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REMEDIES AGAINST UNLAWFUL FOREIGN DIRECT INVESTMENTS SCREENING MEASURES UNDER THE NEW COMMON EU REGULATION

ABSTRACT. *What can foreign investors do when their investments are blocked by the government of the destination country? To what extent is it actually possible to review before an administrative judge a veto decision, given the broad discretion exercised by governments in this field? The paper tries to analyze these problems in the light of different legal orders, also taking into account the effects of the new EU Regulation 452/2019.*

The purpose of this paper is to analyze the remedies against those administrative decisions that unlawfully forbid a foreign direct investment. Two main interests must be taken into account and balanced when discussing this subject: firstly, the interest of the foreign investor as well as the one of the company receiving the investment to achieve the transaction and, secondly, the public interest protected by national States.

However, studying the protection of investments, it's easy to see that it should be ensured in two different moments: the one before the entrance into the market, in which the State may issue a screening measure, and the one after that the investment has been successfully concluded, which poses different issues about the treatment of the foreign investor. These two different phenomena are nowadays regulated in totally different ways.

While the treatment of the concluded investment is part of a supranational set of rules created after many years of development and debate, the phase of the establish-

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ment in the foreign market and its control are still subject to the opposite kind of regulation: national States still claim their sovereignty in this matter and, as a consequence, the remedies are contained in internal laws.

Why did the treatment of established investors become part of international laws?

The main reason can be found through a brief historical analysis. In the thirties, big companies, mainly the so-called Seven Sisters (oil companies), decided to stipulate the "State contracts," which contained the first examples of arbitration clauses. The purpose of this clause was, obviously, to avoid that in case of prejudices the only way to obtain protection would have been to ask the local courts to apply internal laws which in some Nations, like the middle east ones, may have been rudimental or, anyhow, too difficult to be known and studied.

State contracts evolved in the first Bilateral Investment Treaties (BIT), such as the one stipulated between Germany and Pakistan in 1959. Today there are almost 3,600 BITs. The main difference consists in the contracting parties: no more agreements between a private company and a State, but between two different States. However, these treaties may contain an anomalous arbitration clause, which creates the possibility for private investors (and not for the State) to obtain protection against harmful decisions of the State before an arbitrator. This means that while the State agrees to the clause at the moment of the stipulation of the treaty, the investor agrees to it when he starts the arbitration procedure. In this context, the Washington convention of 1965 created the International Centre for Settlement of Investment Disputes (ICSID), which operates under the World Bank and tries to centralize all the arbitration procedures. All these efforts, as mentioned, were put in place with the purpose of reducing the influence of national interests in the resolution of the many State-investor disputes.

However, a very different framework shows up when studying the relationship between arbitration and the moment in which the foreign investor enters the market. Apparently, there is no space for the use of arbitration procedures to guarantee protection against a screening measure that creates unlawful prejudices for the foreign companies. The biggest part of Bilateral Investment Treaties does not allow any kind of protection at the moment of the establishment of the investment, providing only safeguards after the establishment. This means that BITs may only allow for a dispute between two States, which may happen as a consequence of the decision of the State of the investing subject to invoke the diplomatic protection. Anyway, a small minority of BITs and Free Trade Agreements (FTAs) contain a clause recognizing the possibility to settle the dispute before an arbitrator.

The main example is set out by the CETA: this treaty at Article 86 clearly disposes that the State must guarantee to a foreign investor the same treatment offered to domestic investors (the so-called national treatment clause). This should impair the use of any Foreign Direct Investment (FDI) screening mechanism. However, as stated by Article 89, it gives the possibility to legislate with the purpose of protecting main interests, e.g., national security, public health, environment, etc. This provision gives space to all those domestic regulations that alter the equal treatment principle. On the other hand, Article 8.18 of the treaty, when it lists the cases in which the investor can go before the permanent Tribunal, does not include the establishment phase. The CETA, in fact, renounces the arbitration system and adopts a Tribunal composed of 15 members, appointed by Canada and the EU which should ensure more coherence among the judgments and more impartiality than the arbitration system. Moreover, this system may be considered harmful for the investor, because the composition of the Tribunal may shift the protected interests from private parties to the States. Anyway, the mentioned exclusion of the establishment phase from the jurisdiction of this Tribunal means that any dispute about a harmful screening measure under the CETA may be brought before an arbitrator, but always keeping in mind that the exceptions which currently exist in Article 89 may weaken a concrete review of investors' claims.

