



Expedited settlement of commercial disputes in the European Union

European Added
Value Assessment

STUDY

EPRS | European Parliamentary Research Service

Author: Tatjana Evas
European Added Value Unit
PE 627.120 – December 2018

EN

Expedited settlement of commercial disputes in the European Union

European Added Value Assessment
accompanying the European Parliament's
legislative initiative report

(Rapporteur: Tadeusz Zwiefka, EPP)

AUTHOR

Dr Tatjana Evas, European Added Value Unit, European Parliamentary Research Service.

This paper has been drawn up by the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services (EPRS) of the Secretariat of the European Parliament.

To contact the author, please email: eprs-europeanaddedvalue@europarl.europa.eu

LINGUISTIC VERSIONS

Original: EN

Manuscript completed in October 2018.

DISCLAIMER AND COPYRIGHT

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

Brussels © European Union, 2018.

PE 627.120
ISBN: 978-92-846-3352-4
DOI: 10.2861/801421
CAT: QA-03-18-336-EN-N

eprs@ep.europa.eu
<http://www.eprs.ep.parl.union.eu> (intranet)
<http://www.europarl.europa.eu/thinktank> (internet)
<http://epthinktank.eu> (blog)

Executive summary

This European added value assessment (EAVA) argues that **the European Union (EU) procedure for the expedited settlement of commercial disputes could generate European added value for the EU economy and businesses in the range of €3.7 to 5.7 billion annually**. This includes direct economic impacts of between €1.6 and 2.4 billion and additionally €2.1 to 3.3 billion in indirect and induced benefits for the larger economy. The European added value can be created through an increase in the direct contribution of litigation service revenues to the EU economy (€1.6 to 2.7 billion) and through a reduction in the opportunity costs to business associated with lengthy judicial proceedings (€2.1 to 3.0 billion).

The EAVA focuses on the competitiveness of the EU internal market for business-to-business (B2B) commercial litigation. It assesses the benefits of taking EU action to promote the competitiveness of the EU. Taking EU competences and the principles of proportionality and subsidiarity into consideration, the EAVA supports the introduction of the EU measures to expedite settlement of commercial disputes. This would support EU competitiveness.

The EAVA argues that the **EU litigation market has strong potential for growth**, provided further measures are taken at national and EU levels. EU legislative measures could, among other things, facilitate procedural efficiency. The EU Member States are already an attractive choice for the settlement of commercial disputes owing, among other things, to the harmonised EU rules on choice of law, the choice of forum, and strong EU enforcement rules. However, further measures are necessary both at Member State and EU levels to enhance the competitiveness of the EU litigation market. One of the measures that the EU can adopt is the enhancement of procedural rules. An EU procedure for the expedited settlement of commercial disputes could make EU Member States' courts even more attractive for B2B litigants.

There are two main reasons justifying action at EU level. First, the global trend. There is a major change at global level in the services market for the settlement of commercial disputes. **The market is growing more globalised, competitive and digitalised**. This opens **new economic opportunities for the EU that could be lost if the EU did not take collective action**. Second, the EU internal market and the area of justice, specifically the area of settlement of commercial disputes, is not performing to its full potential. EU businesses incur substantial costs arising from lengthy judicial procedures in national courts. This impacts negatively on the EU market for commercial litigation, and on mutual trust in the judicial systems of the EU. Consequently, **EU action to enhance procedural rules is necessary to enhance the competitiveness of the EU internal market and facilitate cross-border judicial cooperation**. Individual actions by Member States to improve the efficiency of the judicial system are necessary but not sufficient to achieve those objectives.

Based on a review of the data and expert studies available, the EAVA finds that procedural rules, especially time limits and procedural steps for appeal, offer significant economic potential for the EU litigation market. **By reducing the time necessary to settle high-value commercial cases the EU can become a more attractive jurisdiction for the judicial settlement of disputes**. Procedural rules to expedite the settlement of commercial disputes would also bring considerable cost savings for EU businesses and potentially generate efficiency gains for national judicial systems. The EAVA estimates that reducing the length of the procedure necessary to settle a commercial dispute at a court of first instance could save EU businesses €0.9 to 1.3 billion annually.

