based on a review of prior decisions in relation to other countries. In this sense, the authorisation of comparable schemes elsewhere would have been a solid basis for expecting the eventual authorisation of the Spanish scheme.

20 The 2021 Preliminary Decision does not assess the compatibility of the RD 661 Regime under EU state aid rules, the EAG 2001, the EAG 2008 or the EEAG 2014.

Solving a market failure

The EAG 2001 recognised that RES installations entail large, upfront capital costs and that electricity market prices alone would be insufficient to generate a return and induce investment.[21] Spain estimated the levelised cost of energy (LCOE) of different RES technologies at different times.[22] In 2007, its LCOE estimates significantly exceeded the wholesale market prices that RES facilities could anticipate earning from electricity sales in the Spanish power pool.[23]

Spain has consistently concluded that the benefits of RES justify the provision of financial incentives to cover the excess of LCOEs over wholesale market prices. Spain's renewable energy plans (PER) for the periods 2005 to 2010 and 2011 to 2020 emphasised the need to promote RES technologies to reduce the negative externalities caused by polluting technologies.[24]

In 2007, on its introduction, both Spain and the Commission recognised the RD 661 Regime as an appropriate policy instrument to overcome the market failure and attract investment in RES capacity in an efficient and effective way.[25]

Development of economic activity and incentive effect

The RD 661 FITs motivated considerable RES investment at lower overall costs for consumers, enabling Spain to reach its long-term RES targets under EU directives. Under the RD 661 Regime, Spain became a worldwide leader in the development of RES, from both a technological and industrial standpoint. For example, the introduction of the RD 661 FITs resulted in an increase in the installed capacity of concentrated solar power (CSP) facilities from zero gigawatts in 2007 to 2.3GW in 2013.

21 EAG 2001, Paragraph 58.

22 Levelised cost of energy (LCOE) is a standard metric for assessing the revenues that would be necessary to meet the investor's goals. The LCOE of a power plant is the annual price per MWh of electricity that the plant would need to earn, increasing each year by inflation, to obtain sufficient revenues to compensate for all operation and maintenance costs over the life of the facility, pay back the initial investment and provide a reasonable return to the investor.

23 See, e.g., Institute for the Diversification and Saving of Energy (IDAE), Renewable Energy Plan 2011–2020, 11 November 2011 (PER 2011–2020), Figure 9.2.2 on p. 577.

24 IDAE, Renewable Energy Plan in Spain 2005–2010 (PER 2005–2010). August 2005, pp. 8, 15, 23–25 and 49; PER 2011–2020, Executive Summary.

25 In 2005, 2008 and 2009, the Commission and the Spanish regulator acknowledged that FITs per MWh attract investment effectively and at a relatively low cost. See Commission of the European Communities, Communication from the Commission: The support of electricity from renewable energy sources {SEC(2005) 1571}, COM(2005) 627 final, 7 December 2005, p. 7 and Annex 3; Commission of the European Communities, Commission Staff Working Document: The support of electricity from renewable energy sources – Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources [SEC(2008) 57], COM(2008) 19 final, 23 January 2008, p. 3 and Annex 3; presentation by Luis Jesús Sánchez de Tembleque, sub-director of special regime units at the Spanish National Energy Commission (CNE); and Carlos Solé Martín, director of electricity at the CNE, 'Economic Analysis of Renewable Energy Technologies', CNE presentation, Cartagena de Indias, 9-13 February 2009, slides 33–39.

The 2001 EU Directive set an overall target for the EU to source 22.1 per cent of electricity from RES by 2010,[26] with more specific targets for each country. Spain's target was 29.4 per cent, which Spain subsequently revised to 30.3 per cent.[27] By 2010 and 2011, Spanish RES production was close to target.

The appearance of substantial RES investment after 2007 is testament to the success of the RD 661 Regime. In its absence, Spain would never have been able to reach its RES targets under the European Union's 2001 and 2009 RES directives; the rate of investment prior to 2007 had been insufficient. Interestingly, Spain has more recently reintroduced financial support that resembles the RD 661 Regime in response to concerns that the New Regime introduced in 2013 is not sufficiently attractive to induce the investment necessary to meet Spain's long-term renewable targets.[28]

No overcompensation

According to the EAG 2001, financial support to RES should cover only the difference between the production costs of a RES installation and the wholesale electricity market price and, therefore, provide RES investors with a sufficient return to induce investment. The RD 661 FITs were explicitly designed to do just that.[29]

Spain designed the RD 661 FITs to permit a representative or 'standard' efficient installation to earn a target rate of return, which Spain deemed to be on average 7 to 9.5 per cent after tax and before financing, depending on RES technology.[30] The RD 661 Regime

26 Including other sectors, the target was for renewable energy sources to produce about 12 per cent of gross national energy consumption by 2010. See Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market (the 2001 EU Directive), Preamble and Article 3.4.

