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Open Markets and Supply Security

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Foreign State-owned or State-controlled companies and funds currently dispose over brimming war chests – ready to invest in and to acquire enterprises in European core sectors. Commentators and politicians are drawing pictures of foreign State companies controlling sensitive national sectors such as energy and gas supply, food, telecommunication, railways, strategic high-technology industries (e.g. EADS) or banks, potentially endangering national (supply) security and triggering an enormous know-how drain.

Distressed by this prospect, several EU Member States are currently considering new restrictions on the acquisition of core national industries by foreign stakeholders. Though, the imposition of new restrictions on the free movement of capital is subject to (legally binding) constraints both under International and European law. Both legal systems, nevertheless, provide for options and opportunities for States to comply with their genuine task of State supervision.

This contribution is a plea for making effective use of State executive power, including measures of expropriation, instead of questioning the system of open and contestable markets.

A. Open Markets for Capital

Globalisation and the worldwide integration of markets for goods, services and capital (and work?) are not only construed to be historical, political or economical phenomena. Globalisation has equally legal dimensions regarding both national and international law. One of the landmark data in this respect is certainly the foundation of the *World Trade Organization, WTO,* at the end of the so-called *Uruguay Round* reforming the then already existing *General Agreement on Tariffs and Trade, GATT,* of 1948.[1] The WTO legal system not only provides for rules on the trade in goods and services, but was also intended to be a tool for opening the national markets to foreign capital (see below I.). The integration of capital markets is, however, already further advanced amongst the Western industrial States assembled within the *Organization for Economic Co-operation and Development, OECD*.[2] Unnoticed to a large extent by the public, the OECD disposes over the most comprehensive and ambitious framework of investment liberalization mechanisms of all international organizations (see below II.). Still more ambitiously, the *EC Treaty* since 1993 calls for a free movement of capital within the EU *and* with third countries. National legislation and administration is subject to the control both of the *European Commission* and the *European Court of Justice, ECJ*. ECJ jurisprudence sets tight limits for tying up liberty for investments. Though, under certain circumstances such restrictions may be justified for reasons of public security and *"on the basis of objective criteria which are subject to judicial review"* (see below III.).

I. World Trade Organization (WTO)

The WTO legal framework is made up by several multilateral agreements primarily dealing with the free movement of goods (*GATT*) and of services (*General Agreement on the Trade in Services, GATS*). As of today, there is no single multilateral agreement within the WTO framework dealing

[1] World Trade Organization, founded in 1994 in Marrakech/Morocco; founding agreement entered into force on 1st January 1995. WTO has its seat in Geneva/Switzerland.
[2] Organization for Economic Co-operation and Development, founded as *Organization for European Economic Co-operation, OEEC,* in 1948, newly founded in 1960, today 30 Member States, including most EU members, USA, Canada, Mexico, Japan and Korea.

exclusively with the trade of capital and the liberalization of capital movements. However, the GATS also contains investment-relevant provisions, since the liberalization programme of the GATS is also applicable to the supply of a service *"by a service supplier of one Member, through commercial presence in the territory of any other Member"* (*Art I para 2 lit c GATS*).[3] Such *"commercial presence"* necessitates either the ownership in such a company (i.e. the disposition over more than 50% of the equity interest) or the control over it (meaning the power to name the majority of its directors).[4] The acquisition of a national utility supplier by a foreign company (no matter if State-owned or privately owned) would, therefore, generally be covered by the GATS.

Liberalization according to the GATS means, generally speaking,

- Most-Favoured Nation Treatment (cf. *Art II para 1 GATS)*[5],
- National Treatment (cf. *Art XVII para 1*)[6], and
- Market Access (*Art XVI para 1)*[7].

The obligation to grant Most-Favoured Nation (MFN) treatment applies to all kinds and categories of services, however a Member State may maintain a measure being inconsistent with the MFN obligation by listing an *"exemption"* with the WTO. Furthermore, and most importantly for the EU Member States, a Member State who is also member of an organization of regional economic integration

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[3] *"Commercial presence"* is defined as *"any type of business or professional establishment, including through*

> *(i) the constitution, acquisition or maintenance of a juridical person, or*
> *(ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service"* (cf. Art XXVIII lit d).

