



Defending against state interventions in energy related investments

2017.05.18 Riga/Latvia/AIJA HJ-Conference

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Agenda

- I. Thread to investments caused by state intervention
- II. Defense and counter-attack – investors' arsenal
- III. BIT and ECT-Arbitration proceedings
- IV. EC law
- V. Tactical approach

Interventions by EU member states

- Bulgaria
- Greece
- Italy
- Poland
- Rumania
- Czech Republik
- Spain

– in particular PV;
– Reduction of feed-in-tarif system

– in particular PV;
– e.g.: 26% tax on PV systems, 500% higher fees on land use

– in particular PV;
– e.g. changes of subsidy system, higher taxes (more than 200kW)

– in particular wind energy;
– distance criterion (wind farms);
– higher property tax

– hydropower plants, windturbines, PV systems affected;
– e.g. reduction of subsidy system (green certificates)

– in particular PV and wind energy;
– e.g. reduction of feed-in, charges (power grid access etc.)

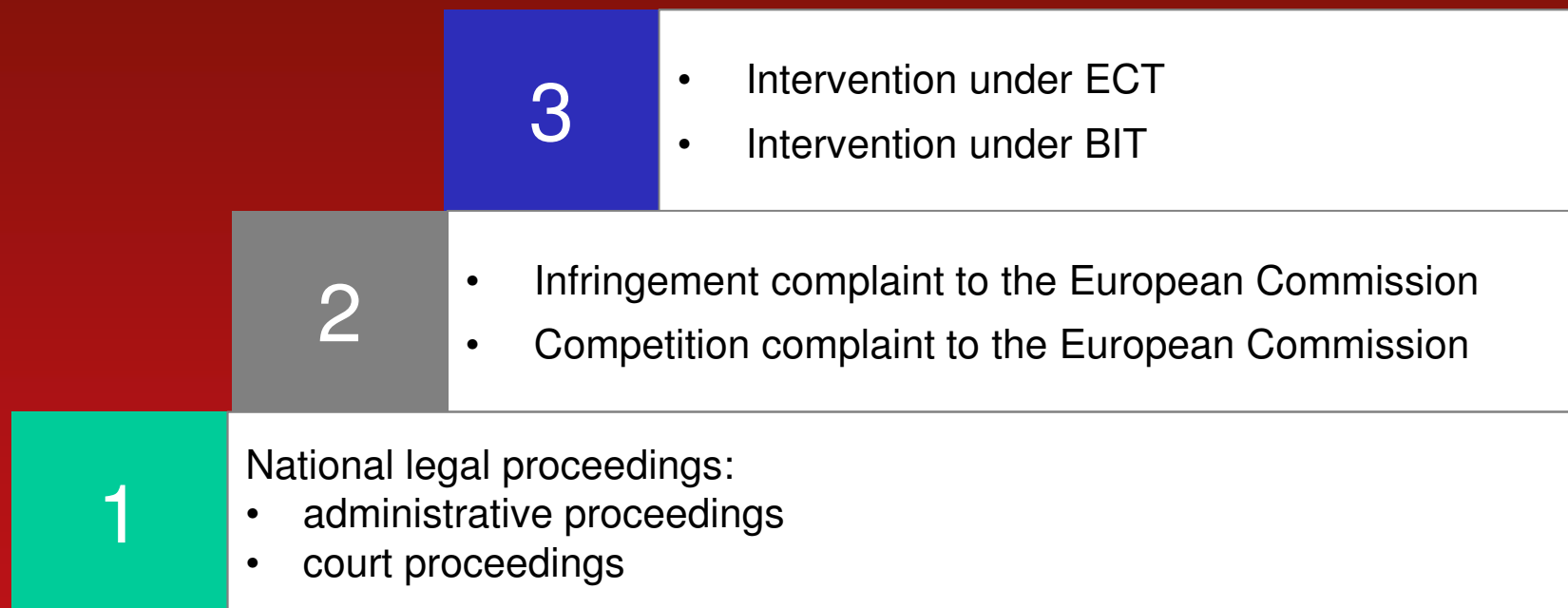
– in particular PV;
– e.g. 25-30% tax on income by PV systems

War story: „In the line of fire“

- Alleged failure of the free market/consumer damage
- Political reaction:
 - Abolishment of subsidy programs (with retroactive effect)
 - Need to establish a de facto state monopoly/state control over energy market
- Use of coordinated measures on various levels:
 - Withdrawal of permits and guarantees/feed-in tariffs/certificates etc.
 - Priority or exclusivity for state-controlled companies/cooperative constraint (e.g. at least 51% state participation) for strategically important projects
 - Different price calculation methods/unfair competition conditions in energy auctions for independent and state-controlled producers
 - Direct state aid to the state-controlled producers
- Result: Losses of/damages on investments made

Possible legal protection measures

II



International law: BIT/ECT

Legal basis

- Bilateral Investment Treaty between the home state and the defendant state
- Energy Charter Treaty

Elements of the infringement

- Protection against discriminatory interference, Art. 2 Bilateral Investment Treaty
- Obligation to work to alleviate restrictions of competition, Article 10 of the Energy Charter Treaty