27 These targets included production from large hydroelectric power stations. The PER 2005–2010 recognised the need to define relevant measures to encourage renewable investors to meet the renewable target of 29.4 per cent defined by the 2001 EU Directive, p. L 283/39 (PER 2005–2010, p. 19). The projections developed by IDAE estimated that Spain would be able to source 30.3 per cent of electricity from renewable sources in 2010 (PER 2005–2010, p. 325).

28 Spain acknowledges that the New Regime has reduced the country's attractiveness to investors in renewable energy. To recover its attractiveness, in October 2018, Spain proclaimed the need to 'introduce stability to the New Regulatory Regime' and 'guarantee a long-term reasonable return'. In June 2020, it published RDL 23/2020, which recognised that Spain was at risk of failing to meet its renewable targets and needed a more 'stable' and 'predictable' remuneration system, in part to help new projects raise third-party loans. In November 2020, Spain responded by establishing a new auction system (the 2020 FIT Regime), which offers the winning bidders fixed FITs per MWh, applicable to all the MWhs produced by their winning projects, and which Spain commits not to change for between 12 and 15 years, depending on the type of plant. Like the RD 661 Regime, the 2020 FIT Regime works without any explicit estimate of a reasonable return and does not give Spain any discretion to change the remuneration of existing plants if it happens to change its opinion on a reasonable rate of return. See Agreement on the State General Budget, 11 October 2018, p. 36, RDL 23/2020 of 23 June 2020, Preamble and p. 6; RD 960/2020 of 3 November 2020, Preamble, Article 2, Article 19 and p. 19.

29 The EAG 2001 defined FIT schemes as 'Option 1' of granting operating aid. It also defined three other options. Members States could (1) choose among a range of market-based mechanisms under 'Option 2' (e.g., green certificates or tenders); (2) provide aid calculated on the basis of the external costs avoided under 'Option 3'; or (3) provide aid for a limited period of five years to promote waste management and energy savings. See EAG 2001, Section E.3.3.

30 The returns projected by Spain under the RD 661 Regime were for representative renewable plants or standard installations. Matching the estimated costs and performance levels of those installations would

included explicit caps and floors on total financial support ensuring that investors would not be overcompensated. As such, Spain explicitly designed the RD 661 Regime to offer sufficient investment returns, while at the same time avoiding overcompensation.

Around 2007 and afterwards, the Commission has routinely approved support schemes targeting project returns well in excess of the 7 to 9.5 per cent after tax targeted by Spain under the RD 661 Regime.[31] The Spanish regulator at the time (the National Energy Commission (CNE)) and the Institute for the Diversification and Saving of Energy (IDAE) assessed the reasonableness of the FITs per MWh under the RD 661 Regime before their implementation and concluded that they would not overcompensate. [32]

ii The Commission's 'preliminary doubts' are unfounded

The 2021 Preliminary Decision does not definitively conclude that the *Antin* award amounts to incompatible state aid under the EAG 2008 and the EEAG 2014; instead, the Commission expresses 'preliminary doubts'.[33] It believes that the *Antin* award does not benefit RES development,[34] does not provide an incentive effect,[35] overcompensates Antin[36] and unduly distorts competition and trade between Member States.[37] We analyse each issue below and consider the Commission's doubts to be unfounded.

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have produced a reasonable return, which Spain considered to be, on average, 7 per cent after-tax and before financing for photovoltaic (PV) and wind technologies. Spain's targeted return for more immature technologies lagging behind long-term RES targets, including concentrated solar power (CSP), was 9.5 per cent after taxes and before financing on average, with a minimum of 7.6 per cent and a maximum of 11 per cent (see Spanish Ministry of Industry, Commerce and Tourism, "The Government prioritizes profitability and stability in the new Royal Decree on renewable energy and combined heat and power", press release, 25 May 2007). A range is applied to the target internal rate of return because the project returns received by the standard installation would depend in part on the evolution of pool prices, subject to a floor and cap (see RD 661/2007, Preamble and Article 36). Spain allowed investors under the RD 661 Regime to earn above the targeted returns if they could outperform the standard installations.

