Public Goods & Governance

RECENT CHANGES IN GOVERNING PUBLIC GOODS & SERVICES

Volume 3 * Issue 1 *** June 2018**

Journal of the MTA-DE Public Service Research Group

CHALLANGES OF GLOBAL TRADE AND EU POLICIES
SPECIAL ISSUE

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Articles

IMPRINT

PUBLISHER:

MTA-DE Public Service Research Group
Head of the research group and Editor-in-chief:
Tamás M. Horváth, DSc., full professor
26th Kassai str., Debrecen, H-4028 Hungary
http://publicgoods.eu

ISSN 2498-6453

JOURNAL DOI 10.21868/PGnG
ISSUE DOI 10.21868/PGnG.2018.1.

Aims and Scope

*Public Goods & Governance*is a semi-annual academic journal, aims to publish original material within the field of public policy, public management, governance and administration. This includes articles, shorter notes and comments based on theoretically and empirically grounded research on public goods, public service delivery and other public functions in a wide range of sectors, especially focused on recent challenges of governmental roles and new governance models in the market economies.

The journal welcomes submissions (articles, notes and comments) from anywhere in the world from both academics and practitioners. The maximum word limit for articles is 2500 words. Notes (not full academic papers presenting new phenomena, ideas or methods in a brief form) and comments providing additional thoughts and critical remarks to previously published articles should not exceed 1000 words.

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EDITOR'S NOTE[1]

CHALLANGES OF GLOBAL TRADE AND EU POLICIES

In April 2018, the Faculty of Law and Political Sciences of the University of Debrecen, in collaboration with the MTA-DE Public Service Research Group and the 'Preator' students' research college of the faculty, organized a conference on recent challenges of jurisprudence and legal studies. The contributions for the international session focused on current legislative and regulatory issues in different areas of law and sector policy fields in Europe and beyond. The aim was to bring together LLM, PhD students and young colleagues from our faculty and other universities and to create a panel discussion around these questions from the point of view of their individual research fields. The present issue of the *Public Goods & Governance* academic journal is the follow-up of that conference session.

Topics discussed in the articles of the present volume are both from less researched areas and the 'hot potatoes' of the European integration process and current globalization trends. Though approaches and subject matters are different, each contribution highlights the regulatory needs and challenges triggered by various economic, political or societal factors and also shows that there is a change in the role of states and supranational integrations greatly influenced by the rearrangement of the global economic order and international trade and business relations.

The order of the articles in the present Issue follows a direction of narrowing the analysis perspective from a broader international context to (rather) internal European affairs. The first contribution (by *Daniel Haitas*) introduces China's Belt and Road Initiative which is a complex project to enhance economic cooperation in the Eurasian region and also an evidence of China's rise on the international stage and its decisive economic impact in Europe. It is followed by a comparative analysis (by *Rafael Lima Asche*) on remedy mechanisms in the US and Europe against human rights violations faced by corporations who wish to expand their business abroad through their subsidiaries. The third paper (by *Gauri Nirwal*) examines the impact of Brexit on International Commercial Arbitration in light of the EU treaty-making power in the field of foreign direct investment (FDI), the scope of the ECJ's jurisdiction and the Member States other commitments under international law. The foreign investment issue will be further analysed in the fourth article (by *Ninjin Bataa*) focusing on EU FDI policy after the entry into force of the Lisbon Treaty and its real and possible conflicts with the Member States' Bilateral Investment Treaties. This is also followed by an EU sector policy analysis (by *Osman Bugra Beydogan*), i.e. on EU policy approach towards the enforcement of IP rights, in particular the combat against counterfeit products and piracy within and beyond the EU. The sixth article (by *Ekaterina Markova*) examines the EU Insolvency Regulation reform, focusing on problems in determination of jurisdiction under the COMI (the centre of the main interest) principle in insolvency proceedings.

[1] by *Ildikó Bartha,* Senior Research Fellow of the MTA-DE Public Service Research Group

The seventh paper (by *Miftar Salihi*) closing this Issue analyses the challenges of EU Member States' compliance in the Single Market, exploring different approaches and possible ways to address the problem.

We hope that the present volume will be an impetus to stimulate further research in all these areas and encourage the authors and other young researchers to continue their academic carrier with similar contributions.

CHINA'S BELT AND ROAD INITIATIVE*

Daniel Haitas[2]

The One Belt, One Road Initiative (OBOR), later shortened to The Belt and Road Initiative, can be said to have been launched with a speech that Chinese President Xi Jingping made at the Nazarbayev University in Astana, Kazakshtan, on September 7 2013.[3] *At this event, President Xi said that "To forge closer economic ties, deepen cooperation and expand development space in the Eurasian region, we should take an innovative approach and jointly build an economic belt along the Silk Road". Furthermore, President Xi stated that "This will be a great undertaking, benefiting the people of all countries along the route. To turn this into a reality, we may start with work in individual areas and link them up over time to cover the whole region."*[4]

1. An Open-access Model

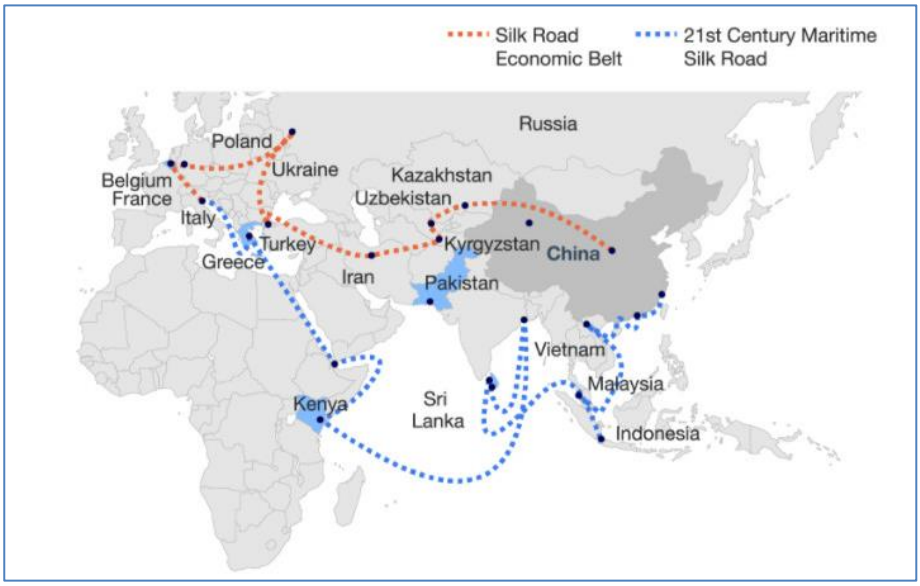
President Xi laid out five steps necessary for creating such an economic belt, which are: the improvement of the communication of policy, the improvement of road connectivity, the promotion of unhindered trade, money circulation enhancement and to increase understanding between the various different peoples in the region.[5]
The Belt and Road is based on 6 corridors:[6]

- New Eurasian Land Bridge, running from Western China to Western Russia;
- China – Mongolia – Russia Corridor, running from Northern China to Eastern Russia;
- China – Central Asia – West Asia Corridor, running from Western China to Turkey;
- China – Indochina Peninsula Corridor, running from Southern China to Singapore;
- China – Pakistan Corridor, running from South-Western China to Pakistan;
- Bangladesh – China – India – Myanmar Corridor, running from Southern China to India;

* DOI 10.21868/PGnG.2018.1.1.
[2]*Daniel Haitas*, Junior Research Fellow of the MTA-DE Public Service Research Group
[3] The State Council Information Office of the People's Republic of China: President Xi's statements on the Belt and Road Initiative. http://www.scio.gov.cn/31773/35507/35520/Document/1548585/1548585.htm [accessed April 17, 2018]
[4]Michelle Witte (2013). Xi Jinping Calls for Regional Cooperation Via New Silk Road. *The Astana Times*, 11 September 2013, https://astanatimes.com/2013/09/xi-jinping-calls-for-regional-cooperation-via-new-silk-road/ [accessed April 17, 2018]
[5]Ibid.
[6]Ruff, A (2017). China's New SilkRoadproject and South Asia, *The Independent*, 21 December 2017, http://www.theindependentbd.com/arcprint/details/128977/2017-12-21 [accessed April 17, 2018]

Figure 1.

Mapping the One Belt One Road initiative



Source: http://www.gospelherald.com/articles/70821/20170606/one-belt-one-road-obor-initiative-could-be-largest-global-economic-platform.htm

The Belt and Road Initiative may be described as an open-access model. An official government statement affirms that "The Initiative is open for cooperation. It covers, but is not limited to, the area of the ancient Silk Road. It is open to all countries, and international and regional organizations for engagement, so that the results of the concerted efforts will benefit wider areas."[7]

2. Key Components of the Initiative

An important component of the Belt and Road Initiative is the concept of the 21st-century Maritime Silk Road, which is usually described as running from the Chinese Coast over Singapore and India to the Mediterranean.[8] However, in fact it has been envisaged that it may even extend as far south as Australia and the Oceania region.[9] This concept was announced on the world stage for the first time when President XIaddressed the

[7]National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, with State Counci lauthorization: Vision and Actions on Jointly Building Silk Road Economic Belt and 21st Century Maritime Silk Road, March 2015, Available at: http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html [accessed May 10, 2018]
[8]Ibid.
[9] Collinson, E., & Van Nieuwenhuizen, S (2017). Australia and the Belt and Road Initiative: A Survey of Developments 2013 September 2017, *Australia-China Relations Institute*, 31 December 2017, http://www.australiachinarelations.org/content/australia-and-belt-and-road-initiative-survey-developments-2013-september-2017, [accessed May 10, 2018]

Indonesian Parliament on 2 October 2013.[10] He stated that "Southeast Asia has since ancient times been an important hub along the ancient Maritime Silk Road. China will strengthen maritime cooperation with ASEAN countries to make good use of the China-ASEAN Maritime Cooperation Fund set up by the Chinese government and vigorously develop maritime partnership in a joint effort to build the Maritime Silk Road of the 21st century."[11]

Furthermore, another project strongly connected to the abovementioned initiatives is the Polar or Ice Silk Road. This involves the development of new arctic shipping lanes as a result of theeffects of globalwarming, which has led to acceleration of thesnow and ice melting in theArcticregion.[12] The Chinesegovernment'swhitepaper „China's Arctic Policy" states that, „The Silk Road Economic Belt and the 21st-century Maritime Silk Road (Belt and Road Initiative), an important cooperation initiative of China, will bring opportunities for parties concerned to jointly build a "Polar Silk Road", and facilitate connectivity and sustainable economic and social development of the Arctic."[13] In relation to the economic potential of such a development, the white paper states that "…with the ice melted, conditions for the development of the Arctic may be gradually changed, offering opportunities for the commercial use of sea routes and development of resources in the region."[14]

Another component of the Belt and Road Initiative is the Digital Silk Road. Chen Zhaoxiong, China's vice-minister for industry and information technology said that, "We will actively promote the digital Silk Road to construct a community of common destiny in cyberspace".[15] This includes expanding broadband access, promoting digital transformation, encouraging cooperation in the area of e-commerce and international standardization.[16] One manifestation of the Digital Silk Road concept is China extending its own satellite–navigation system BeiDou to countries participating in the Belt and Road initiative.[17]

[10] Klemensits, P. (2017). China and the 21st Century New Maritime Silk Road, *Belt&Road Center Hungary*, 23 October 2017, http://beltandroadcenter.org/2017/10/23/china-and-the-21st-century-new-maritime-silk-road/ [accessed May 10, 2018]

[11] Speech by Chinese President Xi Jinping to Indonesian Parliament, ASEAN-China Centre, 3 October 2013, Available at:http://www.asean-china-center.org/english/2013-10/03/c_133062675.htm [accessed May 10, 2018]

[12]The State Council Information Office of the People's Republic of China (2017.) *President Xi's statements on the Belt and Road Initiative, 17* April 2017, http://www.scio.gov.cn/31773/35507/35520/Document/1548585/1548585.htm [accessed May 10, 2018]

[13]Ibid.

