

Legal analysis of systemic investment protection regulation in the European Union's financial sector

L. Bocs

Rīga Stradiņš University, Riga, Latvia

Abstract. After the Treaty of Lisbon the European Union has an exclusive and uniform competence regarding investment agreements within its common commercial policy. Yet the political events in 2016 showed that there are still many regional differences politically and economically, especially after the so-called Brexit and negotiations with the United States of America in relation to transatlantic trade and investment. Therefore, the aim of the research is to determine the legal framework and related problems for unified investment protection within the European Union. Using descriptive, logical and deductive methodology the paper establishes a juristic base consensus for trade and investment policies, concludes that so far those policies have been systemically neglected due to regional differences in economic development and accordingly suggests to unify and protect the common investment policies by using already existing regional judicial mechanisms of member states within a unified code of conduct.

1 Introduction

The European Union (EU) has a uniform competence for investment agreements within the common commercial policy. Political congruency faces increased difficulties because of interdependencies, procedures within the so-called Banking Union and unified policy arrangements for sustained investment. Several *ex ante* considerations have already been demonstrated by the author relating to the international scientific conference “Society. Health. Welfare” in 2014 and have perilous implications for unified policies.^a Considering the events in 2016 relating to the British referendum to leave the EU, also known as “Brexit”, as well as the wide media coverage and criticism for lack of transparency within EU negotiations with the United States of America for the Transatlantic Trade and Investment Partnership (TTIP), the EU wide legal base for unified investment protections needs to be determined by general consensus.

The aim of the research is to determine the normative regulations and associated problems for the enforcement of EU law within the EU's financial sector for unified

^a See also : L Bočs. The difficulties with the European Union's financial sector's legal regulation. Available at: http://www.shs-conferences.org/articles/shsconf/pdf/2016/09/shsconf_shw2016_00019.pdf [visited 31.01.2017].

investment protection and to give an assessment of possible solutions, especially in relation to subsidiary investment protection capabilities within the EU member states that have differently developed economies. The published paper will be addressed in a video commentary by the author, and also recorded and made available as an audio article for listening^b with a creative commons license^c.

The research area is EU public law, the subject of the paper being investment law. Using descriptive, logical and deductive methodology within an *ex ante* doctrinal analysis, the normative supervision of EU investment protection is evaluated in relation to the hypothesis that the centralization of investment protection centralizes volatility into a systemic risk for the whole EU. The results show that unified investment legal protection can be achieved within a comprehensive framework according to existing member state judicial procedures for investment protections since it relates to prior established bilateral treaties and protection of property rights in general. Therefore the merit for legal analysis lies in the common commercial policy interests for unified investment protection and the author suggests to implement national law attributes for investment protection within a decentralized, nevertheless systemically congruent, legal regulation for coherent investment protection.

2 Investment policy of the EU

Article 3 of the Treaty on the Functioning of the EU sets out areas where the EU has exclusive competence and commercial policy is one of them. Under it the EU has sole responsibility for *inter alia* trade and investment issues after the so-called Treaty of Lisbon came into force in 2009, consisting of foreign direct investment (capital for commercial activity purposes) and also portfolio investment (capital for asset purchases and passive income) in EU territory [1]. Therefore EU centralized supervision of investment policies is a fairly recent endeavour without established best practices.

Investment policies in the EU have been national matters through bilateral agreements for most of the EU's existence and the exclusive competence of the EU has faced criticisms regarding proportionality and fair dispute resolution negotiations [2]. Such arguments arise out of general concerns regarding the balancing of state and public interests and private investors for the mutual benefit and proportional protection of legal interests [3]. By foreign direct investment agreements the EU plans wide opening and synchronizing of economies to mostly foreign corporations for added capital value within the EU through integrated policies [4]. This means that regional differences in the EU have to be addressed in order to be integrated in a truly unified commercial policy.

By way of EU regulation the EU has granted protection for bilateral agreements until the EU has made separate ones [5]. Separate EU agreements will be put in place since trade and investment are to be continued, yet in 2016, for instance, the negotiations with the United States of America for the Transatlantic Trade and Investment Partnership (TTIP) Agreement came under severe scrutiny *inter alia* because of private arbitration clauses which would limit public authorities to fully engage in democratic supervision [6]. So in order to actually establish centralized investment policies in the EU, the democratic needs of all member states have to be identified and respected since regional oppositions to EU policies can lead to events like the so-called Brexit, where the United Kingdom decided in a referendum to abolish its membership in the EU.

^b List of public files by Lauris Bočs. Available at: <http://files.fm/laurisbocs> [visited 31.01.2017].

^c Creative Commons license CC BY 4.0. Available at: <http://creativecommons.org/licenses/by/4.0/> [visited 31.01.2017].

