

Vertical Allocation of Competences for Investment Treaties in the European Union

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Under the EC Treaty, the common commercial policy does not extend to foreign direct investment. Recent developments cast doubt on EU Member States' competence to conclude, amend and uphold their bilateral investment treaties. First, following the judgment of the European Court of Justice in infringement proceedings against some Member States, Austria and Sweden may be obliged to denounce some of their bilateral investment treaties. Second, the European Commission's Minimum Platform on Investment extends the Community's competence and may render Member States' current bilateral investment treaty practice in violation of EC law. If the Treaty of Lisbon, however, enters into force, the Union will be exclusively competent to conclude comprehensive investment treaties with third states. The only major limitation will be that the Union's competence does not cover portfolio investments. Due to the lack of any transition provisions in the Treaty of Lisbon recourse may be had to previous models in the same and other policy areas. While the advantages of the new Union competence prevail, there are few drawbacks.

I. Introduction

Germany has the most comprehensive investment treaty network with more than 110 bilateral investment treaties (BITs) in force, while other EU Member States (MS) have also concluded many BITs and continue to conclude such treaties.¹ Conversely, the Community alone has never concluded an investment treaty or an international agreement that is predominantly regulating investment with a third state. From Opinion 1/94 it follows that the existing Community competence for the Common Commercial Policy (CCP) does not extend to

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¹ Other Member States with a comprehensive BIT programme include the United Kingdom, Italy and France all of which have around 90 BITs in force. In 2007, the Netherlands (5), Finland, Germany and Spain (3 each) together accounted for the majority of the new BITs concluded by MS. UNCTAD, 'Recent developments in international investment agreements (2007–June 2008)', http://www.unctad.org/en/docs/webdiaeia20081_en.pdf (visited 10 June 2009).

foreign direct investment (FDI) involving third states.² The Community and the MS together, however, have concluded several international agreements with third states that contain provisions in the field of FDI.³ Nevertheless, currently MS are dominant in shaping the EU's investment relations with third states. But recent developments cast doubt on MS' competence to conclude, amend and uphold these BITs. Two examples illustrate this development.

First, on 3 March 2009 the European Court of Justice (ECJ) rendered its judgment in infringement cases initiated by the European Commission (Commission) against Austria and Sweden. The cases concern some BITs entered into by the two MS with third states. Under the terms of these BITs investors are guaranteed free transfer of capital connected with their investments. All BITs concerned predate the accession of the two MS and are therefore governed by Article 307 EC. Under Article 307 EC MS are obliged to take all appropriate steps to eliminate any incompatibility with the Treaty contained in such agreements. The ECJ held that by not having taken all appropriate steps to eliminate incompatibilities concerning the provisions on transfer of capital in the BITs Austria and Sweden failed to fulfil their obligations under Article 307 EC.⁴ As a consequence, Austria and Sweden may have to denounce these BITs. The ECJ clarified that its findings are not limited to the defendants in these cases.⁵ Therefore, the implications of the ECJ's judgment are likely to go beyond these two cases.

Second, on 27 November 2006 the Council of the EU adopted the Minimum Platform on Investment (Platform).⁶ The Platform serves as a standardised negotiation proposal for free trade agreement (FTA) negotiations with third states. Its purpose is to avoid the need to agree on an investment chapter whenever an FTA is negotiated. It becomes legally binding vis-à-vis third states only as far as the underlying agreement has been concluded. The most important consequence of the adoption of the Platform is that MS would not be competent anymore to conclude treaties that include provisions in the field of FDI covered by the Platform, such as provisions on market access, national treatment and Most Favoured Nation

² ECJ, Opinion 1/94 (1994) ECR I-5267.

³ The EU-Chile Association Agreement, OJ 2002 L/352 is the most advanced bilateral free trade agreement currently in force regulating investment. On the multilateral level, the most important example is the Energy Charter Treaty (ECT) with 47 Contracting Parties, including the European Communities and all MS.

⁴ ECJ, Case C-205/06 *Commission v Austria*, Judgment of 3 March 2009, not yet reported, para 45 and ECJ, Case C-249/06, *Commission v Sweden*, Judgment of 3 March 2009, not yet reported, para 45.

⁵ *Commission v Austria*, above n 4, para 43 and *Commission v Sweden*, above n 4, para 43.