[14]Ibid.

[15]Moody, A. & Yu, C. (2017). Digital Silk Road forges strong links, *China Daily*, 5 December 2017, http://www.chinadaily.com.cn/business/4thwic/2017-12/05/content_35207841.htm [accessed May 10, 2018]

[16]Viney, S. & Pan, N. & Fang, J (2017). One Belt, One Road: Chinaheralds 'Digital SilkRoad'; foresees internet-erapower shift soon, *ABC News*, http://www.abc.net.au/news/2017-12-05/china-presents-foundations-of-digital-silk-road-at-internet-meet/9223710 [accessed May 10, 2018]

[17]Smith, C. (2018). A digital Silk Road, *The Economist*, http://www.theworldin.com/article/14433/edition2018digital-silk-road [accessed May 10, 2018]

3. The Belt and Road Initiative and Europe

In Europe an important initiative within the context of the broader Belt and Road Initiative is the 16 + 1 Forum, which comprises Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Montenegro, Poland, Romania, Serbia, Slovakia, Slovenia, and the Former Yugoslav Republic of Macedonia.[18] Participating at these summits as observers have been Austria, Belarus, Greece, Switzerland, the European Union and the European Bank for Reconstruction and Development.[19] This initiative was launched in 2012,[20] with the aim of intensifying the links between China and states in Central and Eastern Europe in such areas as investment, transportation, finance, education, culture and science.[21] This involves a yearly summit, which was held in Budapest last year, and which took place this year in Sofia in the month of July.[22]

In the Central and South Eastern Europe region one noteworthy project which can be seen in the broader context of the Belt and Road Initiative is the acquisition of Greece's Port of Piraeus by the state-owned Chinese Ocean Shipping (COSCO). COSCO became the operator of two of Piraeus' cargo piers in 2008,[23] and later in 2016 acquired a majority stake in the Piraeus Port Authority.[24] This has led to an enormous boost in output and efficiency, and has generally been seen as a great success story,[25] with the port becoming one of the fastest-growing and biggest in the Mediterranean.[26]

Additionally, a major infrastructure project in the making is the Belgrade-Budapest Railway. This joint China-Hungary-Serbia cross-border project is 350 km in length, and is designed for both cargo and passenger trains that will be able to reach a speed of

[18] Meeting of China-CEEC Business Council and Business Organizations Latvia (2017). About 16 + 1, http://ceec-china-latvia.org/page/about [accessed May 10, 2018]

[19] ERT InternationalAMNA (2017). Greece observer at the 6th CEEC Summit in Hungary, *ERT International*, http://int.ert.gr/greece-observer-at-the-6th-ceec-summit-in-hungary/ [accessed May 10, 2018]

[20] Zalán, E. (2017). Hungary-Serbia railway launched at China summit, *Euobserver*, 29 November 2017, https://euobserver.com/eu-china/140068 [accessed May 10, 2018]

[21] Meeting of China-CEEC Business Council and Business Organizations Latvia (2017). op. cit.

[22] Noinvite (2018). Beijing Says that the Meeting with Eastern European in Sofia is not Postponed, Sofia News Agency, 13 March 2018, http://www.novinite.com/articles/188663/Beijing+Says+that+the+Meeting+with+Eastern+Europe+in+Sofia+is+not+Postponed [accessed May 10, 2018]

[23] China Daily USA (2013). "Greece announces deadline for port, railway privatization tenders", *Daily USA*, 13 August 2013, http://usa.chinadaily.com.cn/world/2015-08/13/content_21593259.htm [accessed May 10, 2018]

[24] Glass, D. (2018). China Cosco Shipping launches new projects in Greece at start of 2018, *Sea trade Maritime News*, 8 January 2018, http://www.seatrade-maritime.com/news/europe/china-cosco-shipping-launches-new-projects-in-greece-at-start-of-2018.html [accessed May 10, 2018]

[25] Smotlczyk, A (2015). "One Port, Two Worlds: China Seeks Dominance in Athens Harbor", *Der Spiegel*, April 9 2015, http://www.spiegel.de/international/business/china-seeks-gateway-to-europe-with-greek-port-a-1027458.html [accessed May 10, 2018]

[26] Granitsas, A, & Paris, C. (2014). "Chinese Transform Greek Port, Winning Over Critics", *The Wall Street Journal*, 20 November 20 2014, http://www.wsj.com/articles/chinese-transform-greek-port-winning-over-critics-1416516560 [accessed May 10, 2018]

200km per hour.[27] It is envisaged that this railway will aid in the transport of Chinese goods that come to Europe through the Port of Piraeus.[28]

4. Concluding Remarks

China's Belt and Road Initiative has the potential to greatly influence the global economic order and to bring about a larger degree of connectivity throughout the world. It is evidence of China's rise on the international stage, and also has the potential to be of great importance to Europe. The region of Central and Eastern Europe can be said to play something of a natural role in this initiative, as it has the potential to act as a bridge between China and the greater European region.

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- Collinson, E., & Van Nieuwenhuizen, S (2017). Australia and the Belt and Road Initiative: A Survey of Developments 2013 -September 2017, *Australia-China Relations Institute*, 31 December 2017, http://www.australiachinarelations.org/content/australia-and-belt-and-road-initiative-survey-developments-2013-september-2017
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- Granitsas, A, & Paris, C. (2014). "Chinese Transform Greek Port, Winning Over Critics", *The Wall Street Journal*, 20 November 20 2014, http://www.wsj.com/articles/chinese-transform-greek-port-winning-over-critics-1416516560
- Klemensits, P. (2017). China and the 21st Century New Maritime Silk Road, *Belt&Road Center Hungary*, 23 October 2017, http://beltandroadcenter.org/2017/10/23/china-and-the-21st-century-new-maritime-silk-road/
- Meeting of China-CEEC Business Council and Business Organizations Latvia (2017). About 16 + 1, http://ceec-china-latvia.org/page/about

[27] Xinhua (2017). Belgrade-Budapest railway construction starts, *XinhuaNet*, 29 November 2017, http://www.xinhuanet.com/english/2017-11/29/c_136787298.htm [accessed May 10, 2018]
[28] Zalán (2017). op. cit.

- Moody, A. & Yu, C. (2017). Digital Silk Road forges strong links, *China Daily*, 5 December 2017, http://www.chinadaily.com.cn/business/4thwic/2017-12/05/content_35207841.htm
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- Ruff, A (2017).: China's New SilkRoadproject and South Asia, *The Independent*, 21 December 2017, http://www.theindependentbd.com/arcprint/details/128977/2017-12-21.
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- Viney, S. & Pan, N. & Fang, J (2017). One Belt, One Road: Chinaheralds 'Digital SilkRoad'; foresees internet-erapower shift soon, *ABC News*,http://www.abc.net.au/news/2017-12-05/china-presents-foundations-of-digital-silk-road-at-internet-meet/9223710
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HOW CAN FORUM SHOPPING HELP VICTIMS OF CORPORATE TORTS PURSUE AN EFFICIENT LEGAL REMEDY AGAINST VIOLATIONS OF HUMAN RIGHTS?*

Rafael Lima Asche[1]

Corporations have been undertaking very risk-taking activities abroad. Since they are met with less protective legislations in third countries, some subsidiaries have been conducting their business without proper respect for human rights. As a result, not only the subsidiaries but also the parent companies can be held liable for violations of such rights in civil proceedings in their home countries. However, there is no standard international convention or jurisdictional body to regulate the relation between business and human rights and the legal remedies that victims can access. In this regard, victims must call upon domestic courts in a pursuit of the most favorable jurisdiction to obtain a civil legal redress mechanism.

1. Legal framework

Business and human rights law have recently become interconnected. As a rule, western legislations do not tend to include legal norms about the corporate behavior abroad. At an international level, the UN has published the Guiding Principles on Business and Human Rights of 2011 on the implementation of the "Protect, Respect and Remedy" framework. Nonetheless, as it consists in a set of guidelines, the voluntary basis prevails. In this sense, an international convention about this topic is still pending, and so is a proper legislative body directed to corporate torts for gross violations of human rights only.[2]

Many corporations who wish to expand their business abroad resort to risk-taking activities through subsidiaries. Since protective legislations outside Europe and the USA can sometimes be not so efficient, violations such as forced labor, killings, torture, negligent supervision of health of workers, damages to land, constantly occur. In this scenario, not only the subsidiaries can be held liable, but also their parent companies due to a breach of the duty of care.[3] Therefore, victims will have more than one possibility to obtain legal redress. Attempting to hold parent companies liable for human rights violations as complicit of their subsidiaries might be efficient. However, choosing the proper jurisdiction is a crucial factor and, thus, forum shopping will play an important role in this context.

* DOI 10.21868/PGnG.2018.1.2.

[1]*Rafael Lima Asche*, LL.M. Student, University of Debrecen

[2] van Dam, C. (2011). Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights. *Journal of European Tort Law* 2(3): 225-227.

[3]See further Cassell, D. (2016). Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence. Journal Articles, *Business and Human Rights Journal* 1263: 179-202.

2. The subject in the USA and in Europe

As a starting point, it is relevant to note that this topic is much more developed in the USA than in Europe. The avenue through which such human rights violations will find a judicial access in America is the Alien Tort Statute of 1789 (ATS).[4] In Europe, differently, a civil recovery system for human rights violations such as in the USA has not yet been developed. Thus, while plaintiffs alleging corporate torts for violations of human rights will have a specific legislation and a competent judicial mechanism in the USA, in Europe states will have to observe the Rome II regulation, which sets choice of law for foreign torts.[5] Its general rule is that the applicable law should be the one from the country where the damage occurred, unless there are strong reasons to apply legal sources from another jurisdiction, for example on the grounds of public policy.[6]

Hence, the first impression is that the ATS might make the American litigation more suitable for the victims of corporate torts. Another fact that might make the American jurisdiction attractive is the existence of punitive damages, which can result in huge awards for the victims. Since punitive damages are connected to the common law system, in continental Europe the final compensation would not be comparable in pecuniary terms. Besides, even in the UK and in Ireland recovery of punitive damages is rare.[7] Subsequently, we can associate this particularity with the American jurisdiction. Despite those advantages, American case law is not always consistent, and this jurisdiction is not necessarily the best alternative, as we will analyze in the next chapter.

In summary, the table below presents the essential differences between the situation in the USA and in Europe on how different jurisdictions respond to corporate torts in relation to violations of human rights.

Table 1

Civil legal redress

USA	Europe
Alien Tort Statute	No standard civil system recovery (Rome II regulation)
Punitive damages	No punitive damages (with limited exceptions)

Source: Author

3. How does forum shopping really work? The Royal Dutch Shell case

Case law for business and human rights shows that choosing a more favorable jurisdiction can lead to extremely different results for the victims. In this regard, we can

[4] See further discussions on the ATS in Wright, R. G. (2016). Negotiating the Terms of Corporate Human Rights Liability under Federal Law. *San Diego Law Review* 53(3): 587-592.

[5] Regulation (EC) no. 864/2007 on the law applicable to non-contractual obligations (Rome II), *OJ L 199, 31.7.2007.*

[6] Zerk, J. (2016). Corporate liability for gross human rights abuses – towards a fairer and more effective system of domestic law remedies. Office of the UN High Commissioner for Human Rights, 50-51.

