Reflections Upon Public and Private Regulatory Approaches to Globalisation

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I. Introduction

Globalisation—interaction and integration across state boundaries—is no longer an abstract concept but has increasingly been affecting everyday life. This becomes readily apparent when considering different types of supply chains and investments, which are becoming more and more connected.[1] Prominent examples include the assembly of motorised vehicles and the production of clothing.[2] Globalisation also results in an increasing integration of people and ideas in one global marketplace. The ongoing digitalisation further reinforces the trend of globalisation, as business partners can communicate faster and adapt quicker to changing economic circumstances.[3] Indeed, to say that we currently live in an era of rapid changes is in all probability quite an understatement. These developments not only alters the market dynamics (relations between supply and demand) in

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1 John T Mentzer, William DeWitt, James S Keebler, Soonhong Min, Nancy W Nix, Carlo D Smith and Zach G Zacharia 'Defining Supply Chain Management' (2001) 22 Journal of Business Logistics 1, 2.

2 Two-well known cases include Toyota (largely responsible for developing the concept of "Just In Time") and Zara (renowned for short production times required in getting its products to the customers). John F Mathis and Joseph Cavinato, 'Financing the Global Supply Chain: Growing Need for Management Action' (2010) 52 Thunderbird International Business Review 467, 469.

3 Susan Lund, James Manyika and Jacques Bughin, 'Globalization is Becoming More about Data and Less About Stuff' (2016) 94 Harvard Business Review 2.

many different sectors, but also allow previously separated markets to become more integrated. This concerns the products and services offered, as well as their relevant geographical market.[4]

Meanwhile, evidence increasingly indicates that globalisation, together with the current technological innovations, do not benefit all the various actors to the same degree.[5] Indeed, the rise in technology-induced globalisation has sometimes resulted in new forms of abuse of economic power and violations of human rights. Disrupted labour regulation and unfair trade conditions are just a few examples. Developing countries, for a set of conjunctural factors, tend to suffer the negative consequences of globalization to a higher degree.[6] In this context, the combined effects of globalised trade and emerging technologies pose many novel questions to national legislators and other rule-making bodies.

These complex questions, however, require careful consideration. On the one hand, the fact that conceiving a mature regulatory response needs time will very likely not come as a huge surprise. The law cannot foresee problems that have not yet arisen.[7] On the other hand, implementing effective policies to mitigate the undesired effects of globalisation sometimes demands a concerted effort. Over the years, various national and international legal orders have become more intertwined through treaties and agreements, restricting the states' latitude for

4 The rise of AirBnB spurred the popularity of temporary residences. Georgios Zervas, Davide Proserpio and John W. Byers, 'The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry' (2017) 54 Journal of Marketing Research 687. Uber, a company that initially provided personal transportation services has, in some markets, started to distribute food as well. Judd Cramer and Alan B. Krueger, 'Disruptive Change in the Taxi Business: The Case of Uber' (2016) 106 American Economic Review 177; Katrina M Wyman, 'Taxi Regulation in the Age of Uber' (2017) 20 NYU Journal of Legislation and Public Policy 1.

5 Brishen Rogers, 'Employment Rights in the Platform Economy: Getting Back to Basic' (2016) 10 Harvard Law and Policy Review 479.

6 Eddy Lee and Marco Vivarelli, 'The Social Impact of Globalisation in Developing Countries' (2006) International Labour Review 145 (3).

7 Stuart Banner, 'What Causes New Securities Regulation? 300 Years of Evidence' (1997) 75 Washington University Law Quarterly 849, arguing there exists a boom-bust pattern of regulation, with stricter laws being adopted immediately after a crisis, and deregulation subsequently taking place upon the gradual improvement of the economic climate.

adopting unilateral measures.[8] On few occasions, though, actors have aimed to circumvent the deadlock by resorting to mechanisms of a more private character.[9]

Here, the distinction between public and private should be considered broadly. First, it can relate to either laws enacted by the constitutional legislator versus those implemented by other bodies that exercise some form of authority.[10] Second, the distinction may concern public and private tools in performance of public duties.[11] Both may effectively serve to influence behaviour. Whereas the regulatory arsenal has thus expanded almost exponentially, its complexity has risen accordingly. Thus, regulating globalizing economies will at least remain highly complex and contentious.

8 SE Merry, 'Legal Pluralism' (1988) 22 Law and Society Review 869. A prime example of multi-layered legal orders would concern the member states of European Union (EU). As the decision of the United Kingdom to leave the EU shows, some countries may prefer more room for manoeuvre.