⁶ Council of the European Union, 15375/06.

Treatment (MFN). MS' current BIT practice would then violate EC law due to lack of competence.

But while EC law constrains MS' competence to conclude, amend and uphold their BITs *de lege lata*, the Treaty of Lisbon, if it enters into force,⁷ will forcefully shift the allocation of competences between the EU and its MS in the field of FDI towards the EU.⁸ The extension of the CCP to FDI under the Treaty of Lisbon means that the EU has exclusive competence to negotiate and conclude investment treaties with respect to FDI.⁹ Accordingly, MS will lose the competence to negotiate and conclude treaties covered by the Union competence. However, the extent of the Union's competence is not yet clear.

II. The Status Quo: The Commission's Challenges to Member States' BIT Practice

A. Member States' Competence to Conclude Investment Treaties under the EC Treaty

Under Articles 131 and 133 EC the scope of the CCP does not *explicitly* extend to FDI. Both the Treaty of Amsterdam and the Treaty of Nice extended the scope of the CCP. These extensions, however, do have limited relevance for foreign investment policy. To the contrary, the Commission's proposals regarding the expansion of the CCP to FDI at the inter-governmental conferences of Amsterdam and Nice were rejected. In Opinion 1/94 the ECJ appears to have ended the expansion of EC competence under the CCP.¹⁰ The court has thereafter indicated that trade measures will not necessarily be perceived as trade or commercial policy measures if they pursue other objectives. According to the ECJ's jurisprudence, a Community measure is covered by the CCP competence under Article 133

⁷ After the failure of the Constitutional Treaty and the Irish referendum on the Treaty of Lisbon the future of the latter is in doubt. According to the Presidency Conclusions of the European Council of 11 and 12 December 2008, 'the Irish Government is committed to seeking ratification of the Treaty of Lisbon by the end of the term of the current Commission.' Council of the European Union, 17271/08. The term of the current Commission will end on 31 October 2009.

⁸ Article 188 C (1) of the Treaty of Lisbon (= Article 207(1) TFEU) states: 'The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, *foreign direct investment*, [...]' (emphasis added). Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007, not yet entered into force, OJ 2007 C 306/50.

⁹ Article 2(1) TFEU states: 'When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.' The TFEU put an end to the three-pillar-structure of the EU. Reference in the context of the TFEU is therefore made to 'Union' or 'EU' rather than 'Community'.

¹⁰ In the early cases concerned with the interpretation of the scope of the CCP, the ECJ took a rather liberal stance when it held that the CCP had the same content as the commercial policy of a state. ECJ, Opinion 1/75 (1975) ECR 1355; ECJ, Opinion 1/78 (1979) ECR 2871.

EC 'only if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade in the products concerned.'¹¹

Besides an explicit external competence the Community may also have *implied* external competence. Implied *exclusive* competence arises either as a result of internal legal acts of the Community or because external action is necessary for achieving Community objectives. Several Community competences provide for the adoption of measures affecting inward investment to the EU, for example, Articles 47(2), 48 and 56-60 EC. These competences confer certain external competences to the Community, but are far from covering all fields that are typically covered by an investment treaty.¹² However, as a consequence of the implied exclusive Community competence, MS may not be in a position to conclude, amend or uphold investment treaties that would affect the Community competence dealing with foreign investment. The consequences of this notion are illustrated in the case of the infringement proceedings against several MS.

The Community may also have an implied *non-exclusive* external competence.¹³ An implied non-exclusive competence requires that the entry into obligations by the Community vis-à-vis third states mentions the attainment of its internal objectives. Unlike in the case of implied exclusive competence, in case of implied non-exclusive competence the test for the exercise of the Community competence is not a necessity test, but rather a facilitation test. Non-exclusive competence might be implied in cases where the attainment of a Community goal is merely facilitated by the conclusion of an international agreement, ensuring the optimal use of an internal competence by the EC. To put it differently, fulfilling the requirements of the necessity test prompts exclusive competence, whereas a positive test of facilitation elicits non-exclusive Community competence. The consequences of this notion are illustrated in the case of the Platform.

B. The Infringement Proceedings against Several Member States

In the cases against Austria and Sweden the relevant BITs contain provisions that guarantee the free transfer, without undue delay and in freely convertible currency, of payments connected with an investment. Articles 57(2), 59 and 60(1) EC confer on the Council the

¹¹ ECJ, Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat*, Judgment of 3 September 2008, not yet in reported, para 301.