[7] Fausten, T. & Hammesfahr, R. (2012). *Punitive damages in Europe: Concern, threat or non-issue.* Swiss Re, Zurich.2.

better illustrate how forum shopping works in this panorama by analyzing the proper case law.

The following lawsuits are related to the giant oil company with joint British and Dutch stock market listings and with headquarters in both countries. In 1958 Shell began exploiting oil in Nigeria, which will be the background for the following litigations. This event involves the following jurisdictions: Nigeria, the Netherlands, the UK, and the USA.[8]

Initially, it is convenient to mention that many claims have been initiated in the Nigerian courts against Shell's subsidiary incorporated in Nigeria. However, many problems such as delay, effectiveness, and economic influence have led plaintiffs to seek judicial redress in the USA and in Europe.[9]

The first case we should mention was litigated in the USA. In *Wiwa v Royal Dutch Shell,*[10] it was alleged that Shell was complicit in military operations against the Ogoni people, which is an indigenous group from Southeast Nigeria.[11] The families sought justice in the USA based on claims of corporate complicity. In 2009 there was a settlement and Shell agreed to pay US$ 15 million.[12] As we can observe, forum shopping was effective in terms of providing reparation in this case.

Contrarily to the previous case, in 2010 the US Second Circuit Courts of Appeals stated in *Kiobel v Royal Dutch Petroleum Co* that customary international human rights law does not recognize the liability of corporations.[13] In 2011 that Court held, moreover, that the jurisdiction granted by the ATS does not extend to civil action against corporations. Finally, in 2013 the Supreme Court stated that the matter in question was another. It decided that mere corporate presence is not sufficient, since the defendants are not American companies and since petitioners seek relief for violations occurred outside the USA. ATS can, therefore, hold defendants liable only when the case touches and concerns the US with sufficient force. The court states, besides, that "there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms."[14] Currently, Ms. Kiobel is attempting to proceed against Shell in the Netherlands, since after the dismissal of Ms. Kiobel's case by the Supreme Court of the United States in 2013 a Dutch law firm took on the case and commenced proceedings in the Netherlands by serving a writ of summons last year.

As we can see, despite the fact that the USA possesses a specific civil recovery system, sometimes case law can diverge, and the American jurisdiction might not necessarily be a better decision than the European ones. In this regard, there were also five lawsuits initiated in the Netherlands against the Nigerian subsidiary and its parent company on the grounds of breach of the duty of care to protect from environmental

[8]Blackburn, D. (2017). *Removing barriers to Justice – how a treaty on business and human rights could improve access to remedy for victims*. International Centre for Trade Union Rights, Centre for Research on Multinational Corporations, Amsterdam, 21-24.
[9]Ibid., p. 22.
[10] See *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 (S.D.N.Y. 2002).
[11]Newman, D. (2002). Litigation Update: Wiwa v. Royal Dutch Petroleum Co. *Sustainable Development Law and Policy* 3, 20.
[12]Meeran, R. (2011). Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position outside the United States. *City University of Hong Kong Law Review* 3(1): 2.
[13]van Dam, C. 2011: 233.
[14]*Kiobel v Royal Dutch Petroleum*, No. 10-1491, 2013, 569 US Supreme Court, 12-14.

harm caused by the spills from pipelines.[15] Four out of the five cases were dismissed by reason that there was a situation which included a third-party sabotage and poor maintenance, but under Nigerian law - applicable according to the Rome II regulation - the subsidiary was liable only for the latter. In the remaining case, the tort of negligence was recognized due to the violation of the duty of care. Nevertheless, all claims against the parent company were dismissed based on Nigerian law. The Court of Appeal overturned the decisions and held that the home state courts had jurisdiction based on the EU jurisdictional rules in the Brussels Regulation.[16] The process is still ongoing.[17]

Two more cases are relevant to mention in the Shell context. The first one is Case Bodo, which was litigated in the UK High Court seeking compensation for around 11,000 claimants.[18] On a preliminary hearing, the Court ruled that the parent company could be held liable if it failed to protect the plaintiffs either from the subsidiary's failure or from a third party. Before a full trial could be heard, Shell agreed in a settlement to pay £55 million in 2015.[19] In this case, therefore, the British jurisdiction was a good choice to achieve reparation for the victims.

Table 2.

Forum shopping in Shell case

- **1) Nigeria**: several claims
- **2) USA**:
  1. Case Wiwa (2009)
  2. Case Kiobel (2010 – 2013) – Supreme Court: "*there is no indication the ATS was passed to make the US a uniquely hospitable forum for the enforcement of international norms*."
- **3) the Netherlands**: 5 lawsuits against environmental harm
- **4) UK**:
  1. Case Bodo
  2. Case Bebe Okpabi

Source: Author

Contrasting with the previous case, we should allude to Case Bebe Okpabi - claim initiated by the Nigerian king - equally litigated in the UK High Court and consisting of two claims seeking compensation for around 42,500 people. In 2017, the Court declined jurisdiction holding that the *Chandler* duty of care proviso[20] was not present in this case. The Court held that, following a corporate restructuring, the parent company lacked technical expertise and had no considerable supervision over the subsidiary, resulting in

[15]Blackburn 2017: 22-23.
[16]Regulation (EU) No. 1215/2012 (Brussels Recast) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L 351, 20.12.2012*.
[17]See Case 200.126.849-01 200.127.813-01 (2015), Gerechtshof den Haag (in Dutch).
[18]*The Bodo Community and Others v Shell Petroleum Development Company of Nigeria Ltd* [2014] EWHC 1973 (TCC).
[19]Blackburn 2017:23-24.
[20]A 3-level test for a duty to arise in English law: 1) if the harm was foreseeable; 2) if there was enough proximity between the parties; and 3) if it is fair, just and reasonable to impose a duty of care. Vide *Chandler v Cape Plc* [2012] EWCA Civ 525 (25 April 2012), para 32, and 62-81. This is also known as the Caparo test: vide *Caparo Industries Plc v Dickman* [1990] 2 AC 605, UKHL 2.

no duty of care.[21] As we can see, case law in the UK can also be divergent and, thus, predictability is extremely hard in those situations.

4. Summarizing the impressions

Corporations have increasingly been required to comply with standards established by international human rights law. Even though there is no international agreement on the topic and the subject remains obscure in many details, we can say that civil litigation has been, in many cases, a successful mechanism to achieve a remedy for the victims. Also, although most of the cases are settled between the parties and not subject to a final judicial decision, they still are conclusive, because in many rulings the orientation of the courts is towards giving a positive affirmation of the corporate liability.

As discussed above, the ATS seems to be a very attractive mechanism against corporations, this being the reason why case law in the USA is more abundant than in Europe. As Bradley argues, some reasons why the ATS is attractive to plaintiffs are: a) corporations do not benefit from immunity doctrines like governmental defendants do; b) most large corporations have presence in the USA, making the jurisdiction problem easier; c) they have considerable assets that can be reached by the courts and also it works as an incentive for them to settle an agreement and avoid bad publicity.[22]

However, this tendency can lack predictability and efficiency, since American courts might diverge about the purpose of the ATS. Also, in some cases the European jurisdictions appear to be equally very effective. Therefore, forum shopping is a practice that really influences the reparation that victims can achieve. Perhaps the best alternative would be to have a standard system for such recoveries through a common convention as *lex specialis* and a proper jurisdictional body. Yet, since they are non-existent, it is important to seek the most favorable jurisdiction to achieve a reasonable remedy through the application of domestic liability laws.

To conclude, some factors should be taken into consideration when searching for the appropriate forum. In common law states, defendants often refer to the *forum non conveniens* doctrine.[23] This happens when the defendant presents a motion to dismiss the case holding that the most convenient or appropriate forum for the judgment would be another one. The result is a delay in the litigation or even a bigger hindrance in case of dismissal. In the UK this doctrine was also applied, but it was reduced because of its integration with the EU jurisdictional rules. Contrarily, it is also convenient to mention that some civil law jurisdictions, such as Germany, France, and Canada (Quebec), apply the doctrine of forum of necessity (*forum necessitatis*), which means that their courts can take jurisdiction over a case when it is understood that there is no other forum available to provide remedy for the victims, that is, it is a legal concept to prevent denial of access to justice.[24]

[21] *His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell PLC and Shell Petroleum Development* [2017] EWHC 89 (TCC), para 107-122.
[22] Bradley, C. A. (2010). State Action and Corporate Human Rights Liability. *Notre Dame Law Review* 85(5): 1825.
[23] See, for instance, *Wiwa v Royal Dutch Petroleum* Co 226 F 3d 88 (2d Cir 2000).
[24] Zerk 2016:48-49.

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- Case 200.126.849-01 200.127.813-01 (2015), Gerechtshof den Haag (in Dutch).
- *Caparo Industries Plc v Dickman* [1990] 2 AC 605, UKHL 2.
- *Chandler v Cape Plc* [2012] EWCA Civ 525 (25 April 2012).
- *The Bodo Community and Others v Shell Petroleum Development Company of Nigeria Ltd* [2014] EWHC 1973 (TCC).
- *His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell PLC and Shell Petroleum Development* [2017] EWHC 89 (TCC).
- *Kiobel v Royal Dutch Petroleum*, No. 10-1491, 2013, 569 US Supreme Court.

EFFECT OF BREXIT ON INTERNATIONAL COMMERCIAL ARBITRATION*

Gauri Nirwal[1]

International Commercial Arbitration is an essential alternate mode of dispute resolution accompanied by the gradual liberalization of national arbitration laws in international trade. One of the many changes in the European Union is Brexit and the impact it will have on choice of law and jurisdiction. It is imperious to consider that the UK remains a signatory to the New York Convention, which provides for the enforcement of arbitral awards across currently 156 jurisdictions, including all EU Member States. The issue may be raised at the stage of recognition and enforcement (in an EU Member State) of an award rendered by a London (UK) seated arbitral tribunal that overlooked the application of EU law.

The following paper will aim to study the impact of Brexit on International Commercial Arbitration and how it will affect enforcement of awards. The jurisdiction clauses designating English courts and parallel proceedings with English courts are expected to raise intricate legal questions subject to many uncertainties subsequent to an effective Brexit.

1. Introduction

Political events generally do not have major impact on International Commercial Arbitration. However, some recent political developments have resulted in significant geopolitical uncertainty with emerging challenges to the international law and order. It may also impair businesses' confidence in arbitrating in the affected jurisdictions. Brexit is one of the major challenges for the European Union and concerns arise mainly from its socio-economic impacts such as trade barriers, financial institutions, etc.

The English courts have been always supported in the recognition and enforcement of arbitral awards. London is an established seat of Arbitration favored all over the world. The biggest question that arises after Brexit is its long-term impact on the International Arbitration Community. It however depends on the perception of local courts in EU Member States to take the risk of disregarding EU law by UK seated arbitral tribunals. London's relationship with international arbitration is reciprocally dependent as well as beneficial on the other hand.

* DOI 10.21868/PGnG.2018.1.3.

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2. Brexit and Its Impact

(a) Anti-Suit Injunctions

An anti-suit injunction is an order directing a party to not pursue a legal action in a different jurisdiction. Anti-suit injunctions are used especially in the Common Law countries. There are two kinds of anti-suit injunctions:

i. Ordering a party to refrain from commencing or continuing arbitration (Restraining Arbitration proceedings)
ii. Ordering a party to refrain from commencing or continuing proceedings before another State court/ Arbitration court (Restraining Parallel Court Proceedings)

The latter kind is more widely practiced within the European Union. The European Court of Justice (CJEU) has long held that intra-EU anti-suit injunctions are incompatible with European Union Law.[2] The decision in the West Tankers case meant that under the scope of Brussels Regulation, an "anti-suit injunction" could not be granted in order to restrain proceedings brought in another EU Member State in case of arbitration.