[4] *"A juridical person is:*

> *(i) "owned" by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member;*
> *(ii) "controlled" by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions […]"* (cf. Art XXVIII lit n).

[5] *"With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."*

[6] *"In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."*

[7] *"Each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule."*

(*“REIO”*) is not obliged to grant the preferential treatment accorded to other REIO-members to all other WTO Member States (cf. *Art V GATS*).

Whereas MFN treatment has generally be accorded to all kinds of services provided by foreign services suppliers, National Treatment and Market Access only have to be granted if a Member State has scheduled so-called *“specific commitments”* with the WTO. These commitments can be reduced both to a certain service sector/sub-sector and to a certain mode of supply.

Even if Member States have scheduled specific commitments and refrained from listing exemptions they still have the general right to withdraw such liberalization if this is necessary to *“maintain public order”* or *“protect human health”* (*Art XIV*).[8] Though, if a Member State fails to comply with its obligations under WTO law, any other Member can start a panel procedure against this Member. If the WTO panel finally holds that the Member State has violated WTO law, all the other Member States might be entitled to so-called “cross retaliations” against this Member depriving it of potential trade advantages deriving from the violation.

Summing up, GATS liberalization thus adheres to the so-called *‘bottom-up approach’* using positive lists where Member States explicitly have to declare which sectors they want to liberalize. The liberalization obligations are therefore rather smooth – which has induced a commentator to taste a certain *“à la carte flavour”* with GATS.[9] So countries which do not want their national services market to be exposed to foreign investors are not obliged to grant Market Access in any service sector under WTO law. EU Member States have however by now filed far-reaching specific commitments to all sectors, though indicating that *“public utilities at a local or national level may be subject to public monopolies or to exclusive rights granted to private operators.”*

[8] *“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:*

(a) necessary to protect public morals or to maintain public order;

(b) necessary to protect human, animal or plant life or health.”

A footnote to Art XIV stipulates that *“the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society“*.

[9] *Sauvé, Pierre: Services and the international contestability of markets,* in: Transnational Corporations 5 (1996 I), p. 37, 43.

GATS originally also provided for a built-in agenda envisaging the progressive reduction of obstacles to a free world-wide market for services in several negotiation rounds. Though, after the enormous effort of bringing the Uruguay-Round to a success in 1995, the general interest in further liberalization steps seems to have diminished. In the present Doha-Round (since 2001) development issues have come to the fore, almost completely eclipsing service and investment issues.

II. Organization for Economic Co-operation and Development (OECD)

On an international scale, the OECD disposes over the most comprehensive and ambitious framework of investment liberalization mechanisms. Especially, the (binding) Code of Liberalization of Capital Movement of 1959, being periodically amended, is now covering all kinds of direct investment in all sectors.[10] *Art 1* is obliging the Member States to *"progressively abolish between one another [...] restrictions on movements of capital to the extent necessary for effective economic co-operation."* According to *Art 2* this means that *"Members shall grant any authorisation required for the conclusion or execution of transactions and for transfers"* specified in an item set out in the annex. This annex lists foreign direct investment (FDI)[11] and various forms of portfolio investments without differentiating between service or industry sectors. Consequentially, under the OECD Code on Capital Movement, signatories are obliged to grant free access for foreign investors originating from other OECD countries to their national markets, also for investment in core or supply industries. As under all international economic conventions, OECD Member States are allowed to lodge reservations for certain sectors on national lists ("negative lists", top-down approach), but after several rounds of negotiations these national lists are already rather short by now. Once a Member State has withdrawn a certain reservation it is inhibited from lodging it anew (so-called "ratchet rule", cf. *Art 2 lit b OECD Code*).

[10] For further information, see *Organization for Economic Co-operation and Development (OECD, ed.), Code of Liberalization of Capital Movements,* 2007.

[11] Within the meaning of the Code is defined as *"Investment for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof"* (Cf. Annex D, No. I).

Among the OECD Member States, the acquisition of essential public utilities or even banks by foreign companies is thus permitted and must not be restricted. As with GATS, Member States are nevertheless allowed to take any necessary measures for maintaining public order or protecting public health.[12]

Contrary to WTO law, the OECD Code does not provide for an executive mechanism or a strong body supervising the compliance with these rules. As is generally the case with the OECD, the compliance with the obligations deriving from the Capital Code is primarily worked out with mere peer pressure.