¹² ECJ, Opinion 2/92 (1995) ECR I-521.

¹³ ECJ, Opinion 1/03 (2006) ECR I-1145.

power to restrict, in certain cases, movements of capital and payments between MS and third states. As the relevant BITs do not contain any provision reserving such possibilities for the Community to restrict movements of capital and payments, the ECJ examined whether Austria and Sweden were under an obligation to take the appropriate steps in accordance with Article 307(2) EC. The ECJ observed that in order to ensure the effectiveness of restrictive measures Articles 57(2), 59 and 60(1) EC, they must be capable of being applied immediately.¹⁴ The court found that there was an incompatibility when the BIT does not first, contain a provision allowing the MS to exercise its rights and to fulfil its obligations and when second, there is no international law mechanism which makes that possible.¹⁵ The court noted that neither Austria's nor Sweden's measures fulfil their Community obligations. First, the time involved in negotiations to amend the relevant BITs is incompatible with the practical effectiveness of measures to restrict the free movement of capital.¹⁶ Second, international law mechanisms such as suspension or denunciation of the relevant BITs or of some of their provisions, is 'too uncertain in its effects to guarantee that the measures adopted by the Council could be applied effectively.'¹⁷

The ECJ concluded that Austria and Sweden by not having taken appropriate steps to eliminate incompatibilities concerning the provisions on transfer of capital contained in the relevant BITs have failed to fulfil its obligations under Article 307(2) EC. The ECJ did not indicate what consequences such failure would have. According to the court's jurisprudence, once there is an incompatibility, Article 307 EC includes an obligation to denounce incompatible prior international agreements. This obligation has been reinforced by the ECJ in *Kadi and Al Barakaat* where the court first acknowledged that it had previously recognised that Article 307 EC 'could, if the conditions for application have been satisfied, allow derogations from even primary law, for example from [Article 133 of the EC Treaty] on the common commercial policy.'¹⁸ It then, however, went on to observe that 'Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order [...].'¹⁹

Austria and Sweden ultimately may have to denounce the relevant BITs, even if denunciation should be considered an *ultima ratio*. Therefore, the immediate consequence

¹⁴ *Commission v Austria*, above n 4, para 36 and *Commission v Sweden*, above n 4, para 37.

¹⁵ *Commission v Austria*, above n 4, para 37 and *Commission v Sweden*, above n 4, para 38.

¹⁶ *Commission v Austria*, above n 4, para 39 and *Commission v Sweden*, above n 4, para 40.

¹⁷ *Commission v Austria*, above n 4, para 40 and *Commission v Sweden*, above n 4, para 41.

¹⁸ *Kadi and Al Barakaat*, above n 11, para 301.

¹⁹ *Kadi and Al Barakaat*, above n 11, para 304.

will be felt by Austria and Sweden.²⁰ Because their efforts to amend their BITs in question have not been successful up until the institution of the infringement proceedings, it seems unlikely that they will be able to do so in the immediate future. Thus, they would most likely be forced to denounce the BITs in question.²¹ However, the ECJ also noted that the incompatibilities with the EC Treaty to which the BITs with third states give rise 'are not limited to the Member State[s] which [are] the defendant[s] in the present case.'²² Put differently, all BITs of MS with third states that contain free movement of capital clauses, but no provision that ensures compliance with Articles 57(2), 59 and 60(1) EC violate EC law. Therefore, the intermediate-term consequences may well be felt not only by some, but by all MS. MS' BITs that do not contain a provision allowing the MS concerned to exercise its rights and to fulfil its obligations under EC law (a so-called REIO clause) violate EC law. While more recent BITs tend to contain such a clause aiming at compliance with EC law, there are numerous BITs of MS with third states in force that do not contain such a clause or a clause that does not adequately take into account MS' obligations under EC law. Potentially, therefore, numerous BITs of all MS may be challenged by the Commission in infringement proceedings before the ECJ.