The judgment had significant implications for arbitration in Europe, especially in London since it follows a common law system. The London practitioners consider anti-suit injunctions in favour of arbitration as an essential to uphold arbitration agreements with a London seat.[3] The practitioners of the Civil Law system took an optimistic approach and considered this judgment to be in accordance with the EU law.

Post-Brexit, the situation may be set to change. Since the UK will no longer be a part of EU, the English courts will not be bound by EU jurisdiction or laws leaving a wider scope for London Arbitration Courts to grant anti-suit injunctions in respect of arbitration proceedings brought before EU Member State courts. The courts of EU Member States will remain prohibited from granting anti-suit injunctions. This might give London an advantage over Arbitration Seats in the EU such as Paris. The approach of the English courts to arbitration is arguably a far more attractive attribute of London as a seat.[4] However, the return of anti-suit injunctions would depend on EU-Brexit negotiations.

[2]See Allianz SpA v West Tankers Case C-185/07. The Court held that an anti-suit injunction obtained in the English courts against a party who brought court proceedings in Italy in breach of an arbitration agreement was incompatible with EU Law. Similar CJEU ruling in Turner v Grovit Case C-159/02.

[3]Gaffney, J. (2009). 'ECJ in West Tanker Shocker: London Anti-suit Injunctions Fall Foul of EC Law', *Kluwer Arbitration Blog*. 12 February 2009. Available at: http://arbitrationblog.kluwerarbitration.com/2009/02/12/ecj-in-west-tanker-shocker-london-anti-suit-injunctions-fall-foul-of-ec-law/ [assessed 27 April 2018].

[4]Cannon, A. & Naish, V. &Ambrose, H. (2016). *Anti-suit injunctions and arbitration post-Brexit*. Herbert Smith Freehills, Global law firm. Available at: https://www.herbertsmithfreehills.com/latest-thinking/anti-suit-injunctions-and-arbitration-post-brexit [accessed 2 May 2018].

(b) Intra-EU BIT Agreements

International investment can be defined as a complex system of international agreements, multilateral as well as bilateral, and which are interrelated to one another.[5] The foundation of the international investment system is the Bilateral Investment Treaty (BIT).[6] The European Commission has taken the clear view that BITs concluded between EU Member States[7] are contrary to EU law and in 2015 launched infringement proceedings against Austria, the Netherlands, Romania, Slovakia and Sweden.

With the EU's power over Foreign Investment, the EU Member States are not entitled to negotiate and conclude BIT agreements without the approval of EU. The European Commission is seeking to replace BITs between all EU and non-EU countries with EU negotiated investment agreements. The EU has negotiated various free trade and investment agreements with third parties. The UK currently has 12 intra-EU BITs with Bulgaria, the Czech Republic, Croatia, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia.[8]

Post-Brexit, the UK will not be directly bound by the regulations of EU. There will no longer be any ambiguity regarding the validity of BIT agreements. The UK will regain its powers to negotiate and conclude new BIT agreements and may benefit from these deals. The EU's new policy of eliminating EU BITs could give the UK a competitive advantage over other European Countries after Brexit.

3. Positive Impact or Negative Impact?

Discussing the relationship between the UK and European Union after the UK's exit is essential. Europe has many well established seats of Arbitration at Paris, Stockholm, and Switzerland. Post-Brexit, the competition will continue to grow in the global market for dispute resolution. London attracts many cross-border arbitration disputes due to its *lingua franca* as English, attracting companies twice as likely to choose English law over other governing laws for international commercial arbitration.[9] Moreover, London attracts many eminent judges and arbitrators.

[5]Juillard, P. (2001). *Bilateral investment treaties in the context of investment law.* Investment Compact Regional Roundtable on Bilateral Investment Treaties for the Protection and Promotion of Foreign Investment in South East Europe, OECD, Dubrovnik, 28-29 May, 29.

[6]BIT is an agreement between two countries that sets up rules and regulations for foreign investment in each other's countries.

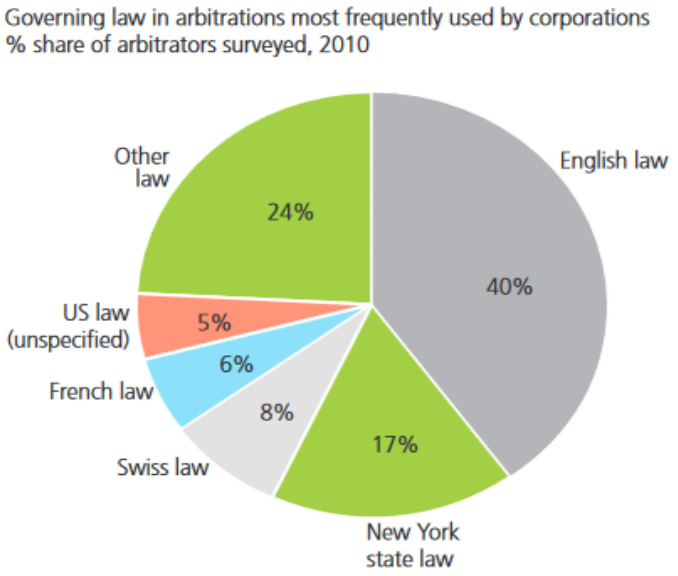
[7]Intra-EU bilateral investment treaties (Intra-EU BITs) are agreements between EU Member States establishing the terms and conditions for private investment by nationals and companies of one country in another one.

[8]Rogers, J. & Goodall, S. & Dowling, C. (2017). *What impact could Brexit have on protections available to foreign direct investors?* Norton Rose Fulbright. Available at: https://www.insidebrexitlaw.com/blog/what-impact-could-brexit-have-on-protections-available-to-foreign-direct-investors [accessed 2 May 2018].

[9]According to 2010 International Arbitration Survey: Choices in International Arbitration (Queen Mary University of London), the most frequently used governing law is English law (40%).

Figure 1

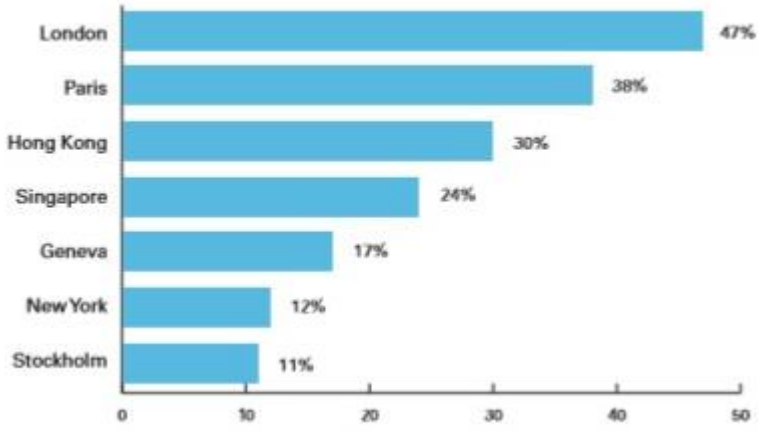
Governing Law in Arbitration Used by Corporations



Source: 2010 International Arbitration Survey

Figure 2

Most Preferred Arbitration Seats by Organizations



Source: 2015 International Arbitration Survey

Some commentators have argued that London could benefit from Brexit, because the city might be perceived as a more "neutral seat" and the English courts would no longer

be controlled by the ECJ's ruling in West Tankers case.[10] According to the 2015 International Arbitration Survey, the five most preferred and widely used seats are London, Paris, Hong Kong, Singapore and Geneva.[11]

Post-Brexit, the English courts might enable EU-wide anti-suit injunctions. Many comparable jurisdictions such as Switzerland and France do not have anti-suit injunction protection. If this may be the case, London will gain advantage over other EU seated arbitration tribunals. However, the return of anti-suit injunctions largely depends on whether the UK still chooses to remain a party to the Brussels Regulation. By a similar token, the UK might be able to conclude more BITs with third countries with EU limitations which may allow investors to maximize investment trade. Brexit is not likely to have immediate consequences on arbitration; however, the changes seen will bring some positive impact on the UK as a seat of arbitration.

4. Conclusion

Brexit has surprised the whole world and is one of the most important concerns politically and economically. However, it establishes a stronger arbitration system for London since the English courts are arguably the far more attractive attribute of London as an arbitration seat. The parties choosing to arbitrate disputes in London will continue to benefit from a "tried and tested" arbitration law and also the jurisprudence of the English courts created under that law.[12] The UK along with other EU Member States will remain a party to the New York Convention of 1958 which is not likely to impact London as a Seat of Arbitration in a significant way. It is however difficult to predict the long term impact of Brexit on International Arbitration. The UK will remain to be one of the most preferred seats for arbitration and the significance of the political impact on Arbitration will not be rigorous.

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EUROPEAN UNION PUBLIC POLICY ON FOREIGN DIRECT INVESTMENT*

Ninjin Bataa[1]

The European Union Policy for Investment addresses the issue of sustainable and inclusive development through the lens of private sector-led development. The policy looks at all forms of investment involving all types of firms. A good investment climate is one which provides opportunities for all investors: public and private, large and small, foreign and domestic. The policy could be non-prescriptive, as it is impossible to find an approach that suits all the countries within the EU. The Member States have different private sector development and economic sustainability and efficiency. The policy recognizes the role of competition in relation to the principle of non-discrimination and national treatment. The importance of foreign investment is directly linked to the fact that the EU is the biggest provider and destination of FDI in the world, measured by stocks and flows. The investment creates enormous growth and numerous new jobs both at home and abroad.

1. History of the Foreign Direct Investment in the European Union

The biggest push to the foreign direct investment flow started with the collapse of communism more than 20 years ago. This event unleashed a historically unprecedented process of economic restructuring and political transformation in the former communist countries. Of course, it was a lengthy process which did not happen over a year: there was a transition period.[2] This transition process involved certain changes in the politics and in the economies of the countries involved. As an example, we can mention democratization, institution building and for the economic sector, - marketization, liberalization, restructuring. In the transition process, FDI proved to be the most effective instrument.

Further studies on the economics of the 2004 Enlargement[3] have shown that this prospect of accession has been paramount in mobilizing foreign investments, as western firms responded to the opportunities offered by the opening of the new markets by changing the geographical organization of their production thus initiating a broader process of restructuring for the European industry. As a result, these movements were part of a deeper integration process, reflecting the significant linkages that developed on

* DOI 10.21868/PGnG.2018.1.4.

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[2]Monastiriotis, V. (2014). Origin of FDI and domestic productivity spillovers: does European FDI have a 'productivity advantage' in the ENP countries? *LSE 'Europe in Question' Discussion Paper Series,* 70/2013, http://eprints.lse.ac.uk/55267/1/LEQSPaper70.pdf [accessed May 20, 2018]

[3]Brenton, P. & Di Mauro, F. & Lücke, M. (1999). Economic Integration and FDI: An Empirical Analysis of Foreign Investment in the EU and in Central and Eastern Europe, *Empirica* 26 (2): 95-121.; Kaminski, B. (2001). How accession to the EU has affected external trade and FDI in Central European economies. *Policy Research Working Paper* No 2578, World Bank, Washington DC.; Monastiriotis, V. & Agiomirgianakis, G. (2009). The economics of the 5th enlargement: trade, migration and economic synchronicity, *Journal of International Trade and Economic Development,* 18 (1): 3-9.

the ground, which in turn facilitated sizeable technology transfers to the companies of Central and Eastern Europe. But the extent of integration with the local economies has been low, and this was related to the volumes of FDI. The countries were seeing foreign direct investment as a market-capture type and a spatial reorganization of the production system. The latest major step in FDI policy happened in 2009 with the Treaty of Lisbon, which changed the perspective of future developments entirely by giving the Union full competence over foreign investments.