9 A well-known example concerns the UK Corporate Governance Code (Code), originally introduced in 1992 and revised most recently in 2018. The Code is drafted by the semi-autonomous Financial Reporting Council, and implemented in the Listing Standards of the London Stock Exchange (LSE). Companies listed on the LSE should report annually on their application of the Code or explain why a specific provision has not been adhered to ("comply or explain"). The initiative has received widespread following. See Jill Solomon, *Corporate Governance and Accountability* (Wiley 2007) 47.

10 One may think of the English model for regulation of waste water and water industries. The model rests on private operators who are supervised by an independent economic regulator who applies regulatory tools to influence competition between water operators, thus encouraging performance improvement among water operators. The model is an opposite of the state ownership where the state is in charge of the industry's regulation. See: Christopher Decker, *Modern Economic Regulation* (CUP 2015) 373.

11 An example may be the situation of different compliance specialists who perform the tasks of public authorities in private companies. These specialists are the compliance officer, monitoring trustee and data protection officer. Compliance officers aim at achieving compliance in different fields of law. Their duties are similar to detecting crimes in undertakings. A monitoring trustee is appointed to monitor compliance with a commitment decision under Regulation No 139/2004. A trustee performs his tasks, on behalf of the EU Commission, based on contracts with a parties. Finally, the situation of a data protection officer is regulated by General Data Protection Regulation of 27 April 2016. *See* Monika Namysłowska, 'Monitoring compliance with contracts and regulation: between private and public law' in: Roger Brownsword, Rob AJ, van Gestel and Hans-W Micklitz, *Contract and Regulation A Handbook on New Methods of Law Making in Private Law* (EE 2017).

In essence, this Special Issue, building on the Erasmus Early-Career Scholars Conference,[12] considered these observations as the starting point for a deeper analysis. The collection of essays of this Special Issue focuses on public and private regulative approaches to the effects of globalisation and, to a lesser but nevertheless considerable extent, the effects of digitalisation. To create a relevant and homogenous sample, the various contributions revolve around two notable fields heavily impacted by globalisation, these being financial markets and cross-border investments—more on this in Section II. Each of the contributions has been carefully selected, based on the quality and novelty of the arguments presented, the depth and rigor of the analysis conducted and the fit with the other papers included.

II. Public and Private Regulatory Approaches to Globalisation

To shed further light on the interplay between public and private regulation and globalisation, this Special Issue consists of two parts. Part One contains two case studies that analyse different examples of the effects of globalisation on financial crimes and financial terrorism, describing how public and private regulators may respond to this phenomenon. Subsequently, Part Two takes a more fundamental approach and discusses how public and private regulation of investment and trade policies shapes globalisation. At an abstract level, Parts One and Two complement each other. The different contributions to this Special Issue are analysed in more detail in Sections II.A and II.B.

A. Responses of public and private regulators to globalised financial markets

In the opening paper to this Special Issue, Dimitrios Kafteranis (University of Luxembourg), compares internal and external whistle-blowing regimes of the UK, the United States (US), France and Ireland financial markets. The author

[12] The Erasmus Early-Career Scholars Conference was held from 11 April 2018 to 13 April 2018 at the Erasmus University Rotterdam on the very theme of globalisation and technologisation, with the (modest) aim of shedding at least some light on such a fundamental development. The Conference was co-hosted by the Erasmus School of Law, the Rotterdam School of Management and the Faculty of Philosophy, and as such had a truly interdisciplinary character. Financial support received from the Erasmus Initiative Dynamics of Inclusive Prosperity, the Erasmus Trustfonds and the Erasmus Graduate School of Law is gratefully acknowledged. The presence of researchers from different academic backgrounds clearly succeeded in fostering a lively and meaningful debate. As guest editors of this Special Issue, we would like to express our sincere gratitude to the Editorial Board of the Cambridge Law Review for their faith in this project and willingness to jointly pursue this opportunity. A special word of thanks goes towards Eirini Kikarea, who kindly brought all of us together.

analyses the changes in corporate environment mainly after the financial crisis of 2007–2009. Kafteranis argues that, whereas internal whistle-blowing (*i.e.* the employees of the company) might save an organisation from negative publicity and could prevent reputational damage, the organisation could prove unresponsive. Additionally, employees might hesitate to take internal action out of fear for informal repercussions. In light of the theme of this Special Issue, the contribution of Kafteranis is notable for the fact that it indicates a clear preference of public legislators for internal whistle-blowing to precede external whistle-blowing, although there does not appear to have been any formal coordination between them. The aforementioned pattern becomes especially apparent when Kafteranis compares Irish and United Kingdom (UK) law. The legislators' preferences for internal whistleblowing can be inferred mainly from the fact that immunity in the external variant is generally subject to more stringent conditions. The analysis of legislation and case law (mainly at the European level), allows the author to conclude that a more balanced regulatory framework is warranted. Treating internal and external whistle-blowers equally enhances flexibility and can be considered a more solid guarantee that justice will prevail.