C. The Commission's Minimum Platform on Investment

The infringement proceedings exemplify that MS are no longer free to negotiate or uphold their BITs. Rather, EC law casts doubt on MS' competence to conclude and maintain their BITs. This limitation is reinforced by the adoption of the Platform. It combines a market access and a national treatment provision with a MFN clause. All three apply only if and to

²⁰ Typically, the BITs in question remain in force for a further period of 10 years (see, for example, Article 12(3) of the Austria-Turkey BIT, signed on 16 September 1988, entered into force on 1 January 1992, http://www.unctad.org/sections/dite/ia/docs/bits/austria_turkey_ger.pdf (visited 10 June 2009) to 20 years (see, for example, Article 11(3) of the Sweden-Vietnam BIT, signed on 8 September 1993, entered into force on 2 August 1994, http://www.unctad.org/sections/dite/ia/docs/bits/sweden_vietnam.pdf (visited 10 June 2009) from the date when the termination of the BIT becomes effective in respect of investments made prior to the effective termination date. However, investments of say, Austrian investors in Turkey after the termination of the Austria-Turkey BIT would not be protected under the BIT until the entry into force of a new BIT to that effect.

²¹ If Austria and Sweden do not comply with the judgment, the Commission may institute proceedings under Article 228 EC for non-compliance with the judgment. According to the ECJ's jurisprudence, it has no jurisdiction under Article 228 EC to require MS to comply with its judgment within a specified period of time. ECJ, Case C-473/93 *Commission v Luxembourg* (1996) ECR I-3207, paras 46 and 47. However, the ECJ ruled that the interest in the immediate and uniform application of Community law required compliance as soon as possible. ECJ, Case C-291/93 *Commission v Italy* (1996) ECR I-859, para 6. Judgments in Article 228 EC proceedings may result in hefty fines for MS, as evidenced in ECJ, Case C-304/02 *Commission v France* (2005) ECR I-6263.

²² *Commission v Austria*, above n 4, para 43 and *Commission v Sweden*, above n 4, para 43.

the extent an economic activity as defined was performed. Investors from MS that have not concluded a BIT with a given third state are excluded from its benefits. This is particularly important for standards enshrined in BITs but not in the Platform. The regulatory principles typically contained in BITs go beyond those in the Platform. The latter does not contain provisions on expropriation, fair and equitable treatment, full protection and security, umbrella clauses or investor-state dispute settlement clauses. On the other hand, with regard to the market access phase, the scope and regulatory content of the Platform is broader than the one of MS' BITs, as the latter typically only concern the post-market access phase. However, the significance of the Platform is that it extends, though to a limited extent, to the post-market access phase as well. It thus extends the Community competence enshrined in Article 57(2) EC. The objective of this internal competence is to regulate the direct investment flows from, to and within MS. Article 57(2) EC primarily focuses on the phase of market access for FDI. It does not, however, provide a sufficient legal basis to regulate FDI in the post-market access phase. In this respect, the Platform goes further.

As the ECJ confirmed the existence of implied shared competences the question is which test has to be passed in order to exercise an internal competence externally. As indicated, with regard to implied non-exclusive competences it suffices that the exercise of the internal competence and the pursuance of the underlying objective is *facilitated* by the conclusion of an international agreement. Thus, it is essential to assess whether the extended objective of the Platform allows it to facilitate the exercise of Article 57(2) EC. There are good arguments to answer in the affirmative. First, it is obvious that regulating market access for FDI by internal legislation is facilitated through third-state agreements. Second, market access will equally be made more attractive for FDI if the conditions for post-market access are laid down in an international agreement. Therefore, the Platform within the EC's external relations facilitates the exercise of the internal competence of Article 57(2) EC both by means of its market access as well as post-market access Articles. Consequently, the Community has implied shared competence for the conclusion of international agreements with third states.

The most important consequence of this finding appears when viewed in the context of the ECJ's AETR jurisprudence. According to this jurisprudence, MS are no longer competent to conclude treaties when and to the extent the underlying subject matter has been part of Community legislation. The potential Community competence could become exclusive if any internal legislation that had been enacted was affected or its scope altered by an international agreement pertaining to that legislation was to be concluded by a MS or

collectively all MS.²³ Applying the ECJ's AETR jurisprudence to this finding with respect to the Platform, MS would not be competent anymore to conclude any treaties that include provisions on market access, national treatment and MFN in the field of FDI. MS' current BIT practice would then violate EC law due to lack of competence.²⁴