2. The Treaty of Lisbon and the Member States'-BITs: the conflict and how the EU regulated them

Many years ago, with the establishing of the European Union (previously European Economic Community/European Community) a Common Commercial Policy (CCP)[4] has been created to govern the EU's trade relations with non-EU countries. The creation of a common commercial policy was a logical consequence of the formation of a customs union among its Member States. The European Union's trade policy therefore establishes common rules including, among others, a common customs tariff, a common import and export regime and the undertaking of uniform trade liberalization measures as well as trade defense instruments.

The biggest change within the FDI policy of the EU was brought by the Treaty of Lisbon in 2009, which gave the EU power, within the framework of the CCP, to make investment agreements on behalf of the Member States. In terms of new competences, the Lisbon Treaty[5] explicitly mentions "foreign direct investment" as forming part of the EU common commercial policy.[6] This includes, among others, the power to regulate investment protection. In addition, the Lisbon Treaty explicitly confirmed that the common commercial policy is an area of exclusive EU competences. This formal declaration confirms existing case-law of the Court of Justice of the European Union (hereinafter the CJEU)[7]and means that the Union alone is able to legislate and conclude international agreements in this field, including international investment.

In this case, one question arises: What to do with Member States' Bilateral Investment Treaties (BITs)? Over the last 50 years, the Member States of the EU concluded a large number of such bilateral agreements (see Figure 1). There are two types of BITs: treaties between Member States and third countries and; intra-EU agreements.

[4] The Common Commercial Policy presents regulations to govern EU's trade relation with non-EU countries. Now it includes, among others, a common customs tariff, a common import and export regime and the undertaking of uniform trade liberalization measures as well as trade defense instrument.

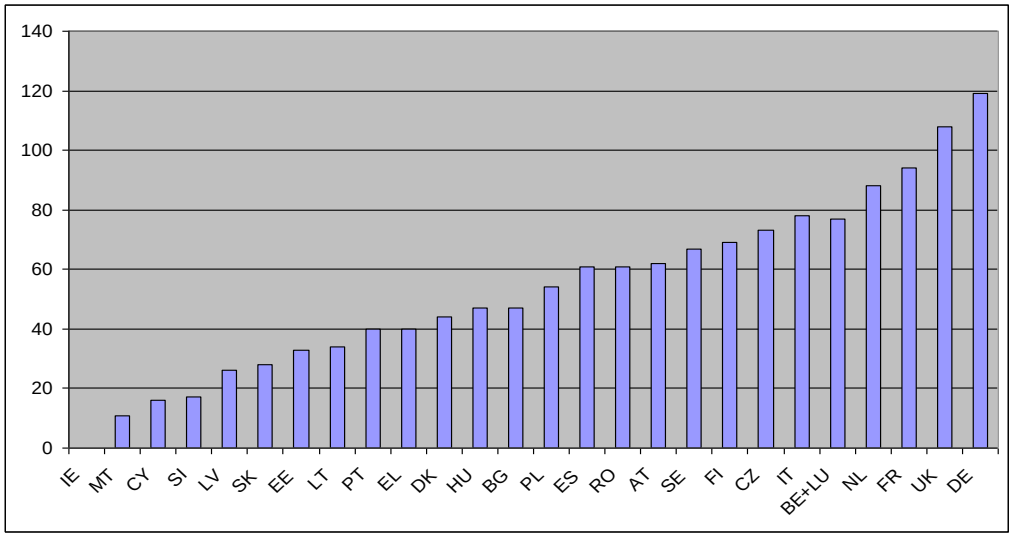
[5]The Lisbon Treaty is the latest amendment of the EU founding Treaties, entered into force in 2009. It resulted in the (current) Treaty on European Union (TEU) [OJ C 326.26.10.2012 p. 13] and Treaty on Functioning of the European Union (TFEU) [OJ C 326.26.10.2012 p. 47]

[6]See articles 206 and 207(1) TFEU

[7] See especially Opinion 1/76 'Draft Agreement establishing a European laying-up fund for inland waterway vessels' [ECLI:EU:C:1977:63]; Opinion 1/94 'Competence of the Community to conclude international agreements concerning services and the protection of intellectual property'; Opinion 2/00 [ECLI:EU:C:2001:664]

Figure 1

Overview of the number of Bilateral Investment Treaties concluded by Member States



Source: COM(2010)343 final[8]

The Regulation 1219/12 of the European Parliament and Council on establishing transitional arrangements for bilateral investment agreements between Member States and third countries (hereinafter the Regulation) addresses the steps that should be taken about existing bilateral investment agreements. It states that the bilateral agreements signed before 1st December 2009 can be maintained in force, or enter into force, in accordance with the Regulation. In addition, a few obligations are engaged for the Member States: to take necessary measures to eliminate the BIT's incompatibilities with the Union law; to amend or conclude BITs in accordance with Union law and to cooperate with the negotiations or the conclusion by the Union of a BIT with third countries.

As a general rule, the Member States should get the Commission's authorization to open formal negotiations with third countries. The Commission may require the Member State to supplement or remove from such negotiations and from the prospective bilateral investment agreement any clauses necessary to ensure consistency with the Union's investment policy or compatibility with Union law.

As for the intra-EU BITs, the main problem was that they were incompatible with the fundamental principles of the EU, more precisely, conflicts arose from restrictions on the free movement of capitals and protections granted for investment in BITs. According to the European Commission, those provisions of the Bilateral Investment Treaties were causing discrimination among Member States which were not parties in those treaties. According to the CJEU case-law, discrimination based on nationality, as declared by the

[8]European Commission (2010). *Towards a comprehensive European international investment policy.* COM(2010)343 final

EU Treaties[9] and confirmed by the case-law of the CJEU,[10] is incompatible with EU law. Thus the Union came up with the general regulation for all bilateral investment agreements of the Member States.

Intra-EU bilateral investment agreements face more problems than the agreements with third countries. The European Commission has made a bold commitment to proving that intra-EU BITs are infringing Union law. The arguments that were presented by the Commission are as follows:[11]

- The principle of *lex posterior*, which requires Member States to take actions against conflict between EU law and earlier treaties in their domestic law;
- The principle of supremacy of EU law, which means that EU law prevails over treaties concluded between EU Member States;
- Availability of equivalent investment protection under EU law;
- The principle of non-discrimination under Article 8 TFEU, which prohibits any discrimination on the grounds of nationality;
- The violation of State aid rules under EU law;
- And lastly, the exclusive jurisdiction of the CJEU on interpreting EU law and that an arbitral tribunal is not competent to seek preliminary ruling from the CJEU.

In response to the arguments of the Commission, the Member States presented the problems arising from termination of their bilateral investment agreements. Firstly, European Union investors would lose their right to benefit from the advantages of international investment arbitration for disputes arising out of their investment in a European Union Member State. The only available solution would be national courts. Thus the investors would not have complete confidence in their investments in Member States. Secondly, a number of intra-EU BITs stipulate a sunset clause, which allows protected investors to enjoy substantive and procedural protection under the BIT upon its termination for a specified period of time. And lastly, Union law has no equivalent substantive protection to intra-EU BITs since the latter generally provide a broader scope of protections, as pointed out by Advocate General Wathelet in the *Achmea v. Slovakia*[12] preliminary ruling.

3. Other novelties of the approach of the European Union towards Foreign Direct Investment

Besides having conflicts about previous multilateral and bilateral agreements of the Member States, the EU also had some new visions about FDI.

[9]See especially Article 18(1) TFEU and in the context of the so called four economic freedoms, Part Three Title 1 TFEU

[10] See for instance Case C-467/98 Commission v Denmark [ECLI:EU:C:2002:625]

[11] Ilie, L. (2018). What is the Future of Intra-EU BITs? *Kluwer Arbitration Blog*, January 2018, http://arbitrationblog.kluwerarbitration.com/2018/01/21/future-intra-eu-bits/ [accessed May 20, 2018]

[12]Opinion of AG Wathelet in case C-284/16 Slovak Republic v. Achmea BV [ECLI:EU:C:2017:699], para 205., in the view of the arbitral tribunal, investment protections under Intra-EU BITs were neither covered nor applied in the same scope as under EU law. Furthermore, European Union law did not grant access to investment arbitration or an equivalent provision that would allow a EU investor to bring a claim against EU Member State.

The two major agreements that EU is working on are the CETA (Comprehensive Trade and Economic Agreement) with Canada and the TTIP (The Transatlantic Trade Investment Partnership) with the USA.

CETA is a new trade agreement between the EU and Canada. On 21 September 2017 CETA entered into force provisionally.[13] As such, most of the agreement now applies. National parliaments in EU countries – and in some cases regional ones too – will then need to approve CETA before it can take full effect. In the case of TTIP, the trade and investment negotiations with the US are in process since 2013.

The EU has recently made clear that it is determined to move away from its previous system of investor-state dispute settlement (ISDS), as its ad hoc nature does not sufficiently guarantee impartiality and predictability. That is why, after a long and thorough debate with all relevant stakeholders, the EU replaced ISDS in all its negotiations with a permanent Investment Court System.[14] The Commission says that the Investment Court System in EU trade and investment agreements already addresses all the main shortcomings identified in the old ISDS system. But due to its bilateral nature, it only applies to the specific parties to each agreement. It can't address the problems outlined above at a global level. For example, it does not cover the many Member States' agreements. Moreover, it would be much more efficient to have just one, multilateral institution to rule on investment disputes covered by all the bilateral agreements in place.

The proposal for the new court system includes major improvements such as:[15]

- a public Investment Court System composed of a first instance Tribunal and an Appeal Tribunal would be set up;
- judgments would be made by publicly appointed judges with high qualifications, comparable to those required for the members of permanent international courts such as the International Court of Justice and the WTO Appellate Body;
- the new Appeal Tribunal would be operating on similar principles to the WTO Appellate Body;
- the ability of investors to take a case before the Tribunal would be precisely defined and limited to cases such as targeted discrimination on the base of gender, race or religion, or nationality, expropriation without compensation, or denial of justice;
- Governments' right to regulate would be enshrined and guaranteed in the provisions of the trade and investment agreements.

This builds on the EU's existing approach which ensures:

- proceedings will be transparent, hearings open and comments available on-line, and a right to intervene for parties with an interest in the dispute will be provided;
- Forum shopping is not possible;

[13] http://ec.europa.eu/trade/policy/in-focus/ceta/ [accessed May 20, 2018]

[14] European Commission (2017). *A Multilateral Investment Court*, http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf [accessed May 20, 2018]

[15] The main elements of the reform can be found in the communications that Union made since the negotiations of CETA http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364 [accessed May 20, 2018]

- Frivolous claims will be dismissed quickly;
- A clear distinction between international law and domestic law will be maintained;
- Multiple and parallel proceedings will be avoided.

4. Conclusions

It can take decades to finally stabilize the investment policy of the Union. The reform steps taken by the EU towards new regulations on investment have shown the Union's determination. Regardless of the, numerous problems, including previous, agreements that the EU is dealing with, the process itself is quite successful. After long-term negotiations, the multilateral agreements of the Union are waiting for approval from Member States' Parliaments, and the proposal regarding the single judicial system is getting positive feedback from the observers. The single judicial system is striving to live up to the standards set by international tribunals', and this is evidenced by the use of approaches developed by the WTO.