So if an OECD Member State wanted to restrict the free movement of capital to and from other OECD Members, the OECD and its Member States could very well table this issue with one of the regular consultation rounds, but would not have any legal means to prevent this Member from doing so except for exercising political pressure. As from a lawyer's point view, it is of course regrettable that there is no court or other institution which might be competent to further clarify the degree of liberalization due under the Code and to define what exactly is covered by "necessary measures for maintaining public order".

III. European Union (EU)

This is different under European law where both the European Commission, being the guardian of the European treaties, and the European Court of Justice, are two extremely efficient bodies ruling over the compliance of the Member States with all rules as laid down in the European treaties and the EU secondary law (made up by regulations, directives and decisions).

EU law provides for the most ambitious and effective investment liberalization rules. The last step towards today's open market for capital from all over the world was the *Treaty of Maastricht* of 7 February 1992, entering into force on 1st January 1993, anchoring the *Free Movement of Capital* in the *Treaty Establishing the European Community (ECT).* This was also the last – and most consequen-

[12] Cf. *Art. 3:* "The provisions of this Code shall not prevent a Member from taking action which it considers necessary for: i) the maintenance of public order or the protection of public health, morals and safety; […]"

tial – element of the realization of the European Single Market (ESM) as envisaged in the Single European Act of 1986. In the ESM, the movement of goods, workers, service and capital must not be subject to any legal or administrative constraint.

The pivotal provision of the free movement of capital is to be found in *Art 56 ECT* which reads: *"Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited."* The ECT, consequentially, calls for a liberalization of the capital streams both within the EU but also vis-à-vis non-EU members. Third States are thus profiting from the *acquis communautaire* without granting the same preferences to capital originating from the EU (no reciprocity requirement). According to *Art 57 ECT,* EU Member States may uphold such restrictions against non-EU members that were already in place on 31 December 1993. However, following the introduction of the rules on the free movement of capital, EU Member States have widely abandoned a great part of their existing capital controls and restrictions. New EU members are granted a certain transition period in which they have time to adapt their national legislation to the EU rules.

Since 1993, the European Court of Justice (ECJ) has further outlined this "youngest" fundamental freedom. Although the ECJ has, by now, not defined what has to be construed as a *"restriction"* to capital movement, the Court has nevertheless recognised that deviations from the free movement of capital may generally be rectified by overriding requirements of the general interest if they are applied on a non-discriminatory basis.[13] These restrictions are, nevertheless, only allowed if they are in an appropriate relation to the objective of the measure. The ECJ has thus applied the so-called "Cassis-formula" developed for restriction of the free movement of goods to the free movement of capital.[14]

In spite of all obligations to open national markets to foreign capital, EU Member States have constantly tried to uphold or to establish safeguards, especially for their national energy sector. Upon application of the European Commission, the ECJ has issued several decisions in this regard of which two will be further analyzed below.

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[13] ECJ, Case C-148/91, *"Veronica",* Rec. 1993, p. 487; Case C-35/98, *"Verkooijen",* Rec. 2000, p. I-4071.

[14] ECJ, Case 120/78, *"Cassis de Dijon"*, Rec. 1979, p. 649.

1. Commission ./. Belgium, Case C-503/99

A Belgian decree of 1994 stipulated: *"On the day on which the shares currently held by the State […] are actually transferred to one or more natural legal persons in the private sector, the [company] shall assign one share in the capital of the 'Société nationale de transport de canalisation' to the State."* The identical provision to this was found in a second decree vesting the Belgian State with a golden share in the "*Société de distribution de gaz (Distrigaz)"*. According to both decrees, this golden share *"shall confer on the Minister the right to oppose any transfer, use as security or change in the intended destination of the [companies'] system of lines and conduits which are used or are capable of being used as major infrastructures for the domestic conveyance of energy products, if the Minister considers that the operation in question adversely affects the national interest in the energy sector."*

The ECL ruled that the said measure vesting the Belgian State with such Golden Shares was to be regarded as a restriction on the free movement of capital and went on analysing whether this restriction might be justified:

> *"Free movement of capital, as a fundamental principle of the Treaty, may be restricted only by national rules which are justified by […]* ***overriding requirements of the general interest*** *and which are* ***applicable to all persons and undertakings*** *pursuing an activity in the territory of the host Member State. Furthermore, in order to be so justified, the national legislation must be* ***suitable for securing the objective*** *which it pursues* ***and must not go beyond what is necessary*** *in order to attain it, so as to accord with the principle of proportionality."*

According to the ECJ it thus needed for a restriction of the free movement of capital to be justified:

- An overriding requirement of the general interest,
- Applicable on a non-discriminatory basis,
- With the restriction being suitable for securing the requirement of general interest
- And not going beyond what is necessary in order to achieve it.

The ECJ ruled that the safeguarding of a country's energy supplies constituted an overriding requirement of the general interest which was here also applied on a non-discriminatory basis. The ECJ underlined that the exercise of control by the minister required an initiative on the part of the government authorities and that no prior approval for any transfer or change in the intended destination of the said system of lines and conduits was needed. The decision of the Minister was to be taken on the basis of objective criteria (threat that the objectives of the energy policy might be compromised) which were subject to judicial review.

The ECJ concluded that *"the scheme therefore makes it possible to guarantee [...] the effective availability of the lines and conduits providing the main infrastructure for the domestic conveyance and storage of gas [...]. The legislation in issue is therefore justified by the objective of guaranteeing energy supplies in the event of a crisis."*

2. Commission ./. Italy, Case C-174/04

An Italian decree-law of 2001 stipulated:

> *"[...] in the case of legal persons controlled directly or indirectly by a State or by other public authorities and a enjoying dominant position in their domestic markets and not quoted on regulated financial markets, which acquire directly or indirectly [...] holdings in excess of 2% in the capital of companies operating in the [electricity and gas] sectors, [...] the grant or the transfer of authorization or concession measures [...] shall be subject to the conditions set out in [...]."*

If the said limit of 2% was exceeded, from the time of the grant of the authorizations, the voting rights attached to the shares in excess of that limit were to be automatically suspended. Italy contended that the suspension of voting rights was designed to prevent the efforts of the Italian authorities to open up the energy sector to competition from being negated.

The ECJ ruled that the said measure was construed to be a restriction of the free movement of capital since it made the acquisition of shares of companies in the energy and gas sector less attractive. The

court went on stating that an interest in generally strengthening the competitive structure of a certain market could not constitute valid justification for restrictions on the free movement of capital. With a view to the above mentioned case law (Commission ./. Belgium) the Court confirmed that the safe-guard of energy supplies may justify restrictions of fundamental freedoms. The limitation of voting rights could, though, not be regarded to be necessary in order to attain this object.

Summing up, ECJ jurisprudence indeed recognizes that the free movement of capital may be restricted in an effort to guarantee a secure supply with energy. But the limits the ECJ sets for tying up liberty for investments are tight. Generally spoken, clauses providing for an automatism and setting precise thresholds for foreign investments cannot be regarded a justified restriction. In contrast, provisions vesting authorities with a (retroactive) right to contradict certain entrepreneurial measures which is subject to judicial review might be justified under European law, although being obstacles for the free flow of capital.

B. Guaranteeing Supply Security

According to press information, non-EU State funds currently dispose over an enormous war chest ready to invest into the European core industries. Chinese funds are said to have collected some 200 billion Euros, Russians more that 120 billion, both still far behind the United Arab Emirates State fund with the incredible amount of 875 billion Euros.[15] The investment of a Russian State-owned bank in the European aviation and space concern EADS was discredited in public to such an extent that the bank now will withdraw from this investment and start a close cooperation with the US Boeing. When Gazprom showed interest in investing in European, especially German, energy suppliers and their grid, the reaction of the public opinion was likewise rather cold – some commentators speaking of a Russian threat rather than of a "Russian challenge".[16] There were also some representatives from the pri-

[15] *Marc Brost, Angst vorm Chinesen,* in: DIE ZEIT, No. 29/2007.
[16] *Julija Timoschenko, Die russische Herausforderung,* in: DIE ZEIT, No. 48/2006.

vate sector asking for more State invention and protection from certain State-controlled investors warning of the national infrastructure falling prey to foreign governments.