III. The Shape of Things to Come: Shifting the Balance to the Union

A. Union Competence to Conclude Investment Treaties under the Treaty of Lisbon

The extension of the CCP under the Treaty of Lisbon to investment has one significant limitation: the Union competence is limited to foreign *direct* investment. Agreements which cover forms of investment other than FDI are not covered by the exclusive EU competence. The TFEU, however, does not define the term FDI. Neither is the term 'direct investment' defined in the EC Treaty, while being referred to in Article 57 EC (= Article 64 TFEU). The explanatory notes of Council Directive 88/361/EEC, the secondary legislation passed with respect to Article 57 EC, define investments in the following: 'Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest sense.'²⁵ Annex I to Directive 88/361/EEC also gives some examples for direct investments such as '[e]stablishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings', '[p]articipation in new or existing undertaking with a view to establishing or maintaining lasting economic links',²⁶ '[l]ong-term loans with a view to establishing or maintaining lasting

²³ ECJ, Case 22/70 *AETR* (1971) ECR 263, para 17.

²⁴ Niklas Maydell, 'The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence', in August Reinisch and Christina Knahr (eds), *International Investment Law in Context* (Utrecht, Netherlands: Eleven International Publishing, 2008) at 91.

²⁵ Council Directive 88/361/EEC, OJ 1988 L 178/5. The ECJ has on numerous occasions endorsed this definition of direct investment. See ECJ, Case C-446/04 *Test Claimants in the FII Group Litigation* (2006) ECR I-11753, para 179; ECJ, Case C-157/05 *Holböck* (2007) ECR I-4051, para 33; ECJ, Case C-101/05 *Skatteverket v A* (2007) ECR I-11531, para 46.

²⁶ According to the explanatory notes 'there is participation in the nature of direct investment where the block of shares held by a natural person of another undertaking or any other holder enables the shareholder, either pursuant to the provisions of national laws relating to companies limited by shares or otherwise, to participate effectively in the management of the company or in its control.' Council Directive 88/361/EEC, OJ 1988 L 178/5.

economic links²⁷ and '[r]einvestment of profits with a view to maintaining lasting economic links.'²⁸

On the other hand, the wording of Article 207 TFEU does not contain any further limitation of the Union competence, and for reasons of efficiency and practicability alone the Union should possess the competence for all possible aspects of FDI promotion and protection. One possible limitation, however, may flow from the parallelism clause contained in Article 207(6) TFEU which reads as follows: 'The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of internal competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of Member States insofar as the Treaties exclude such harmonisation.'

The most important question with regard to international investment law is to what extent this clause may limit the scope of investment treaties which the Union is competent to conclude. It has been argued that by virtue of Article 207(6) TFEU substantive treatment standard provisions such as the protection against expropriation would be excluded from the Union's competence.²⁹ Indeed, Article 345 TFEU (= Article 295 EC) states that '[t]he Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.' But the better interpretation of this provision is that it does not preserve exclusive powers for MS to determine expropriation. According to the ECJ's settled case-law, the right to property is one of the general principles of Community law. However, it is not absolute but must be viewed in relation to its social function. Consequently, the exercise of the right to property may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.³⁰ More specifically, the ECJ has interpreted Article 295 EC

²⁷ The explanatory notes explain that the term 'long-term loans' means 'loans for a period of more than five years which are made for the purpose of establishing or maintaining lasting economic links. The main examples which may be cited are loans granted by a company to its subsidiaries or to companies in which it has a share and loans linked with a profit-sharing arrangement. Loans granted by financial institutions with a view to establishing or maintaining lasting economic links are also included under this heading.' Council Directive 88/361/EEC, OJ 1988 L 178/5.

²⁸ See also ECJ, Case C-463/00 *Commission v Kingdom of Spain* (2003) ECR I-4581. In turn, in international investment law it is generally understood that the basic features of an investment are a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host state's development. See Christoph Schreuer, *The ICSID Convention - A Commentary* (Cambridge: Cambridge University Press, 2001) 140.

²⁹ Jan Ceyssens, 'Towards a Common Foreign Investment Policy? - Foreign Investment in the European Constitution', 32 *Legal Issues of Economic Integration* 259 (2005), at 279-281.