31 For example, the Commission authorised a Slovenian scheme providing a 12 per cent return for RES installations in 2009 (see Commission, State Aid N 354/2009 – Slovenia: Support for production of electricity from renewable energy sources and in co-generation installations). The Commission proceeded to cite the Slovenian decision as the basis for approving a UK support scheme providing a 9 per cent return (see Commission, State Aid N 94/2010 – UK: Feed in tariffs to support the generation of renewable electricity from low carbon sources, Paragraph 86). In 2011, the Commission authorised a Finnish support scheme providing a 10 per cent return (see Commission, State Aid SA.31107 (11/N) – Finland: Tuki tuulivoimaan ja biokaasuun perustuvalle energiantuotannolle/ Driftstöd till elproduktion från vindkraft och biogas, Paragraph 34.) The authorised return levels comfortably exceed the after-tax project returns of 7 to 9.5 per cent on average targeted by Spain for PV, wind and CSP plants under the RD 661 Regime.

32 The Spanish regulator at the time, the CNE, published a report in February 2007 (the CNE Report 3/2007) assessing the support offered to PV, wind and hydro FITs under RD 661/2007. Jaume Margarit, the director of renewable energy at IDAE, developed a presentation in December 2007 assessing the profitability of CSP installations under RD 661/2007 (see IDAE, 'Economic Framework for the Development of Renewable Energy: Investment Cost, Returns and Incentives to the CSP industry', conference organised by the CNE regarding the actual development and evolution of renewable energy in Spain, Madrid, 11 December 2007).

33 2021 Preliminary Decision, Paragraph 94.

34 ibid., Sections 4.3.2.2.a and 4.3.2.3.a.

35 ibid., Sections 4.3.2.2.b and 4.3.2.3.b.

36 ibid., Sections 4.3.2.2.c and 4.3.2.3.c.

37 ibid., Sections 4.3.2.2.d and 4.3.2.3.d.

Development of RES

The 2021 Preliminary Decision argues that the *Antin* award does not benefit RES because:

a it only compensates for Antin's lost future cash flows without contributing to the development of RES;[38]

b it is paid to Antin, not the underlying RES facilities themselves;[39]

c Antin has already sold its interests in the underlying RES facilities and is no longer engaged in RES, such that the Commission cannot establish which economic activity the payment of the *Antin* award supports;[40] and

d the *Antin* award includes an allowance for production using gas under the RD 661 Regime even though gas is not RES.[41]

First, that the *Antin* award compensates Antin's lost future cash flows is irrelevant. The Commission recognises that the *Antin* award compensates Antin for the removal of support that the underlying RES facilities would have received under a continuation of the RD 661 Regime.[42] The *Antin* award, therefore, is tied to the expectations of financial support that motivated Antin's decision to invest in the underlying RES facilities in the first place.

Second, that awards are paid to investors (in this case Antin) and not to underlying RES installations reflects economic reality. Member States offer support to RES installations but understand that support ultimately benefits the investors who provide the necessary equity and debt financing to facilitate construction. In other words, the direct provision of FITs to RES facilities automatically results in the indirect provision of aid to investors such as Antin. Investment funds would never be forthcoming to RES if aid did not flow back up from RES projects to owners.

Third, Antin invested €139.5 million in 2011 expecting remuneration under the RD 661 Regime,[43] and sold its interests in 2017 for only €75.2 million, equivalent to a €64.3 million discount to the purchase price. The lower sale price reflected the lower prospective revenues of the underlying facilities after the withdrawal of the RD 661 FITs.[44] The *Antin* award is a compensation payment for the reduced sale value caused by the withdrawal of the RD 661 Regime and the resulting lost future cash flows to the underlying facilities.[45]

Fourth, Antin invested in CSP facilities that had the ability to generate electricity using natural gas, in addition to solar production. The use of natural gas improves efficiency, in part by maintaining the temperature of the heat transfer fluid and sufficient steam pressure in the turbine during periods of reduced sunlight. The financial support for production using natural gas formed one part of an overall package of financial support. When assessing investment, Antin and other investors would have considered the overall package of financial support and assessed whether it generated a sufficient investment return. In effect, Spain induced investment by setting the RD 661 FITs and extending their application to production using

38 ibid., Paragraph 109.