Under this pressure European governments – and the European Commission – seemingly felt obliged to take new measures restricting the possibility of foreign capital to invest in certain national industries.

I. New national restrictions on capital movements

When in 2005 the US giant PepsiCo showed interest in acquiring the majority of the French food company Danone, the then French Prime Minster *Dominique de Villepin* proclaimed a new era of *"patriotisme économique"* and announced some new legislative measures designed to secure several industry sectors of national interest against the appetite of foreign investors. After the latest amendments of the French Monetary and Financial Code[17] in 2004, foreign investment in certain sectors could be made subject to the prior approval of the French Minister for Economics (Art L 151-3). The investment was to be regarded null and void if the foreign investors failed to ask for such authorization before making the investment. The French Minister for Economics was entitled to issue a list containing all sectors which were meant to be subject to such protection. After the announcement of the Prime Minister, according to rumours, the French government wanted to extend these rules to the national food industry and other fourteen core sectors of superior national interest. When the plans of the French government on extending these rules to fifteen economic sectors became public, the European Commission immediately and unequivocally reminded the French government that such prior approval condition was against European law and that the government should respect the free movement of capital.

Finally, the French Minister for Economics issued the expected list in December 2005 containing only investments in national defence activities and – rather strangely – gambling services for which the prior approval of the authorities was required. Measured to the above mentioned ECJ jurisprudence,

[17] Code Monétaire et Financier, amended by law of 01/08/2003 and of 09/12/2004.

the French constraints as originally announced would have been clearly contrary to European law. Especially, the categorical exclusion of certain sectors from the freedom of capital movements would have been undoubtedly exceeding the legal possibility of constraining this fundamental freedom. Only with regard to the national defence sector, these constraints may be justifiable[18] – the rather quaint provision as to gambling services left aside.

Restrictions as to the production and trade in arms also exist (again) in Germany where, after 9-11, the German *Foreign Trade Regulations (Außenwirtschaftsverordnung, AWV)* were accordingly amended, now vesting the German Minister for Economics with the right to object the acquisition of more than 25% of the voting rights of companies in certain defence sectors by foreign investors. Distressed by several press articles in the summer slump of 2007 and interviews of regional political leaders (e.g. the Minister President of the German Land of *Hessen*), the German Federal Ministry for Economics is currently discussing further amendments of the *Foreign Trade Regulations* tightening up the monitoring and steering tools for the purchase of sensitive national supply industries by foreign State-owned or State-controlled companies. This political debate, however, has to take into account the legal constraints deriving from the instruments as described above: A general control of foreign capital being invested in certain enumerated sectors would be clearly contrary to OECD and European law – and contrary to WTO law if Germany has already scheduled a specific commitment with the WTO for the sector in question.

As we have seen from the ECJ jurisprudence, a restriction of the free movement of capitals necessitates an overriding (and concrete) requirement of general interest which has to be applied on a non-discriminatory basis, with the restriction being proportionate to attain the objective envisaged. The unspecific concern about foreign influence in special sectors is certainly not capable of providing sufficient justification for such an encroachment of the principle of open markets.

[18] Art 296 para 1 ECT provides:
"The provisions of this Treaty shall not preclude the application of the following rules:
(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;
(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes."

II. EU Commission Proposal for new rules of the internal energy market

After a long internal debate and wide speculations in the European and international press, on 25 September 2007 the European Commission has finally produced her proposal for a new directive on common rules for the internal market in electricity and gas amending several existing directives and regulations.[19] In her paper, the Commission underlines the importance of the electricity and energy market for the Europe's competitiveness and for her citizens and proposes consequent unbundling measures in an effort to guarantee the utmost concurrence on the energy market.

As already disclosed before the official presentation, the Commission proposal also enlarges on some "*third country aspects*" restraining international (non-EU) competitors which do not observe the EU rules on the energy market from acquiring EU energy companies. Following the unbundling approach of the Commission proposal this implies that no supply or production company active anywhere in the EU can own or operate a transmission system in any EU Member State. Measured against the ECT, this provision is certainly to be construed as a restriction of the free movement of capital since it is generally capable of making the acquisition of shares of companies in the energy and gas sector less attractive. It is, however, not evident that this restriction – although applicable on a non-discriminatory basis – can be justified by overriding requirements of general interest and whether it is proportionate. If the Commission proposal becomes law, this will undoubtedly be one of the most imminent legal questions to be answered.