³⁰ ECJ, Case C-306/93 *SMW Winzersekt* (1994) ECR I-5555, para 22; ECJ, Joined Cases C-37/02 and C-38/02 *Di Lenardo and*

narrowly so that its scope does not reserve for MS the power to decide the conditions under which an expropriation takes place.³¹ In *Kadi and Al Barakaat*, the court emphasised that even temporary measures which entail a restriction of the exercise of the right to property need to be justified under Community law. There must exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised.³² There is one more reason why expropriation should be deemed to fall under the Union's competence for FDI. It appears that before the Treaty of Lisbon was opened for signature, a footnote to Article 188 C (= Article 207 TFEU) excluded expropriation from the scope of the reference to FDI.³³ The footnote, however, does not appear in the final text of the Treaty of Lisbon. Consequently, the better view is that the Union enjoys the competence to include provisions on expropriation in its investment treaties.

In conclusion, under the Treaty of Lisbon the EU is competent to conclude comprehensive investment treaties. The competence covers market access; pre- and post-establishment standards of treatment; performance requirements; investor-state dispute settlement provisions and the terms of the conditions under which expropriation may take place. The major apparent limitation of the Union's competence results from the term 'foreign direct investment'. Because of this limitation the Union's competence does not cover portfolio investments. The limitation is mitigated, however, due to the broad interpretation which this term should be given. Nevertheless, due to this limitation of the Union's exclusive competence under the Treaty of Lisbon investment treaties that cover *all* forms of investments and their protection including a dispute resolution mechanism will have to be concluded as mixed agreements. Mixed agreements have to be ratified by the EU and all 27 MS. Therefore, the EU and its MS will have to sign and ratify agreements with coverage beyond the exclusive Community competence for FDI.³⁴ In the process of negotiation, conclusion and application of mixed agreements, MS are bound by Article 10 EC. MS are under a duty, if not to abstain from action, at the very least to co-operate closely with the Community institutions in order to 'facilitate the achievement of the Community tasks and to ensure the

Dilexport (2004) ECR I-0000, para 82. ECJ, Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and ERSA* (2005) ECR I-3785, para 119; *Kadi and Al Barakaat*, above n 11, para 355.

³¹ See ECJ, Case 4/73 *Nold* (1974) ECR 491 and ECJ, Case C-84/95 *Bosphorus* (1996) ECR I-3953.

³² *Kadi and Al Barakaat*, above n 11, paras 358 and 360.

³³ In addition, this very footnote also excluded investor-state arbitration from the Union's foreign direct investment competence.

³⁴ As far as negotiation is concerned, the division of competence under a mixed agreement does not, generally, influence participation in negotiations. While the practice is decided on a case-by-case-basis, it is accepted that the Commission may act as a sole negotiator for the whole agreement according to the mandate given to it by the Council. See Paul Craig and Grainne de Burca, *EU Law*, 4th ed. (Oxford: Oxford University Press, 2008) 198-199.

coherence and consistency of the action and its international representation.³⁵ Consequently, the result of the vertical allocation of competences under the Treaty of Lisbon may be an increased cooperation on foreign investment policy between the Union and the MS. On the other hand, once the Treaty of Lisbon enters into force, the Union's competence for FDI will be exclusive and MS will not be competent anymore to conclude, amend and uphold their BITs.

B. Consequences of the Union's Competence for European Foreign Investment Policy

Even if the Treaty of Lisbon enters into force, the better view is that MS' then existing BITs with third states, while being in violation of EC law, remain valid under international law.³⁶ Consequently, investors may even then rely upon an applicable MS BIT with a third state and institute proceedings under the BIT. Following the ECJ's judgment in the infringement proceedings cases it remains to be seen whether the Commission moves on to comprehensively challenge the compatibility of MS' BITs with EC law. Until the Commission does, from her point of view, successfully challenge MS' BITs, these BITs will remain in force at least until the Union exercises its new competence in this field, assuming the Treaty of Lisbon enters into force.

It is important to note that the Treaty of Lisbon does not contain a provision that would recognise the right of MS to keep in place their existing agreements. Neither does it contain a transition period. To that extent, the situation is different from the situation upon the occasion of the full entry into force of the CCP. Then, two Council Decisions were issued. Council Decision of 9 October 1961 set out the guidelines on the duration of trade agreements with third states in light of the transitional period of twelve years under Article 111 EEC combined with Article 8 Treaty EEC.³⁷ A second Decision, Council Decision of 29 December 1969 shows that some flexibility in the regime set out in the previous Council Decision was adopted.³⁸ It may well be that Council Decisions along the lines of the Council Decisions of 1961 and 1969 will be issued to set out a time-limit and guidelines for the

³⁵ ECJ, Case C-266/03 *Commission v Luxembourg (Inland Waterways Agreement)* (2005) ECR I-4805, para 60; ECJ, Case C-459/03, *Commission v Ireland (MOX Plant)* (2006) ECR I-4635, para 174.