3 Investment issues under EU commercial policy

The need for the EU to have a centralized trade and investment policy is related to the single market concept which comprises also single currency, capital flow and regional congruency aspects [7]. That is a logical system of integrated components, yet the specific details of investment policies are related to essential economic factors like, for instance, legal certainty, asset protection and dispute resolution on several political levels [8]. So in order to fully establish a single commercial policy, a common approach for these matters should be established since, for instance, dispute resolution has a connection to established legal jurisprudence.

The biggest issue of investment in the EU is the arbitration of possible disputes, yet within legal research this can be considered a purely political decision with several options available since the EU does not have prior experiences within the common commercial policy principle [9]. Since this paper is related to the international scientific conference “Society. Health. Welfare” in 2016 and its context of integrated social sciences, the author points out interdisciplinary research as a fundamental cornerstone relating to the efficacy of arbitration of investment disputes between states and investors, which has not yet been addressed in a coherent legal framework.

Established historical and economic research suggests that European relations for foreign trade and investment are more stable for foreign direct investment, so for national economies there is a reduced volatility and fluctuation of financial flows [10]. So the legal democratic interest for economic stability and growth leads to the possible conflict of a too broad state’s forthcoming to investors by establishing investment law practices with compromised democratic justifications [11]. As recent statistics indicates (Fig. 1), the clearly leading countries in the EU for foreign direct investment, for instance, are those with a very favourable taxing system for foreign corporations, meaning that international corporations can use them as legal tax havens. So the essential need for countries is the economic development, but a private investor has too much risk for public interests can have long-standing consequences, such as lack of transparency, unfavourable arbitration in disputes and an overwhelming dependency on private capital sources for public officials without the public *fiscus* actually benefiting much. So considering the regional tax laws as well as common commercial policy needs, a unified approach would be to implement simple EU directive measures for ensuring congruent external investment options under a centralized investment framework that is yet to be developed under EU law and poses a separate challenge because of aforementioned issues.

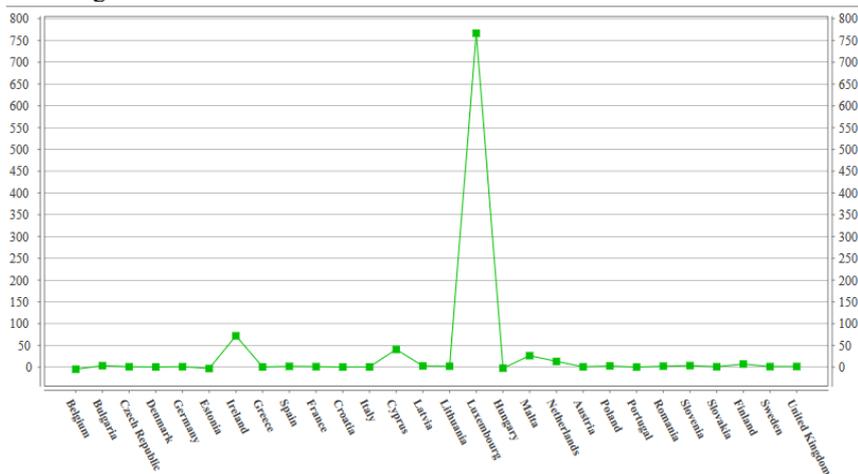


Fig. 1. Direct investment in the reporting economy (flows) – annual data for 2015, % of GDP (Source: Eurostat, code: tipsbp90).

4 Conclusions

According to the aforementioned legal evaluation, the author concludes the following:

1. The Treaty on the Functioning of the EU has created a central, but legally unsophisticated investment protection mechanism with a somewhat new common commercial policy approach under which the EU acts as a representative entity for its member states for *inter alia* investment issues, so the need is to establish EU wide political congruence for that.
2. The EU faces criticism whenever it challenges democratic principles of public transparency for the sake of private interests for capital allocation, so the lobbying and sustainable development criteria should be as big of an issue within the common commercial policy as trade and investment issues.
3. A common commercial policy can only be achieved under a unified code of conduct, because congruent and predictable economic decisions are a key factor for private capital allocation, so EU policy should reflect the proportional needs of society for the creation of long term wealth which could prevent separate member states to forsake the legal interests of their residents for short-term economic gain.
4. While regional economic differences relating to matters such as economic growth, employment and tax rates are still an issue in the EU, the arbitration for investment dispute resolution is overwhelmingly planned to be a unified approach so the risks for regional indifference for economic matters become increased and should be hedged against at least by national authorities.
5. It is clearly questionable issue whether or not all EU member states are willing to risk their position as legal tax havens, so an EU directive for minimum aims within investment policies could relate to a more diversified spectrum of investment locations in the EU since exceptional tax havens are just another form inter-EU competition which is contrary to a single market principle.
6. Conditions for investment *de lege ferenda*, i.e., future EU investment regulations are yet to be developed in a consistent framework, so the author points out the economic sector of public procurements as a possible role model for EU wide implementation of investment matters, since tender operations do take into account regional differences and operate with the intent of public-private cooperation for the public good with the practical effectiveness of regional member state courts.

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