What is, however, less probable to be conceived as a justifiable restriction on the free movement of capitals is another aspect of the Commission proposal already entitled the *"Gazprom clause"* since its direction of impact is more than clear. The Commission text reads:

> *"In this light it is imperative – without prejudice to the international obligations of the Community and in particular WTO rules – to ensure that all economic operators active on European*

[19] Proposal for a Directive of the European Parliament and of the Council amending Directives 2003/54/EC and 2003/55/EC, establishing an Agency for the Cooperation of Energy Regulators, amending regulation (EC) No 1228/2003 and regulation (EC) No 1775/2005.

> *energy markets respect and act in accordance with investor principles. Therefore, the Commission proposes a requirement that third country individuals and companies cannot acquire control over a Community transmission system or transmission system operator unless this is permitted by an agreement between the EU and the third country. This aim is to guarantee that companies from third countries respect the same rules that apply to EU based undertakings in both letter and spirit – not to discriminate against them."*

Although proposed by the European Commission it is hardly thinkable that such a provision would stand the "*Cassis de Dijon* test" if it was brought to the ECJ – *if* this was done, with Russia of course having no means to address such question to the ECJ. Putting the acquisition of EU transmission systems or system operator under the condition of the existence of the bilateral treaty between the EU and the home country of the interested investor is an evident restriction of the free movement of capitals with third countries and today there are in fact no overriding requirements of general interest visible which might justify such approach. Furthermore, it would be perceived as such an obvious renunciation of the principle of free markets that the EU would also have to weigh the political and economical consequences this approach might entail.

Directly after the announcement of this new Commission proposal several EU Member States – *inter alia* France and Germany – declared their strict opposition against several core elements of the new envisaged EU legislation on the energy market – especially the unbundling idea. So it has to be awaited what the outcome of this political discussion will be and if it will lead to a redefinition of idea of free and open markets for foreign capital.

One further element of the Commission's proposal on the new internal market for electricity and gas may, nevertheless, leads in a direction which the political and legal debate on supply security might also take. The Commission plans to establish a new independent body vested with decision powers, designed to complement at European level the regulatory tasks performed by national regulators ("*Agency for the Cooperation of Energy Regulators*"). Among these national authorities is *inter alia* the German *National Grid Agency* ("*Bundesnetzagentur*") which is currently supervising grid-based services such as electricity, gas, telecommunication or railways.

III. Effective State Control, esp. expropriation

EU, OECD and WTO Member States may avoid coming into conflict with the obligation to open their national capital markets to foreign investors and to do without any discriminatory measures by concentrating their efforts to guarantee supply security in the so-called "post-investment phase", i.e. after the acquisition by or the establishment of the foreign investor. National authorities need to be vested with all required rights in an effort to take the necessary measures in case of threats to supply security or to other important public interests. In such extraordinary situations, every State may take any compulsory measure as necessary and proportionate in an effort to force privates to comply with laws.

Like any measure of State control the tight regulation and supervision of a national market can indeed be construed to be an obstacle to the free movement of capital since it is generally capable of potentially rendering investments less attractive. But as long as it is guaranteed that the State measures of supervision and control are applied in a proportionate way on a non-discriminatory basis and are subject to judicial review, the granting of certain intervention rights to national or European regulatory authorities will in most cases not be contrary to obligations under European law (see the above mentioned ECJ case law). As to WTO law, the State has to respect the relative treatment standards of MFN and NT. The OECD is silent on the treatment to be accorded to investors in the post-investment phase.

The most radical way of exercising the State executive power in an economical sense is certainly the expropriation of private property, e.g. the grid owned by foreign or national individuals or companies. An expropriation may, nevertheless, prove to be necessary to achieve an "overriding requirement of general interest". Ultimately, the unbundling idea of legally separating the operation of the electricity or gas grid from the production of electricity or gas means nothing else than an expropriation of the companies presently involved in both the production of energy and its supply.