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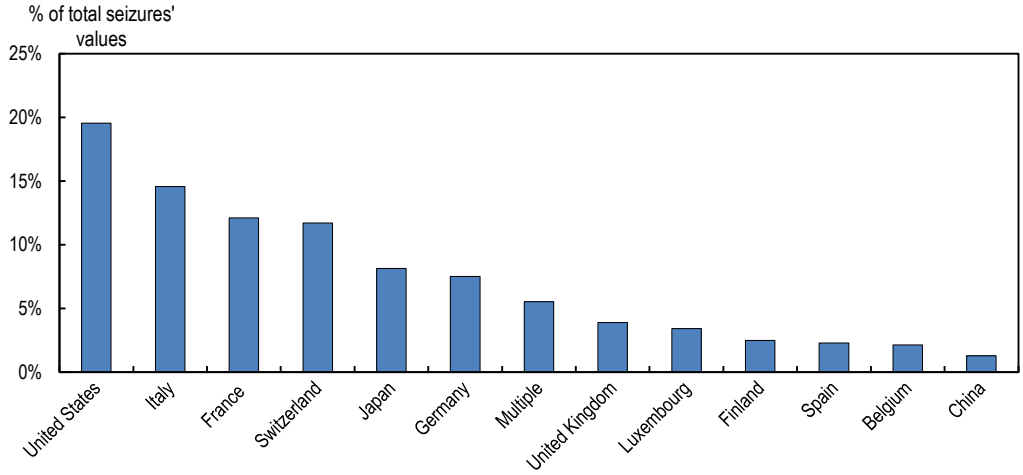
THE EU POLICY PATTERN IN ENFORCEMENT OF IP RIGHTS*

Osman Bugra Beydogan[1]

The widely digitalized world has enabled a whole range of new opportunities at any rate. Having gathered the innovators and creators globally, the environment of the internet has become a solid marketplace. Technologies of all kinds, therefore, have been available to a much greater audience whilst the innovators and creators achieved the access to new markets without substantial investments needed. However, the activities that have been catalyzed and globalized by the digital environment are not limited to legitimate content. Besides the affirmative impact of digitalization on IP rights, it also increasingly serves as a distribution channel for counterfeit and pirated goods. Owing to the broader and quicker spread of IP-infringing goods and content through the digital environment, it became more and more difficult for consumers to distinguish infringing goods and content from genuine and legal ones. Correspondingly, the digital upheaval contains a major risk for the European innovation and growth, having regard to the fact that the EU figures one of the greatest global actors in innovation and knowledge-based technologies. Moreover, such sorts of IP-infringing activities may readily take advantage of the weaknesses of IP right enforcement at an international level.

Table 1

Seizures of counterfeit and pirated goods: Top economies of origin of right holders whose IP rights are infringed



Source: OECD (2016) Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact, http://dx.doi.org/10.1787/888933345922

* DOI 10.21868/PGnG.2018.1.5.

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The European Commission has underlined in its Communication[2] that today counterfeit and pirated goods figure 2.5 % of global trade. The EU industry is dramatically affected, hence, recent studies suggested that 5% of all imports into the EU are counterfeit and pirated goods, corresponding to an estimated EUR 85 billion in illegal trade.[3] With this being the case, a special emphasis by the Commission was put on enforcement of IPRs. Indeed, enhancing the internal and external exercise of IP rights has been in the core of the Union's 2020 Strategy as well as both the Single Market and Digital Single Market Strategies.

However, even at the premature phase of digitalization, IPRs enforcement at multinational level has always been challenging. Inherently, this is also the case for the Union. As an initial step, Directive 2004/48/EC on the enforcement of intellectual property rights (hereinafter: IPRED) has been introduced. The directive has been dedicated to provision of minimum measures, procedures and remedies allowing effective civil enforcement of intellectual property rights. The objective of IPRED has been expressed as approximating national legislative systems, hence, ensuring more comprehensive, equivalent and homogeneous level of protection within the Union and, of course, in the internal market. As the Directive per se stated in its Article 18,[4] an assessment regarding implementation and impact of IPRED on the enforcement of IPRs was carried out, and eventually subjected to the Commission's report.[5] The evaluation of the directive disclosed that the Directive created high European legal standards to enforce various rights that are protected by independent legal regimes. Similarly, the measures, procedures and remedies stipulated by IPRED have facilitated the better protection of IPR throughout the EU and the circumvention of IPR infringements in civil courts. Therefore, it has led to the creation of a common legal framework where the same set of tools is to be applied across the Union.

Nevertheless, the measures, procedures and remedies set out in the Directive are not implemented and applied uniformly among the Member States. In other words, the interpretation of the Directive has presented divergences from one Member State to another. This diversity, on the other hand, was blamed on differences in national civil law proceedings and judicial traditions.[6] In this context, necessity for further clarification to facilitate a common understanding of the Directive became evident. Eventually this prospect led the Commission to introduce a communication[7] to clarify its views on the provisions of the Directive around which divergent interpretations appeared ever since it entered into force. The Communication made its remark on the following provisions

[2]Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: *A balanced IP enforcement system responding to today's societal challenges,* COM (2017) 707 final.

[3] Ibid.

[4]Three years from 29 April 2006, each Member State shall submit to the Commission a report on the implementation of this Directive. On the basis of those reports, the Commission shall draw up a report on the application of this Directive, including an assessment of the effectiveness of the measures taken, as well as an evaluation of its impact on innovation and the development of the information society.

[5]Application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights.

[6] Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights, 1.

[7]Ibid.

of IPRED respectively;[8] Scope; General obligation; Entitlement to apply for measures, procedures and remedies; Presumption of authorship or ownership; Rules on obtaining and preserving evidence; Right of information; Injunctions; Corrective measures; Calculation of damages; Legal costs.

Similarly, the patterns of the European Union's action plan relating to enforcement of the IP rights, more particularly its combat against counterfeit products and piracy, are also overtly drawn up in the Communication from the Commission.[9] The action plan has its focus on commercial extent of IPR infringements which have been deemed the most harmful. It aims to stipulate a new policy approach, the so called "follow the money", that seeks to deprive commercial scale infringers of the revenue flows that draw them into such activities. This policy approach contains the objective for stakeholders and associations to avoid placing advertisements on commercial scale infringer websites and apps. They are also obliged to endeavor to dissuade their members from offering, selling, recommending, or buying media space on commercial-scale IP infringing sites. The entire action plan is comprised of ten sectors, the most significant of which are:

- To raise awareness amongst citizens on the economic harm caused by commercial scale IP infringements and on the potential health and safety risks associated with IPR-infringing products;
- Consultation actions with all relevant stakeholders on applying due diligence to prevent commercial scale IP infringements;
- Improving IP civil enforcement procedures for small and medium scale enterprises (SME), in particular in respect of low value claims;
- To consult stakeholders on the need for future EU action; To establish a Member State Expert Group on IP Enforcement;
- To support the development of a comprehensive set of sectoral IP enforcement related training programs for Member State authorities in the context of the Single Market.

As far as enforcement beyond the Union's borders is concerned, diversities and difficulties are of greater amount. Evidently, however, as one the biggest global actors of IP-based industry, the EU not only has to achieve the enforcement of the IP rights within its borders; but it also has to remain competitive in the global market where lower-quality third country products are involved and take advantage of less strict IP regulations. Moreover, the EU has a limited capacity to convince third countries to improve their standards and secure better protection of EU intellectual property.[10] On the other hand, the necessity of a decent policy response has been observed relevant, not only to ensure effective protection and enforcement of IPRs internationally, but also to raise public awareness of the economic and other impacts of infringing goods and their

[8]Ibid, 2.

[9]Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee (2014). *Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan*. COM (2014) 392 final.

[10]Bendini, R & Mendonca, S. (2015). *In-depth analysis, Re-communicating the EU's IPR strategy for third countries*, 2015. Available at: http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/549030/EXPO_IDAN(2015)549030_EN.pdf [accessed 2 May 2018].

harm to further innovation and on health and safety.[11] Concordantly, and as a "logical subsequence" of the IPRED which is to harmonize enforcement legislation within the Union, the Communication of the Commission, with the intent of contributing to the enforcement in third countries, was introduced.[12] The said strategy initially aimed to take a long term action so as to significantly reduce IP rights violations in third countries. It also seeks for cooperation between the right holders, relevant entities and the users and to inform them as to the importance of their participation.

The strategy suggests that the institutional structures of multilateral agreements may be used as channels to monitor and discuss multinational legislation and enforcement problems from a very early stage. Therefore, these could serve as an area for political dialogue. It also maps out the inclusion of enforcement clauses in future bilateral or regional agreements more operationally and to clearly define what the EU regards as the highest international standards in this area and what efforts it expects its trading partners to put in.[13] Additionally, it deems the bilateral agreements that the Community establishes with third countries a tool of standardization. In other words, it adopts a strategy through which the Union stipulates the achievement of a high level of IPR protection as well as enforcement standards by the third countries that conclude bilateral agreements with the EU.

The Communication also draws attention to the fact that forming an IPR enforcement framework involves substantial complexity and multi-disciplinary effort. It involves composing legislation drafts, training judges, enforcement officers, customs officials and other experts, forming the relevant institutions and offices, as well as raising social consciousness as to the importance of IP rights. However, as most of these needs are addressed by the Commission via technical cooperation programs, it is important to strengthen and enhance the technical cooperation in prioritized third countries.

As regards to IPR disputes, the Communication suggests to stipulate the WTO dispute settlement mechanism and dispute settlement tools of a similar kind into bilateral agreements. It also encourages public-private partnerships and seeks to improve the cooperation between the companies and associations which actively combat counterfeit and piracy.

At a multilateral level, however, it is necessary to mention the failure of the Anti-Counterfeiting Trade Agreement (ACTA) to come into force in the EU. The objective of ACTA was to provide a widely applicable multinational legal framework for IP rights enforcement. However, it remained controversial and was widely criticized on the ground that it favors the interests of business giants over the individual's rights and liberties with regards to copyrights. Furthermore, it was found to be "too vague and open to misinterpretation".[14] Eventually the European Parliament rejected the treaty.

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[11] Full text is available at: http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152643.pdf [accessed 2 May 2018 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee (2014). *Trade, growth and intellectual property - Strategy for the protection and enforcement of intellectual property rights in third countries* (2014),].

[12]Strategy for the enforcement of intellectual property rights in third countries (2004). Full text is available at http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122636.pdf [accessed 2 May 2018].

[13] Ibid.

[14]Acta down, but not out, as Europe votes against controversial treaty, Available at: https://www.theguardian.com/technology/2012/jul/04/acta-european-parliament-votes-against [accessed 2 May 2018].

Upon the rejection of the ACTA by the European Parliament, the Commission, in July 2014, passed a revised version of the Communication concerning the IPR enforcement in third countries.[15] However the latter Communication has been based on the previous ones with some nuances and with some advancements in line with digitalization in the field, putting emphasis on the below objectives:

- Raising awareness of the overall benefits of IPRs
- Cooperation with third-country governments,
- Broader consideration of stakeholders interests and improving stakeholder engagement,
- Providing better data,
- Building on EU legislation (by means of FTAs, IP Dialogues, technical cooperation),
- Providing assistance to EU right holders in third countries.