The paper of Dimitrios Kafteranis is followed by that of Magdalena Jaczewska (University of Warsaw) who analyses the relationship between recent European anti-money laundering initiatives and fundamental civil rights. Specifically, she focuses on the 4th and 5th European Union (EU) Anti-Money Laundering Directive (AML) vis-à-vis the right to privacy and family life (Article 7 of the Charter of Fundamental Rights of the EU). To that end, Jaczewska also takes note of the Recommendations drafted by the Financial Action Task Force (FATF), an intergovernmental organisation founded by the G7. Again, this shows a tendency of public regulators towards harmonisation, but also highlights that concurrence between public and private regulation can occur in many forms. In her paper, Jaczewska meticulously describes how innovative technologies such as bitcoin allow for financial anonymity and therefore facilitate terrorism. The EU response to these developments has typically been to infer more money-laundering preventive duties upon private actors, by conscripting additional entities into the regulatory framework and applying a risk-based liability approach. However, Jaczewska argues that both the conception of this approach and the penalties in case of non-compliance might differ between EU Member States. Jaczewska furthermore observes that the European Court of Justice (ECJ) sanctioned restrictions on the freedom for businesses to conduct services (as enshrined in Article 51 of the Treaty on the Functioning of the EU) and the right to a fair trial (Article 6, European

Convention of Human Rights) in previous cases, as safeguarding the monetary system from illegally obtained funds was deemed a sufficiently relevant justification.

The author concludes that recent provisions of the 4th and 5th AML, granting national anti-money laundering authorities more powers to conduct data mining operations, will likely not be held in violation of EU law by the ECJ. Jaczewska warns for the potentially far-reaching consequences of these competences, and advocates restraint by authorities through strict adherence to the standard of proportionality. Given that the future will only become more data-driven, this topic deserves our close and continuing interest.

B. Responses of public and private regulators to international investment law

Part Two of this Special Issue commences with a paper by Cheng Bian (Erasmus University Rotterdam) on the appropriate regulatory framework in respect of Sovereign Wealth Funds (SWFs). Although SWFs can bring prosperity to their investee countries, they are sometimes regarded with suspicion due to the potential presence of ulterior (including strategic or political) motives. Bian describes some of the common traits of SWFs (such as the mineral origins of their funds) and the concerns their presence invariably gives rise to in great detail. Indeed, this discussion is also important when thinking about the EU level, whereas different EU Member States such as France and Germany have unilaterally adopted mechanisms to analyse Foreign Direct Investment, a uniform approach has so far been lacking. Bian develops a number of highly interesting policy proposals for SWFs to create a friendlier, less predatory image and to enable them to continue their contribution to welfare on a global scale. To achieve this, he draws inspiration from the Santiago Principles, adopted in 2008. Again, this is a good example of non-binding best practices potentially having thorough effects in the real world. Specifically, the proposals put forward by Bian include commitments of restricting investments to smaller, non-controlling stakes or the acquisition of non-voting stock. In conclusion, these developments suggest a more dispersed investment pattern by SWFs and less (direct) voice, both entailing a reduction in influence of developing countries on globalization. Thus, will be most interesting to see how SWFs will actually adapt their investing behaviour in the changing regulatory climate of the coming years.

Finally, the paper of Yawen Zheng (University of Edinburgh) concludes this Special Issue. In her contribution, she discusses the possibility of successfully concluding a Multilateral Investment Treaty (MIT) governing the One Belt, One Road-initiative (OBOR). Designing an adequate legal framework to grant OBOR investments effective legal protection is a complicated matter, as the investments are usually made on a long-term basis and, given the investee countries, face heightened risks of political instability. Zheng also describes the existing treaty framework, which is primarily bilateral by nature and thus rather fragmented. A practical and effective solution would comprise the concluding of a multilateral treaty—similar to the strategy of the OECD in handling existing tax treaties to combat evasion. Zheng notes that China, as the main OBOR-sponsor, should initiate negotiations to conclude a multilateral treaty, but is well aware that, for the project to succeed, an equal-footed approach is paramount. Subsequently, Zheng describes various elements of an OBOR-treaty that she deems essential, including dispute resolution. Given the ever increasing investments China makes in the world economy, a clearer legal background and enforcement of the treaty could have a positive effect on the course of globalisation.