39 ibid., Paragraphs 111–12.

40 ibid., Paragraph 134. The Commission's analysis results in uncertainty for investors planning to sell an asset as the Commission seems to believe that arbitration awards to those investors cannot be compatible.

41 ibid., Paragraphs 113 and 135.

42 ibid., Paragraph 77. *Antin* award, Paragraphs 642–44 and 675.

43 ibid., Paragraph 47. We have reviewed Antin's initial investment models, which show that Antin expected to receive the RD 661/2007 FITs for their entire useful lifetime.

44 ibid., Paragraph 48. We have not seen the valuations underlying the sale of the Andasol plants.

45 ibid., Paragraph 109.

natural gas. If it had instead limited support to only CSP production using solar, then higher FITs would have been necessary to generate the targeted returns that Spain itself deemed necessary to induce investment.

Incentive effect

The EAG 2008 and the EEAG 2014 provide that compatible state aid should have an incentive effect in comparison to a counterfactual scenario without the aid.[46] Aid should cause a recipient to increase the level of environmental protection. The Commission doubts that the *Antin* award has an incentive effect,[47] but only because it assesses the incentive effect of the *Antin* award at the wrong point in time and in isolation from the RD 661 Regime.[48]

The Commission assesses the incentive effect at an assumed granting date of 2013 or 2018,[49] long after Antin and the other RES investors had undertaken investments and chosen between available RES technologies. Once built, RES investors can do nothing to change capital costs and the chosen technology. Operating costs are relatively fixed, given the technology adopted. Existing facilities cannot significantly reduce their high levelised costs in response to a withdrawal of support, even if successive generations of new plant can benefit from cost reductions and technology updates.[50]

The core incentive effect of any RES support scheme concerns the inducement of initial capital investment, rather than of production from an existing facility. The withdrawal of promised support and the prevention of a compensatory award would preclude Antin's underlying projects from covering their levelised costs and, as a result, condemn Antin to the loss of more than half its capital investment. Had Antin and other RES investors known

46 ibid., Paragraphs 115 and 138.

47 ibid., Sections 4.3.2.2.b and 4.3.2.3.b.

48 The Commission states that it is not able to assess whether the *Antin* award has an incentive effect because Spain has not submitted an '*ex ante* business plan', which renders the Commission unable to analyse the profitability of the Andasol plants with and without the aid. Instead, it states that 'the production of electricity by the Andasol plants remained largely comparable since their start of operation' (see 2021 Preliminary Decision, Paragraphs 139–140). So, presumably, the Commission believes that an incentive effect would exist if the assumed receipt of the award by Antin in 2018 should have incentivised the Andasol plants to change their production. We disagree with this reasoning. The New Regime removed production incentives from RES installations in general by providing capacity-based remuneration instead of remuneration per MWh of production, and from the Andasol plants in particular as they will no longer use gas to supplement their production and shut down before the end of their scheduled useful lifetime.

49 The Commission assesses the incentive effect of the *Antin* award as detached from the RD 661 Regime on the alternative assumptions that Antin received the aid entailed in the *Antin* award either in 2013, when Spain repealed the RD 661 Regime, or with the issuance of the award in 2018. There can be different legal interpretations of the correct granting date, but from an economic perspective the granting date should not determine the relevant date for the compatibility analysis.

50 The RD 661 Regime provided for periodic revisions of the FITs offered to generations of new plants to track the expected downward trend of industry LCOEs over time (see, e.g., RD 661/2007, Article 44.3). Spain could, therefore, address any emerging concerns about falling industry costs and overcompensation through periodic revisions in the FITs for new plants. At the same time, the RD 661 Regime did not envisage periodic revisions of the FITs for existing plants, effectively 'grandfathering' the remuneration levels to existing plants originally foreseen in the Original Scheme. Declines over time in industry LCOE levels and corresponding reductions in the remuneration for new plants do not imply the overcompensation of prior generations of existing plants.

that Spain would withdraw financial support once RES installations were completed, and that the Commission would impede compensatory awards on state aid grounds, they would have refused to invest in the RES installations that have helped Spain satisfy its RES targets.