First steps in arbitration proceedings

„Trigger letter“
„Cooling-off period“ (3-6 months)
[e.g. Art. 11 BIT/26 ECT]



Filing of a detailed and precise application; the claimant additionally submits one or more pleadings



After examination of the application:
Appointment of an arbitration tribunal



Meeting with the chairman of the arbitration tribunal to address the first questions in the proceedings (e.g. language of the proceedings)



Commission complaint



Involvement of the Commission as the "Guardian of the Treaties"

Possible consequences of filing a complaint with the Commission

- Reprimand by the Commission for an infringement of the treaty
- Demand to repair the infringement

Requirements: Complaints to the European Commission

- No specific form and deadlines for informing the EC of an infringement of a treaty
- Procedure is not explicitly regulated in the EU treaties
- To expedite the procedure, active steps should be taken by the complainant
- A thorough preparation of information about the case and presentation of precise evidence to substantiate the infringement will simplify the EC's examination and can further accelerate the procedure

Overview EC primary / secondary law IV

Primary law

- Fundamental freedoms, in particular the prohibition of state monopolies, Article 37 TFEU, and freedom to provide services, Article 56 TFEU
- Prohibition of cartels, Article 101 TFEU
- Prohibition of abuse, Article 102 TFEU
- Prohibition of state aid, Article 107 TFEU



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Other grounds (examples)

Directive on energy end-use efficiency and energy services 2006/32/EC (EES-Direktive)

- a. General prohibition of activities that hinder the development of markets for energy services, Art.6 (1) EES-Direktive
- b. Obligation to ensure equal and fair treatment of energy service providers, Art.6 (3) EES-Direktive

Renewable energy resources directive 2009/28/EC (RES-Direktive)

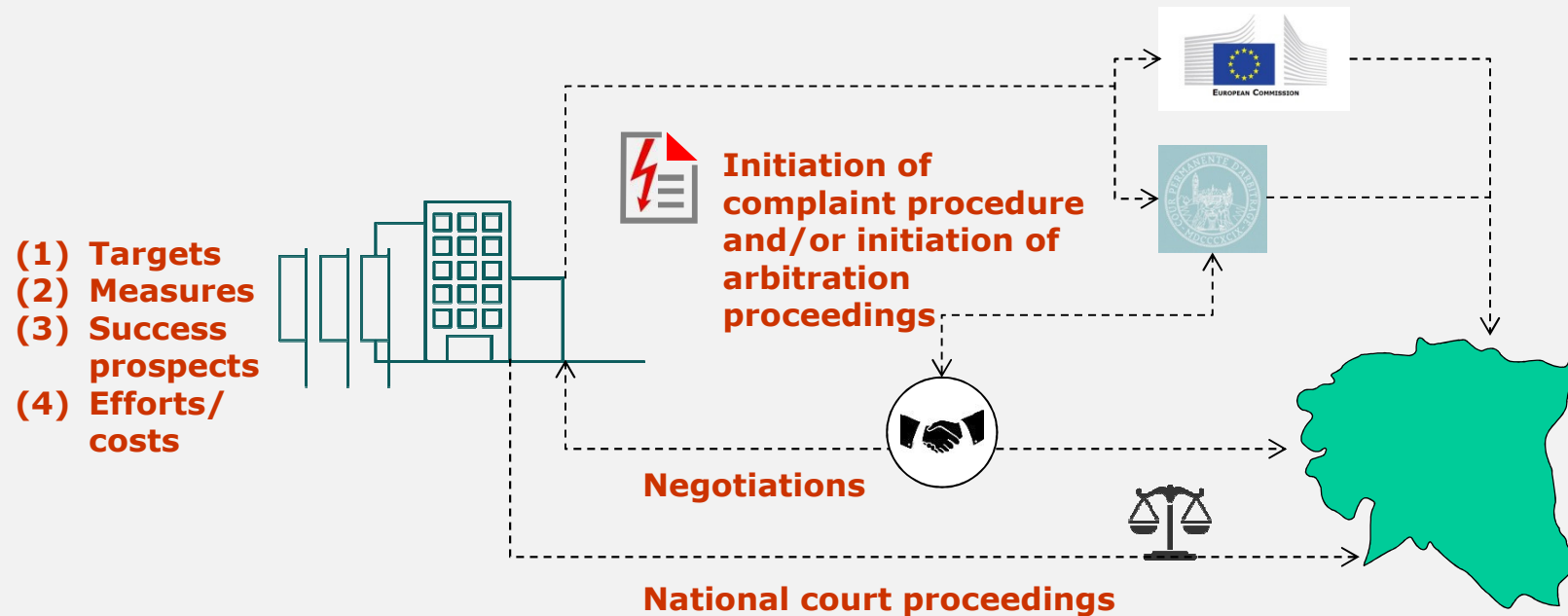
- Prohibition of discrimination in authorisation and licensing procedures, Art. 13 (1) (d) RES-Direktive

Cogeneration directive 2004/8/EC (C-Direktive)

- Prohibition of discrimination in administrative procedures, Art. 9 (1) (d) C-Direktive

Tactical approach

V



Primary target: Causing a favorable negotiating position for an out-of-court settlement

Secondary target: court decision/arbitration award or settlement agreement

Thank you

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