All in all, at the current stage, the EU at internal level seems to pursue the goal of approximating the legal framework for IPR both in context of substantive law and procedural law. Thus, obstacles as to the enforcement owing to the territorial nature of IPRs may be circumvented. We may argue that the intellectual property field is a good example where the EU law has been widely harmonized. Indeed, certain types of IPRs (i.e. European Union Trademark, Community Design, Unitary Patent and the patent litigation) have been subjected to a unitary protection which, inherently, facilitates the enforcement within the Union. On the other hand, aligning the IPR enforcement on a multilateral level is of great difficulty and crucial at the mean time. As far as the enforcement in third countries is concerned, the Union's contemporary tendency is focused mainly on bilateral efforts (FTA negotiations, dialogues, capacity-building and technical cooperation) thus stipulating more advanced IP standards to the third countries so as to approximate the laws beyond the Union's territory. Furthermore, the ever-increasing level of harmonization within the EU is likely to boost its credibility in third countries.

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[15] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee (2014). *Trade, growth and intellectual property - Strategy for the protection and enforcement of intellectual property rights in third countries.*

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DOES THE COMI ENSURE LEGAL CERTAINTY OF GROUP INSOLVENCY IN THE EU?*

Ekaterina Markova[1]

Many corporations are structured as groups of companies. However, the Insolvency Regulation and its Recast version do not contain any special provisions on determination of the COMI (the centre of the main interest) in case of group insolvency. This raises some problems in determination jurisdiction in insolvency proceedings. This paper will reveal strengths and weaknesses of the current approach to the COMI and also will address possible changes in European case law stemming from the recasting of the Insolvency Regulation.

1. Introduction

The need for regulating insolvency at EU level can be traced back to the tendency that activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by EU law. Since the insolvency of such undertakings also affects the proper functioning of the internal market,[2] there is a need for an EU act requiring coordination of the measures to be taken regarding an insolvent debtor's assets. Council Regulation (EC) No 1346/2000 (here in after Insolvency Regulation 2000) and its recast version Regulation (EU) No. 2015/848 (hereinafter Insolvency Regulation 2015) established that *"the courts of the Member States within the territory of which the centre of the debtor's main interests (or simply COMI) is situated shall have jurisdiction to open insolvency proceedings".*[3] However, there are no specific provisions on establishing the COMI of groups of companies in the Regulation. The question is whether the current legal framework and case-law has clear and unambiguous rules on insolvency proceedings in case of corporate insolvency.

2. Concept of the COMI

The Insolvency Regulation 2000 describes the COMI as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties (Insolvency Regulation 2000, Recital 13). This concept includes three elements. First, the COMI is a place where the debtor conducts the

* DOI 10.21868/PGnG.2018.1.6.

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[2]According to a calculation based on an impact assessment study of the European Commission covering a time span between 2005 to 2015, the (average) rate of cross-border insolvency proceedings is approximately 4 % in the total number of insolvency proceedings (i.e. cross-border + domestic insolvency proceeding altogether) at EU level. [For the results of the study, see European Commission (2017) Impact assessment study on policy options for a new initiative on minimum standards insolvency and restructuring law – Final Report. Luxembourg: Publications Office of the European Union]

[3] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160, 30.6.2000, Recital 13: Regulation (EU) No. 2015/848of 20 May 2015 on insolvency proceedings. OJ L 141., 2015, Recital 23.

administration of its interests. Second, the conduct should be on the regular basis. Third, the COMI should be ascertainable by third parties.[4]

The term "*place where the debtor conducts the administration"* is a wide concept, which may include different activities related to the business, for instance, the place where the business actually operates and has its employees, the place where the board of directors of the company meets, the place where strategic decisions of the company are made.[5]Following this logic, the subsidiary which is wholly owned by the parent company and does not decide independently upon its own conduct on the market may have its COMI in the jurisdiction of its parent company.

The Regulation does not explain which activity is a major definitive factor and does not imply the weighting of each factor. There maybe situations when the meetings of the board and operating business are located in different places; the Regulation only suggests that the registered office shall be presumed to be the COMI in the absence of proof to contrary.[6] At the same time, the Court of Justice of the European Union (hereinafter the CJEU, or the Court) established that all of these factors are not sufficient to rebut the presumption. Instead, the Court preferred to consider the registration as a reliable factor that ensures legal certainty which is contrary to the idea that the COMI has to be in a jurisdiction that has major links with the company's business.

3. The Eurofood case

In the *Eurofood* case the policy of the Irish subsidiary wholly owned by an Italian parent company was determined by the parent's headquarters. Also the subsidiary had no employees in Ireland. The only function of the subsidiary was carrying out financial transactions for the parent company. The CJEU ruled that, first, the COMI should be determined for each distinct legal entity,[7] and second, "*the mere fact that the economic choices are […] controlled by parent company is not enough to rebut the presumption"*.[8] The same logic was used in the *Interedil* case, where the CJEU confirmed the impossibility to rebut the presumption unless all relevant factors make it possible to establish the COMI in a manner ascertainable by third parties.[9] Although this decision opened the possibility to overcome the presumption, the standards of proof remained high, which makes it hard to rebut.

The third criterion is that the COMI shall be ascertainable for third parties or can be observable. The logical question is who these third parties are. In the *Eurofood* case the CJEU defended the position of creditors. However, the insolvency proceeding is open on a request of an applicant while there is no full list of creditors. Therefore, it is

[4]Bachner, T. (2006). The Battle Over Jurisdiction in European Insolvency Law. *European Company and Financial Review* 3(3): 71.

[5]Wautelet, P. (2007). Some Considerations on the Centre of Main Interests as Jurisdictional Test Under the European Insolvency Regulation. In, Affaki G. (Ed.), *Cross-Border Insolvency and Conflict of Jurisdiction: A US-EU Experience*, Bruxells: Bruylant., 73-76.

[6] Council regulation (EC) No 1346/2000, Article 3 Para.1.

[7] Case C-341/04, Eurofood IFSC Ltd, European Court Reports 2006 I-03813, Para. 30

[8]Eurofood, Para. 36.

[9]Case C-396/09, Interedil Srl, in liquidation v. Fallimen to Interedil Srl and Intesa Gestione Crediti SpA, 20 October 2011, ECR 2011 I-09915, Para. 59.

impossible to establish whether the COMI was ascertainable for all creditors at the time when the court must decide on its jurisdiction. This criterion is subjective and depends on the particular creditor who requested for insolvency. In most cases only the applicant participates in the hearing on opening the insolvency proceedings, therefore other creditors cannot object to his evidence. Also, such a key notion as "presumption" may have various meanings to lawyers from different legal systems within the Union. For example, some courts will assume their jurisdiction unless somebody rebuts the presumption,[10] therefore they will not examine the ascertainment for third parties. Therefore, the reliance on this criterion does not lead to actual legal certainty. Unfortunately, in the *Eurofood* case the CJEU based its argumentation exactly on the subjective third criterion of the COMI.[11]

Without a doubt, the registered office is more ascertainable for third parties.[12] But it appears that the rationale of choosing the registration office as the place of COMI in most cases is the following. In all insolvency cases one particular creditor, namely the national tax authority will always defend that presumption, because it may have priority in creditor ranking in its own country, sufficient infrastructure to participate in insolvency etc. The desire to make insolvency proceedings subjected to corporate law and tax law was demonstrated many years ago in the *Daily Mail* case.[13] As a consequence, following the *Centros* case logic[14] the CJEU only agreed that in the case of a 'letterbox' company, the COMI cannot be situated where the registered office is.[15]

Eurofood company made three transactions with the applicant, and two of them were secured by the parent company.[16] Therefore, the counterparty in these transactions, or creditors, could have assumed the operation of the subsidiary is conducted in a different member state. The principle of the *"COMI ascertainable for third parties"* may become the instrument to choose preferable jurisdiction for creditors.

It is important to note that some scholars interpret the third criterion as a consequence of conducting administration of interests on regular basis and, thus, as a non-independent criterion.[17] Indeed, the wording of Recital 13 allows interpreting in such a way. And some courts diverge from the position of the CJEU by explaining all links between the company and the jurisdiction other than where the registered office is located.[18] This divergence decreases legal certainty in insolvency proceedings.

[10]Bachner2006: 324.
[11]Eurofood, Para. 33.
[12]Almaskari, B. J. (2016). *Towards Legal Certainty: European Cross Border Insolvency Law and Multinational Corporate Groups*, Thesis submitted for the degree of Doctor of Philosophy, University of Leicester, 85.
[13] Case 81/87, The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc, ECR 1988 -05483, Para. 20.
[14]C-212/97, Centros Ltd v Erhvervs- ogSelskabsstyrelsen, ECR 1999 I-01459, Para. 39.
[15]*Eurofood*, Para. 35.
[16]Opinion of Advocate General Jacobs, delivered on 27 September 2005, Case C-341/04, Paras. 28-29.
[17]Wessels, B. (2012*). International Insolvency Law*, Third Edition, Deventer: Kluwer, 456.
[18]Kycia, K. & Dec, M. (2015).*Global Insights: Practical Problems in the Cross-Border Insolvency of a Subsidiary in Poland*. Available at: http://www.insol.org/emailer/May_2015_downloads/Document%2015.pdf [accessed April 29, 2018]

It is obvious that in *Eurofood* the CJEU refused to link the parent company and the subsidiary. At the same time, the CJEU established the possibility of treating the corporate group as 'a single economic union' in other cases considering tax issues and competition law.[19]This may cause particular problems. For example, if the parent company and its subsidiary were held liable as a single union and both of them claimed insolvency, how will the liability be divided between two proceedings?

4. The new EU Insolvency Regulation of 2015

The recast EU Insolvency Regulation 2015 confirms all the three criteria developed in the CJEU case-law. More than that, it confirms the importance of the test that the COMI shall be ascertainable by third parties supporting the approach seen in *Eurofoodas an independent criterion (Article 3(1))*.

On the other hand, it states that *"rules on the insolvency proceedings should not limit the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the COMI of those companies is located in a single Member State",* but specific rules regarding the COMI for a group of enterprises were still not introduced. Will the CJEU find more possibilities in this Recital to deviate from the strong presumption established by the CJEU? Or is this a reference to a 'letterbox' parent company? What is more important, will there be any guidelines how to establish whether the COMI was ascertainable for third parties and who shall be counted as a third party under the Insolvency Regulation 2015?

The Insolvency Regulation 2015 came into force in 2017, therefore now we do not have a sufficient number of cases before the CJEU to analyse if there are any changes in the Court's approach due to the Recast version. Till then, the possibility that an applicantwillchoosepreferablejurisdictionremains.

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GOVERNANCE OF EU POLICIES IN THE SINGLE MARKET: CHALLENGES OF MEMBER STATES' COMPLIANCE*

Miftar Salihi[1]

While the EU is drafting a huge number of laws in recent times, Member States respond differently to the laws and obligations issued by the EU. It is debatable if the EU has achieved success in the Single Market, whether the EU lifted barriers existing between Member States and how States apply the policies created by the EU. The process of compliance has several distinct stages, and the process itself is very dynamic because some Member States hesitate to comply with the EU obligations. Through successful governance, the EU is making the harmonization process easier: at all times, the EU is ready to take legal measures in order to ensure the uniform application of EU law in all Member States.

A good governance and a better compliance with EU law are what EU citizens expect: the promotion of these values is not only a task for the Commission but it is a responsibility of all levels of public authority, private undertakings and organised civil societies. The failure to correctly apply EU law has a huge impact on the Single Market, because it denies the millions of citizens and European businesses the rights and the benefits they enjoy under European law. The issue of compliance is broad and has many different aspects, such as legal, political, administrative and economic. Member States may fail to comply because they are unwilling, unable, have a lack of human and material resources or they are unaware of their obligations.