Beyond this very particular case of arbitration, however, the Investor-State Dispute Settlement-ISDS system rarely works for the protection from unlawful FDI screening measures. The only kind of remedies that can be adopted are the ones offered by national legal systems, whether and when they are provided for. In this field, an apparently positive innovation is provided by the new EU Regulation for a common framework in FDI screening procedures, issued in March 2019. Article 3 provides that Member States may maintain, amend or adopt mechanisms to screen foreign direct investments in their territory, but they shall also provide for some minimum requirements, among which point n. 5 of the Article is the most interesting one: «foreign investors and the undertakings concerned shall have the possibility to seek recourse against screening decisions of the national authorities.»

This Regulation sets out a kind of protection that is not always recognized by the States. The main example against this is the one offered by the USA and the jurisprudence about the Committee on Foreign Investment in the United States (CFIUS). In the recent case *Ralls Corporation v. Committee on Foreign Investment* (United States Court of Appeals, District of Columbia Circuit, 2014), the possibility to review a presidential decisions which prohibits an FDI was radically excluded by the judge because of the political question doctrine. The main reason was, in fact, that the power exercised by the President shall be deemed to have a political content, so it does not consist in the mere administrative implementation of public goals. The measure adopted would have a purely political nature, because the State would be setting the goals to be pursued, describing in detail the concept of "national interest" underlying these decisions. It is not a mere definition of the concrete attitude of this power in the face of the specifics of the facts. Therefore, due to the separation between executive and judicial power, the excluded investor would not be given any possibility to obtain judicial review of the taken decision, which cannot be considered "unlawful", since the decision of whether an investment is lawful or not in the field of foreign investments lies solely with the CFIUS. The only protection given in that case to the Chinese company *Ralls* was the right to due process. *Ralls* in fact, did not request a judgment about the Presidential determinations concerning foreign policy and national security. Instead, it only asked to decide whether the due process clause entitled it to have notice of, and access to, the evidence on which the President relied and an opportunity to rebut that evidence before he reaches his non-justiciable and unreviewable determinations.

In Europe, on the other hand, the nature of mere administrative activity of screening measures is more peacefully accepted. In Italy both jurisprudence and doctrine agree that these powers of veto can be fully controlled by the administrative judge, being qualified as measures of high administration and not, rather, as political questions. In France, the exercise of these powers is subject to the jurisdiction of the administrative judge, even extended to issues of substance, thus enabling the judge to adopt decisions that will replace the ones of the administration. In Germany, because of the general principle contained in paragraph 40 of the *Verwaltungsgerichtsordnung* (the Code of Administrative Court Procedure), which states that «Recourse to the administrative courts shall be available in all public-law disputes of a non-constitutional nature insofar as the disputes are not explicitly allocated to another court by a federal statute», veto measures (as any other administration's decision) cannot be considered political questions and will always be subject to legal redress.