These economic characteristics of RES highlight the need to assess the incentive effect of the *Antin* award (1) as a payment in lieu of withdrawn financial support and (2) as of the date when the withdrawn financial support was initially introduced. Had the Commission recognised the compensatory aspect and assumed a granting date of 2007, it would have concluded that the *Antin* award played a clear and obvious part in the inducement of additional RES capacity.[51]

The Commission's approach to the Antin award can be applied to the New Regime and would result in a finding at odds with the Commission's own prior assessment of the New Regime. In the 2017 decision, the Commission found that the New Regime was compatible aid, for which the applicable EAG 2008 or EAG 2014 guidelines require demonstration of an incentive effect. Following the Commission's approach to the Antin award would require us to adopt 2013 (the introduction of the New Regime) or 2017 (the date of notification and assessment) as the granting date of the aid. At that time, the relevant facilities were already operational, and the provision of further support was unlikely to impact production levels. Spanish wholesale electricity prices consistently exceeded the typical variable operating costs of wind installations, implying that wind installations would continue to operate without the need for any further financial support. The Commission nevertheless found the New Regime to be compatible aid, presuming an incentive effect that only exists if we look back to when the relevant RES investments were sunk.[52]

Antin not overcompensated

The 2021 Preliminary Decision observes that the Commission already authorised the New Regime, under which Spanish RES installations receive a 7.398 per cent pre-tax return for the first regulatory period (2014 to 2019), and 7.09 per cent for the second period (2020 to 2025) onwards. The Commission claims that the *Antin* award is disproportionate[53] because it would increase the return of Antin's facilities above those authorised in the 2017 Decision.[54]

The 2017 Decision does not provide that the New Regime represents a maximum in the sense that the Commission can never authorise any further aid over and above what the

51 See 'Development of economic activity and incentive effect' under Section III.i.

52 The same argument applies to other RES technologies, such as CSP and PV. CSP and PV installations would continue to operate in the absence of the provision of the investment incentive per MW installed that was granted under the New Regime, as long as the operating incentive per MWh produced is high enough to cover the difference between the operating costs of the installations and the wholesale market price. Once built, the production of the renewable installations is relatively independent on the level of financial support: solar and wind installations will generate electricity as long as the sun shines and the wind blows. Yet, under the New Regime, CSP and PV installations are granted both the investment incentive and the operating incentive; therefore, under the Commission's own reasoning in relation to the *Antin* award, the financial support to CSP and PV under the New Regime has no incentive effect. Nevertheless, the Commission has authorised the New Regime.

53 2021 Preliminary Decision, Paragraph 126.

54 ibid., Paragraphs 123–24.

2017 Decision already authorised.[55] It would, therefore, be incorrect to automatically assume that higher financial support under the RD 661 Regime, which is then compensated in the *Antin* award, resulted in overcompensation.

In 2013, Spain unilaterally reduced its own opinion of what constitutes a reasonable return. It did so after major RES investments had been induced and committed, in effect attributing a reduction in Eurozone interest rates that occurred after 2012 to investments that occurred before.[56] In 2013, Spain reduced the target return for CSP installations from 9.5 per cent on average after taxes under the RD 661 Regime to 7.398 per cent before taxes, equivalent to less than 6 per cent after taxes, under the New Regime. Investors are unlikely to have accepted a reduced return of less than 6 per cent after taxes prior to 2013, before their commitment of investment, not least because Eurozone interest rates were higher than afterwards. In other words, additional remuneration compared to the New Regime was needed to induce RES investment in the first place, and compensation for the withdrawal of these additional amounts does not result in overcompensation. The resulting investment returns remain far below those authorised by the Commission elsewhere.

The *Antin* award does not fully compensate Antin for the withdrawal of the RD 661 FITs.[57] The financial support under the New Regime plus the *Antin* award is inherently lower than the support that would have arisen under the RD 661 Regime because of the tribunal's liability findings.[58] If the RD 661 Regime did not overcompensate, then the *Antin* award (plus the support granted under the New Regime) cannot do so either.

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55 Paragraph 120 of the 2017 Decision merely confirmed that the financial support that RES plants receive under the New Regime does not entail overcompensation.

