The Treaty of Lisbon and Foreign Direct Investment

The Treaty of Lisbon brought into being “The Treaty on the Functioning of the European Union” (TEU). The TEU modified many policy areas of the European Union (EU), including the “Common Commercial Policy” (CCP). The CCP is now governed by Article 207 TEU and contains a number of new elements, one of which is foreign direct investment (FDI). Article 207 (1) TEU does not define the term FDI. Ultimately, therefore, the interpretation of this term is left to the Court of Justice.

FDI is commonly understood as the acquisition by a direct investor of a lasting interest in an enterprise established in a country other than that of the direct investor. Such acquisition confers to the direct investor a significant degree of influence on the management of the foreign enterprise concerned. The position that was taken previously by the EU in the (now discontinued) WTO “Working Group on the Relationship between Trade and Investment” is fully in line with the aforementioned understanding. In a communication to said Working Group, the EU pointed out that two criteria are decisive in determining FDI: (a) a long-term relationship between the direct investor and the foreign enterprise, and (b) a significant degree of influence of the direct investor on the management of the foreign enterprise.

While it is clear that the EU’s position in the aforementioned Working Group is not determinative of the understanding of FDI under Article 207 (1) TEU, it indicates what this notion would seem to encompass. Further, Article 207 (1) TEU does not qualify the term “foreign direct investment”, contrary to the term “commercial aspects of intellectual property”. This suggests that the protection of FDI, as reflected in bilateral investment treaties (BITs) concluded by EU Member States, comes under the notion of FDI in Article 207 (1) TEU.

The foregoing raises the question whether EU Member States retain any competences in the area of FDI, in particular with regards to the negotiation and conclusion of BITs. In principle, this question has to be answered in the negative because the CCP falls within the exclusive competence of the EU, pursuant to Article 3 (1) lit. (e) TEU. However, pursuant to Article 207 (6) TEU, the “exercise of the competences” conferred by Article 207 must “not affect the delimitation of competences between the Union and the Member States”. Given the far reaching scope of investment protection offered by existing BITs and their consequent impact on the regulatory conduct of the host states, it is quite conceivable that the EU does not possess an exclusive competence with regards to FDI. Consequently, trade agreements that include investment protection provisions similar to those in existing BITs would have to be concluded jointly by the EU and its Member States as mixed agreements.

To sum up: the EU’s exercise of the competences in the area of FDI may lead to certain frictions with EU Member States where a trade agreement is supposed to include provisions on the protection of FDI similar in scope to those contained in BITs. With respect to the case law of international arbitration tribunals in the area of investment protection, it may be argued that the impact of such provisions on the regulatory power of EU Member States could exceed the competences of the EU. In this case, the trade agreement in question would have to be concluded jointly by the EU and its Member States as a “mixed agreement”.

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