The EU Regulation, therefore, partially recognizes and partially extends this tendency to protection already present in some of the Member States that possessed a screening mechanism. In general, this Regulation imposes on States only some obligations, because it does not create a tool for centralized control of foreign investments and, consequently, it does not centralize judicial review. The new legislation, in fact, keeps the power to adopt (or not) a veto measure in the hands of national governments. However, on the one hand the Regulation envisages a mechanism of cooperation between the States and the Commission, entrusting to the latter a power of recommendation and to the former a duty to inform and evaluate the considerations of the Commission. On the other hand, and that is more important for the analysis conducted here, a series of interesting minimum requirements are imposed to all the States that own or will want to adopt a screening mechanism. Among these requirements, in addition to the aforementioned provision about the obligation to provide for instruments of judicial protection for foreign investors who suffered an illegitimate ban, we can mention compliance with the principle of non-discrimination based on the State of origin and compliance with the investor's transparency and privacy principles. Furthermore, Member States are obliged to report to the Commission any proposed reform of their instruments for investments' control and, even if they do not have a control mechanism, they must submit an annual report to the Commission on the flow of investments in the country.

With regard to the possibility of judicial review, the reform lets two main questions survive: legal redress to what end? Legal redress by which material standards?

To what end is judicial review useful?

On the one hand, pending review of a particular investment often suffices to scare investors to an extent that they withdraw from a takeover altogether. On the other hand, one should not forget that shareholders invested in the target company also face significant devaluation as a consequence of pending review or withheld approval.

Against this background, how sensible is it to review a screening decision of a screening mechanism, *i.e.*, the decision to initiate a review, to make a transaction contingent upon certain conditions or even to prohibit an investment altogether? Mildly so. Court cases take time, and even preliminary injunctions will overstrain the patience of the market. It seems unlikely that the victory in court will completely save a deal that has (publicly) run into the prospect of review.

This impression is reaffirmed by the fact that often one lawsuit in one jurisdiction would not be enough. An example is offered by the case of the German company *Aixtron*: in May 2016 the Fujian Chinese investment fund issued a 670 million euro takeover bid for *Aixtron*, active in the chip production market. On 2 December 2016, President Obama decided to block the transaction and to reject the inclusion of *Aixtron*'s US business in the deal. Both the prohibitive decision of the US as well as the decision of the German screening mechanism may have been subject to legal action (the US one, however, only for procedural issues). In addition, there was still no decision taken by the German *Bundesministerium für Wirtschaft und Energie* (the Federal Ministry for Economic Affairs) brought before the Court, only the prospect of one in the future. What were the investors supposed to do in this case? To sue the German administration for a potential decision? Fujian, however, decided to drop its offer to purchase *Aixtron*.

This is not to say that seeking legal redress against screening decisions is not possible or irrational *per se* (there may be sound legal reasons to do so), but it seems to be of little use to actually save investments under review. In most cases, in fact, the most sensible course of action for frustrated investors (or shareholders in the target company) seems to be a claim for damages resulting from a withheld, delayed or issued screening decision.

What are the material criteria?

It is decisive to pinpoint the material standards for legal review. Investors must have clear what each screening mechanism understands by a covered transaction (with sub-questions such as what are foreign investors, critical industries and infrastructure, etc.) to ensure that the scope of review is clear and investors follow the pertinent notification and application procedures.

However, the centerpiece of any control mechanism is usually the national security standard (or a semantical equivalent). Foreign investments imperiling national security are what they aim (or purport) to prevent, at least in liberal economies. This term is never exhaustively defined, sometimes it remains enigmatic and in many cases not revisable by the reviewing bodies. Thereby, it leads to wide, perhaps infinite administrative discretion, even in those countries that do not consider it as a form of political activity. For example, the CFIUS was defined, with a colored expression, a "church without a bible." National security has often been construed in such broadness to include even the economic security of the States. The new EU Regulation does not seem to limit these tendencies, as it refers to security and public order and provides a non-exhaustive catalogue of factors, which may be taken into account when determining whether they are affected.

In conclusion, legal redress against FDI screening measures is significantly limited from a practical point of view. Effective legal review for foreign investors is a prerequisite for legal certainty, which is held dear by the Regulation. It could also reduce suspicions of screening measures being protectionist instruments against whoever turns out to be the latest "economic enemy." In this regard, however, a radical change is not to be expected from the Regulation, whose only reference to legal redress in Article 3, number 5, leaves much room for interpretation.