56 In 2009, Luis Jesús Sánchez de Tembleque said that allegations of 'excessive remuneration' under FIT regimes similar to RD 661/2007 are 'unfounded and the alternatives imply more drawbacks that benefits' (authors' translation, see Gonzalo Sáenz de Mieraand Luis Jesús Sánchez de Tembleque, 'La regulación de las energías renovables' in Fernando Becker Zuazua, Luis María Cazorla Prieto, Julián Martínez-Simancas Sánchez and José Manuel Sala Arquer (eds.), *Tratado de regulación del sector eléctrico*, Vol. 2, Thomson Reuters Aranzadi, 2009, p. 547).

57 This is because the *Antin* tribunal did not consider Spain liable for all the claims that Antin raised in the proceedings and, therefore, for the entire extent of the removal of the financial support under the RD 661 Regime. For instance, (1) the award does not include damages arising prior to June 2014, although the New Regime already affected the Andasol plants as early as 2012; and (2) the award considers a 25-year useful lifetime for the Andasol plants, although the RD 661 Regime would have provided financial support throughout an extended 40-year lifetime (see *Antin* award, Paragraphs 667 and 714). In theory, an award could also provide a return that exceeds the return envisioned under the RD 661 Regime. It would not be correct to infer that such an award provides overcompensation without further analysis. For instance, macroeconomic developments that have occurred between the introduction of the regulatory regime and the assessment of damages, such as decreasing interest, can affect awards. Lower interest rates imply lower discount rates and tend to increase damages.

58 The 2021 Preliminary Decision shows that the Andasol plants would stand to earn returns of 9 per cent to 9.2 per cent, including interest, after receiving the *Antin* award. The returns are below Spain's targeted return for CSP plants under the RD 661 Regime (see 'No overcompensation' in Section III.i), which, in view of the Commission having authorised returns in excess of the RD 661 Regime, reaffirms that the *Antin* award is proportionate (see 2021 Preliminary Decision, Table 4).

Undue distortions of competition and trade

The 2021 Preliminary Decision claims that the *Antin* award may unduly distort competition and trade between Member States because it compensates 'one sole investor'.[59] All RES investors will receive the financial support provided by the New Regime; only some investors (by definition, foreigners) would receive an award, even if they initiated arbitration proceedings.[60]

We recognise this result but do not consider it a good reason to preclude the payment of the *Antin* award, or arbitration awards in general. If the Commission is concerned about creating a level playing field between RES investors, the answer would be to compensate all investors under the RD 661 Regime that have suffered because of its withdrawal. These investors were induced to invest by Spain and the promise of the RD 661 Regime, and locked in technology and financing, only to now receive far lower support and returns than they required to invest in the first place.

This point aside, the 2021 Preliminary Decision creates an inconsistent assessment framework that, by design, cannot find state aid compatibility. The Commission both requires an incentive effect and no undue distortion of competition and trade. The Spanish RES cases fulfil both requirements: the RD 661 Regime attracted significant RES capacity,[61] and the *Antin* award is a one-off payment that does not distort competition.[62] The Commission effectively reverses this logic to find that the *Antin* award has no incentive effect, while still causing an undue distortion of competition.

The Commission believes the *Antin* award 'confers on Antin an additional benefit to that received by its competitors'.[63] The Commission recognises that the payment of an award would not 'induce additional activity of Antin . . . a private equity investor which does not operate directly in the electricity market'.[64] Moreover, 'the Commission has doubts that the aid has an incentive effect and is necessary in order to develop the economic activity of producing electricity from renewable sources'.[65] If the award will neither affect Antin's investment behaviour nor change the production of electricity, it is difficult to see how the award could unduly distort competition and trade. It is inconsistent for the Commission to claim simultaneously the absence of an incentive effect and an undue distortion of competition.

59 2021 Preliminary Decision, Paragraph 129, Paragraph 151.

60 ibid., Paragraphs 129–130 and 151–52.

61 The 2021 Preliminary Decision does not recognize that the RD 661 Regime solved a market failure by attracting significant RES capacity, as we discuss above. The 2021 Preliminary Decision merely states that Spain has not demonstrated the market failure that the RD 661 Regime addressed (see 2021 Preliminary Decision, Paragraph 137). But Spain has no incentive to provide this analysis faced with the significant awards to RES investors.

62 For additional details, see Carlos Lapuerta and Richard Caldwell, 'Damages in Competition/Antitrust Arbitrations' in John A Trenor (ed.), *The Guide to Damages in International Arbitration*, 1sr edn., Law Business Research Ltd, 2016; Carlos Lapuerta and Jack Stirzaker, 'EU state aid as a Ground for Non-Enforcement of Arbitral Awards' in Crina Baltag and Ana Stanic (eds.), *The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court*, Kluwer Law International, 2020.