As to the expropriation of *foreign* property a State has also to respect special rules of both or international and European law – though not from the instruments mentioned above. These rules derive from international customary and statutory law and from the *European Convention on Human Rights.*

In international customary law,[20] it has widely been recognized that every State has the right to expropriate under the following conditions:

- The expropriation must be in the **public interest**. International Courts and Arbitration Institutions have – by now – been rather reluctant in declaring an expropriation illegal due to a lack of public interest. Under international law, States dispose over a prerogative in assessing whether a certain measure is in the public interest or not.
- The expropriation has to be conducted on a **non-discriminatory basis**. This implies that arbitrary measures against foreign property taken only for political reasons are forbidden.[21]
- Finally, the State has to pay a **compensation** for the expropriation which – according to the so-called "*Hull formula*" named after a US foreign secretary in the 1930s – has to be "*prompt, adequate and effective",* providing for compensation of the full economic loss.

The question whether the payment of a full compensation as envisaged in the *Hull formula* really corresponds to an international custom is rather academic since in the worldwide network of more than 2,500 bilateral investment treaties (BIT), almost all BITs provide for the payment of a full compensation in case of expropriation. Presently, Germany alone has concluded BITs with 124 countries, with almost all BITs calling for a full compensation in case of expropriation.

On the EU scale, the ECT is silent on expropriation and property matters.[22] Nevertheless, the ECJ has recognized that any EU measure has to respect property rights, basically calling for the same condi-

[20] As to the conditions of expropriations under International customary law see *Rosalyn Higgins, The Taking of Property by the State,* in: RdC 176 (1982 III), p. 259.
[21] In this respect see the decisions of Arbitral Tribunals ruling on the nationalization of the Libyan petroleum industry in the late 70s (*TOPCO/CALASIATIC,* ILM 17 (1978), p. 1; *British Petroleum,* ILR 53, 279; *LIAMCO,* ILM 20 (1981), p. 1).

tions as outlined above.[23] The protection of property rights is also subject to the *Council of Europe's 1st Additional protocol to the European Convention on Human Rights.*[24] Although being a human right, the right to property is also applicable to "legal persons", i.e. companies.

As from a historical point of view, the era of expropriations for pure economic reasons seemed certainly to be over for a long time. After the nationalizations of some French banks after the assumption of office by *Francois Mitterrand* in 1981, there seem to be no major cases of expropriations or nationalizations in Western Europe. Globalization however seems to pose new challenges to national governments which still dispose over instruments they already might have forgotten.

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[22] Art 295 stipulates: *"This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership"*.

[23] ECJ, Case 44/79, *"Hauer"*, Rec. 1979, p. 3727.

[24] Art 1 of the *Additional Protocol* reads: *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

Conclusion

Globalization has changed the perspective: Countries for a long time assumed to be “only” capital - exporting now face an enormous interest of foreign capital originating from countries supposed to be “only” capital importing. While facing this interest of foreign investors in investing into national companies managing or simply owning core infrastructure, the room for manoeuvre for national governments is indeed considerably constrained by International and European law. Especially the ECT rules on the free movement of capital forbid capital restrictions without a sufficient reason. The mere concern about foreign influence on national core industries or the supply sector is – according to ECJ jurisdiction – not designed to give such sufficient reason for restricting the free movement of capitals. The *political* question is whether the outlined development is giving reason for questioning the liberalization efforts in international trade and commerce of the last 40 years.

Before doing so, Western States should bring to their mind that they still dispose over sufficient instruments to guarantee supply and prevent their national economy from being sold out. This requires that State take seriously their genuine economic task to exercise control and supervision, especially in those sectors identified as particularly sensitive. In exercising this public task they may even resort to expropriation of privately owned property if this it necessary to guarantee e.g. supply security.

List of abbreviations

Art	Article
BIT	Bilateral Investment Treaty
cf.	confer, see
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on the Trade in Services
ECJ	European Court of Justice
ECT	Treaty Establishing the European Community
ESM	European Single Market
EU	European Union
ILM	International Legal Materials
ILR	International Law Reports
lit	littera
MFN	Most favoured nation (treatment)
No.	Number
NT	National treatment
OECD	Organization for Economic Co-operation and Development
p.	Page
para	Paragraph

RdC	Recueil des Cours
Rec.	Reports of Cases before the Court of Justice and the Court of First Instance
REIO	Organization for regional economic integration
WTO	World Trade Organization