³⁶ See Piet Eeckhout, *External Relations of the European Union* (Oxford: Oxford University Press, 2004) 335; but see also Pietro Manzini, 'The priority of pre-existing treaties of EC Member States within the framework of international law', 12 *European Journal of International Law* 781 (2001) at 785.

³⁷ Council Decision of 9 October 1961, OJ 1961 71/1274.

³⁸ Council Decision of 16 December 1969, OJ 1969 L 326/42.

termination and/ or renegotiation of MS' BITs, even if the Treaty of Lisbon does not contain a transition period to that effect.

In the end, from an EU policy perspective, an enhanced EU competence would be welcomed. The negotiating power of the Commission is likely to be stronger than that of individual MS. A strengthened EU competence might also contribute to the development of an integrated policy approach concerning trade and investment. There are strong linkages between these two areas and an increased EU competence for investment might make it easier for the EU to conclude combined international agreements on trade and investment. Indeed, the main rationale for including investment into the CCP was to strengthen the EU as an actor in multilateral negotiations on foreign investment.³⁹ Thereby, the drafters of the Treaty followed a proposal which the Commission has made for many years.⁴⁰

An extension of the CCP to investment would also lead to efficiency gains, since an investment treaty between the EU and a third state would protect investments of 27 MS at the same time. This multiplying effect would be particularly beneficial for those MS that have not yet concluded a considerable number of BITs. An EU competence for investment would also reduce distortions between EU investors in third states through replacing the existing MS BITs with EU BITs. This would remedy a comparative advantage which a few MS enjoy compared to other MS, given their magnitude of BITs. Such competence would also improve the transparency at the global level, as the total number of BITs would be reduced significantly. A common EU investment policy would further increase the attractiveness of the EU as a location for FDI from third states because a harmonised investment scheme on an EU level would create an equal level playing field for foreign investors in the EU.

But even if the Treaty of Lisbon enters into force, the continued fragmentation of competences between the Union and its MS in particular due to the limitation of the Union competence to FDI under the Treaty of Lisbon is likely to cause confusion both within the EU and with the EU's treaty partners. Because the Union's exclusive competence to conclude

³⁹ European Convention, Draft Articles on external action in the Constitutional Treaty, CONV 685/03.

⁴⁰ The Commission made proposals to that effect during the Intergovernmental Conferences leading to the Treaty of Amsterdam and the Treaty of Nice. See European Commission, 'Report on the operation of the Treaty on European Union' SEC(95)731, 57-60 and European Commission, 'Commission Opinion in accordance with Article 48 EU' COM(2000)34, 27. More recently, in an issues paper that led to the adoption of the Platform the Commission stated: 'In comparison to NAFTA countries' agreements, EU agreements and achievements in the area of investment lag behind because of their narrow content. As a result, European investors are discriminated vis-à-vis their foreign competitors and the EU is losing market shares. All these elements require an appropriate and timely answer from the EU. The only way to redress that situation is to rapidly upgrade the EC investment approach.' European Commission, 'Note for the attention of the 133 Committee - Issues paper: Upgrading the EU Investment Policy', http://www.iisd.org/pdf/2006/tas_upgrading_eu.pdf (visited 10 June 2009).

investment treaties with third states does only cover FDI, but not cover portfolio investments, BITs comparable to the US Model BIT covering all kinds of investments, pre- and post-establishment rules, protection of investments in cases of expropriation as well as investor-state arbitration would have to be concluded as mixed agreements by the EU and the MS. As indicated, mixed agreements have to be ratified by the EU and all 27 MS. Because international investment negotiations may have a broader scope, this limitation of the Union's competence may have the consequence that the EU finds itself in these negotiations in a legal straitjacket, being unable to meet the demands of its negotiating partners to extend the scope of the agreement beyond FDI, unless the EU participates in such negotiations jointly with MS.