63 2021 Preliminary Decision, Paragraph 129.

64 ibid., Paragraphs 110–11.

65 ibid., Paragraph 118.

Arbitration awards can give strong support to competition policy as they typically involve one-off payments. If a Spanish RES investor receives a lump-sum award and knows that the continuing operations of its plants will not attract any ongoing support under the RD 661 Regime, the investor will behave as if the RD 661 Regime no longer exists while receiving full compensation for its withdrawal.[66] In contrast, the Commission claims that EEAG 2014 requires aid to be granted in the form of a per MWh premium to the market price. The Commission states that the *Antin* award is not compatible with this criterion.[67] It does not recognise the inherent tension between providing a per MWh incentive to produce and a focus on avoiding competition concerns.

IV THE COMMISSION'S REASONING HAS WIDER IMPLICATIONS

In theory, the Commission's reasoning in relation to the *Antin* award could be generalised to any arbitration award provided as compensation for the removal or reduction of any RES incentive scheme. Suppose a Member State established a support scheme to induce investors to fund additional RES capacity. The incentive scheme covers the excess of levelised costs of RES over electricity market prices; otherwise, investors could not obtain a reasonable investment return, RES investment would not come forward, and environmental goals could not be attained.

Suppose next that the incentive scheme was successful in attracting significant RES capacity, but that macroeconomic circumstances subsequently changed and that political pressures emerged for a Member State to reduce the electricity costs paid by households and businesses. Suppose further that a Member State responded to those pressures and withdrew or reduced the promised support to existing RES capacity. Existing RES plants would continue producing electricity and collecting revenues rather than shut down; however, the reduction or removal of support would leave RES investors unable to recover their historical investment costs.

The Commission's logic in relation to the *Antin* award would rule out any compensation to RES investors on the basis that, by itself, a compensatory arbitral award (or even compensation granted by a national court) would be unlikely to alter the production of the affected RES capacity.

The problem is that subsequent investors would anticipate the Commission's reasoning, and anticipate that no compensatory award would be available should another Member State reduce or remove promised financial support in response to political pressure. At a minimum, this anticipation would increase the costs of the necessary support to induce further RES investment. It could even reduce the willingness of some investors to come forward at all. Either way, it would harm Europe's ability to attain its environmental targets.

The Commission's assessment of the *Antin* award at the assumed granting date of the award – long after Spain's introduction of the RD 661 Regime – will create regulatory uncertainty for Member States and investors in any subsidised industry. Market participants can no longer be certain that the Commission will not reassess a subsidy scheme after its granting date. In other words, the *ex post* compatibility analysis in the 2021 Preliminary Decision creates a precedent for the Commission to reanalyse past RES support schemes

66 For additional details see Lapuerta and Caldwell, p. 356.

67 2021 Preliminary Decision, Paragraph 143. The Commission disregards that the RD 661 Regime fulfilled this criterion by providing a per MWh FIT as a premium to the market price.

if Member States did not notify them as state aid and retroactively refuse the aid, after concluding the absence of an incentive effect. This creates uncertainty for capital-intensive projects that rely on long-lived support such as RES.

When evaluating any subsequent Member State promise of financial support, RES investors will rationally factor the potential for adverse outcomes, where support is reduced or removed *ex post* without the possibility of a compensatory award. The rational investor response would be to raise the applicable discount rate on any RES investment, effectively requiring Member States to raise support levels to provide effective *ex ante* compensation for the risks of an *ex post* reduction in support without compensation. The increased costs of investment would require Member States to increase incentives or risk attracting less investment, all else being equal.

The Commission, therefore, is incorrect to conclude that the *Antin* award does not benefit RES, even disregarding the significant incentive effect of the RD 661 Regime. Payment of the *Antin* award provides an important signalling effect to prospective RES investors. It would signal (1) that Spain is willing to comply with its obligations under the ECT and (2) that the Commission will not stand in the way of investors receiving compensation for the withdrawal of support that would have been deemed compatible at the time it was granted. Increased legal certainty implies that investors will demand lower returns to develop RES in future, in Spain and other Member States, and, in the end lower, costs to consumers.