1. Governance of the EU in the field of the Single Market

The term 'governance' means rules, processes and behaviour that affect the way in which powers are exercised at a European level. A good governance by the EU must be achieved through the principles of good governance, such as *openness, participation, accountability, effectiveness and coherence.* Each principle is important for establishing more democratic governance. They underpin democracy and the rule of law in the Member States.

In the early 1980s the failure of the single market was obvious for all to see and for that reason the Single European Act was issued, which set the objectives for achieving a successful single market. But even during this time the single market was developing gradually and was faced with numerous problems. These problems seemed to be present due to the lack of power of EU institutions to impose measures or sanctions against the Member States breaching EU law; at the same time, the competences of the EU Commission were not clearly defined. Another problem was that certain Member States, even after their accession to the EU, continued to develop a protectionist policy against other EU Member States. It is really difficult to face this situation when we have a detailed legal infrastructure and a never before seen cooperation between Member States

* DOI 10.21868/PGnG.2018.1.7.

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and the EU: it appears that the Member States comply with EU law only when it is in their own interests.

In July 2001, the European Commission presented its White Paper on European Governance (in the following: the White Paper), which was the first document in the European integration history directly addressing the question of how to govern ourselves (European institutions and Member States) better. The White Paper suggests a key issue about the effective transposition of EU law: there must be a closer legislative collaboration between the institutions, annual assessment of the quality of legislation, a more appropriate use of legislative instruments, simplifying and reducing Community (now: EU) legislation, and ensuring the quality of legislation adopted.

2. Compliance of Member States with EU law

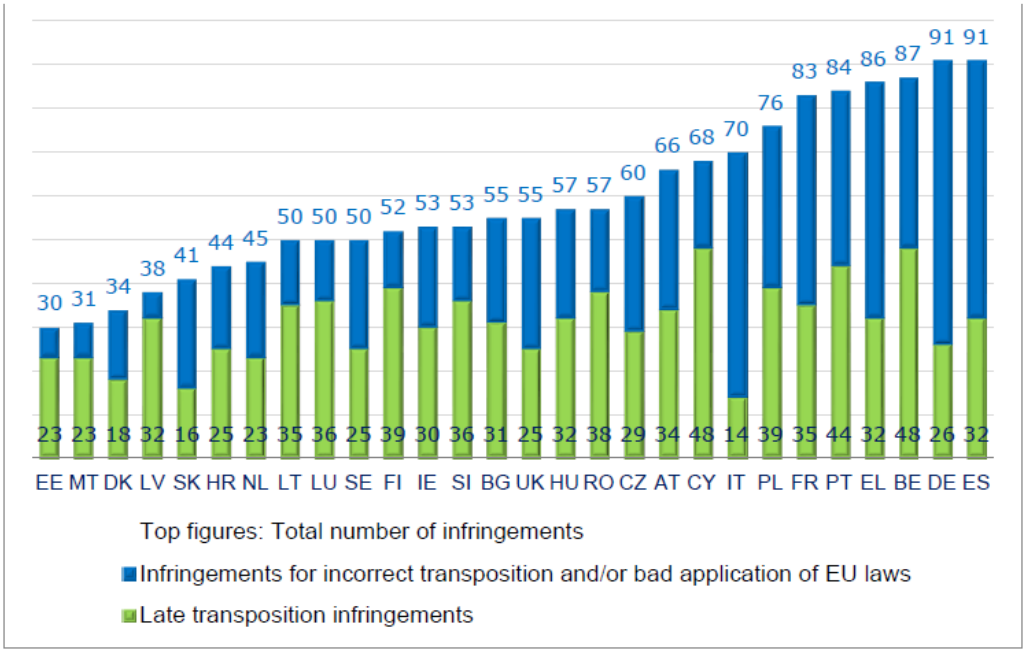
Member States act differently with regard to the transposition of EU law into national legislation. For different reasons, they do not always comply with EU rules, and even if they do, some of the states tend to comply only once the transposition deadline has already passed; even though it would be important for the Single Market to exist not only on paper but also in reality. At the end of 2016, there were 1657 open infringement cases, which is a considerable increase (21%) from the previous year and higher than all previous years. Also the number of new late transposition cases increased sharply (by 56%), from 543 (in 2015) to 847 (in 2016).[2] Figure 1 shows the number of infringement cases by country at the end of 2016.

The process of compliance in itself is more complex and difficult when it has to do with directives, as these legal instruments require transposition by the member states. So, in this case, states may be more flexible in how they incorporate EU law into national rules and very often they show negligence in this regard. The variety of instruments and procedures used by the Member States to give effect to directives can cause differences in national legal and administrative systems: for this reason, we do not have the same level of transposition within the EU. The best solution could be if the EU Commission would engage itself in finding the appropriate instruments and procedures for the transposition of EU law that would be used by all member states. This could be realized if the European Commission would observe the instruments that are being used by the best complying Member States and propose these to the non-compliers, or would arrange more meetings for experts representing Member States. For these reasons, it's not surprising that some scholars have given strong arguments in favour of regulations, proposing to reduce the number of directives not only in the single market field but in all areas of EU legislation, because regulations are directly applicable in each member state. However, we should take into consideration that it is not necessarily the best solution, as it can create tensions between member states and not all the members have the same level of development and democracy.

[2] For more details see: European Commission (2017b): *Monitoring the application of European Union law*. 2016 Annual Report. COM(2017) 370 final, 6 July 2017, Brussels.

Figure 1

Number of infringement cases in EU-28 on 31 December 2016



Source: European Commission (2017b)

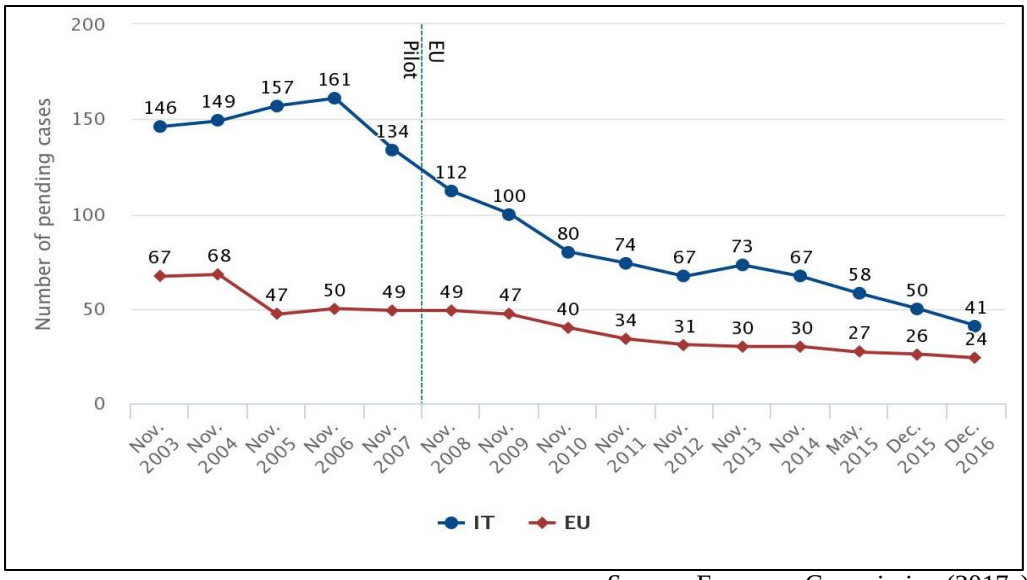
Regarding the compliance of Member States with EU law, we have several competing approaches. Enforcement approaches argue that states simply do not comply if the costs of a rule are too high and point to the role of infringement proceedings to increase non-compliance costs. Seeing this situation, the EU should create a clear framework in which it should determine the sanctions for the non-compliance with EU law, sanctions that must be imposed by measuring the consequences caused by non-compliance. In this case, non-compliance can be prevented only by increasing the costs of non-compliance. Based on this approach, smaller and less powerful states should be better compliers because they cannot bear the costs of infringement procedures and any eventual sanctions, while powerful states can afford the costs and they have more alternatives to cooperation with a particular partner: for these reasons it is more likely that powerful states would not comply and infringe on EU law.

The management approach assumes that non-compliance is involuntary. The literature has identified three sources of such involuntary non-compliance: lacking or insufficient state capacities, ambiguous definitions of norms, and inadequate timetables within which compliance has to be achieved. But, one can argue that the non-compliance is not involuntary because states intentionally resist to comply with EU law, due to governments trying to defend their existing rules. Any national government may decide to fight hard against the EU rules in Brussels, and having lost the battle at the European level, try to win it back at the implementation stage.

Due to the administrative reasons, in some cases the transposition of EU law is delayed for years. Based on the single market annual reports of 2017[3] (European Commission, 2017a and 2017b) and previous years, we can see that for example Italy – even though it is one of the founding states of the EU – has a considerable number of infringement procedures relating to late transposition and it is considered as one of the worst compliers, however, to 2016, there has been a decrease in the number of infringement cases as compared to the EU average (see Figure 2 below).

Figure 2

Evolution of infringement cases – Italy (2003–2016)



Source: European Commission (2017a)

It is thought that the problems of non-compliance in Italy have their roots in the country's administrative problems. The administration of Italy is faced primarily with the issue of corruption – which stems from political problems, but affects the whole administration of Italy – the lack of staff and the lack of professionalism may be the other reasons making this administration ineffective.

Non-compliance also happens because the Member States do not protest against a specific EU law, they do not offer any appropriate alternative and in the end they do not implement it. The shortcomings of the judiciary system can also be a factor for the non-compliance as well, because some judges refuse to refer to EU law.

[3]European Commission (2017b): i.m.; European Commission (2017a): *Single Market Scoreboard Performance per Member State Italy* (Reporting period: 2016), available at http://ec.europa.eu/internal_market/scoreboard/_docs/2017/member-states/2017-italy_en.pdf [accessed 2 May 2018].

3. What should the EU do for better compliance?

As it is determined in the 2001 Commission White Paper on European Governance, more effective enforcement of Community law is necessary not only for the sake of efficiency of the internal market but also to strengthen the credibility of the Union and its Institutions.

One of the tools through which they can ensure a better compliance is the impact assessment. It provides a structured framework for informing the consideration of the range of options available for handling policy problems and the advantages and disadvantages associated with each. This can include not only the impacts on business, but also on the environment, on social exclusion, etc. In an open, transparent and democratic decision-making process, it is important that groups and organizations, which will be affected by the new regulation, are consulted at the appropriate stages of the regulation process, so the consultations are also an effective tool.

Some of the other tools that are mentioned in different strategies of the EU are: simplification; access to regulation, meaning that everyone has the right to access regulation and to understand it; wider use of codifications; equality in the treatment of users; ability to impose sanctions and to make clear formulation of objectives.

4. Conclusions

The variety in the administrative systems of Member States is one of the factors why they do not comply with EU law at the same level. Administrative shortcomings can occur due to the lack of resources, the lack of professionalism, political problems or because of governments not wanting to apply the specific EU law who would rather not notify the state administration on time about the new EU law because they want to use their administrative problemsas a justification for non-compliance. Based on practice, Member States are the least likely to comply with EU law if they do not benefit from a specific law: for this reason, they sometimes intentionally fail to inform their administration on time about EU rules, they resist adopting EU law claiming it's incompatible with their legislator traditions, or they interpret EU law in their favour. For many reasons the EU should take the enforcement approach seriously and increase the costs of non-compliance. Based on the above, it should be apparent that the EU system of governance suffers from a lack of the features that we usually associate with democratic governance.

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