In addition to the added value generated by reducing the opportunity costs of delayed adjudication, the EAVA also estimates the economic potential of the EU litigation market. The EAVA analyses three scenarios to show how the EU litigation market could develop and what economic European added value it could bring. The first scenario is conservative. It assumes that there will be a minor shift in the current market structure. This scenario has the potential to generate €1.6 billion annually. The

second scenario is more ambitious. It estimates the growth potential of the EU litigation market as a reflection of the EU's share of GDP on the global market. This scenario assumes that part of the commercial litigation business would shift to the EU-27 Member States to reflect natural business dynamics. This scenario, based largely on the re-distribution of market shares between current EU Member States, would generate €1.9 billion in economic value for the EU-27 annually. Finally, the third scenario is based on the assumption that there will be a major shift in cross-border commercial litigation practices. It assumes that the EU-27 would be able to attract a substantial share of the litigation business that is currently generated in London. This scenario has an annual potential additional value of €2.7 billion.

Table of contents

1. Introduction _____	10
1.1. Background _____	10
1.2. Methodology and scope of assessment _____	14
2. Resolution of commercial disputes in the EU – state of play _____	15
2.1. EU law and policy: positive efforts to harmonise EU substantive law with procedural rules lagging behind _____	15
2.2. Possible further EU action – adoption of measures to simplify and expedite procedures for the resolution of disputes _____	16
3. The EU market for resolution of commercial disputes _____	19
3.1. Key legal services market indicators _____	19
3.2. Factors influencing choice of law and choice of forum _____	24
4. European added value assessment _____	35
4.1. Analytical framework _____	35
4.2. Economic impact of attracting additional litigation business to the EU legal services market _____	35
4.3. Economic opportunity cost reduction through faster procedure _____	40
4.4. Total potential economic and efficiency benefit of EU measures to expedite the settlement of commercial disputes _____	42

Table of figures

Figure 1 – Global market in legal services, 2017 (US\$ billion) _____	19
Figure 2 – Factors that impact parties' decision to litigate a case in a specific jurisdiction (Oxford Survey, 2008) _____	25
Figure 3 – Factors that impact parties' decisions to litigate cases in a specific jurisdiction (BCG Survey, 2016) _____	25
Figure 4 – The World Justice Project - Rule of Law Index (20 EU Member States) _____	27
Figure 5 – The World Justice Project – Civil Justice Index (20 EU Member States) _____	28
Figure 6 – Time needed to resolve litigious civil and commercial cases in courts of first instance in 2016 (in days) _____	29
Figure 7 – Total (minimum) costs including lawyer and court fees (Oxford 2010 Costs Study) _	32

Table of tables

Table 1 – Overview of the main EU legislative acts in the area of civil and commercial matters	16
Table 2 – Key indicators: legal services, EU-28 (2015)	20
Table 3 – Global and country or regional shares in global legal services (2015)	21
Table 4 – Legal services market in selected EU Member States (2017)	22
Table 5 – Gross domestic product in current prices, € billion	23
Table 6 – Share of GDP and share in EU legal services market revenues in selected EU Member States	23
Table 7 – The World Justice Project Rule of Law Index (five EU Member States)	27
Table 8 – 2015 Legal Certainty Index	30
Table 9 – Large commercial cases (in US\$)	31
Table 10 – Factors impacting choice of law/choice of forum – comparative assessment of five EU Member States	33
Table 11 – Current commercial B2B litigation – basic assumptions	37
Table 12 – Size of the B2B commercial litigation market in 2017 (in € billion)	37
Table 13 – Scenario 1 (in € million per year)	38
Table 14 – Scenario 2: legal services market/ GDP global share	39
Table 15 – Summary of direct and indirect economic impacts stemming from extra demand for EU commercial dispute resolution services (in € billion per year)	40
Table 16 – Total opportunity costs of EU measures to expedite the settlement of commercial disputes (in € billion)	42
Table 17 – Potential economic and efficiency benefits of EU measures to expedite the settlement of commercial disputes (in € billion)	44

1. Introduction

This European added value assessment (EAVA) analyses the benefits for the EU economy that can be generated by adopting new EU procedural rules for the settlement of high-value commercial disputes. The policy debate on the competitiveness of EU procedural rules for the settlement of commercial disputes is necessary both because of the changing structure of the global legal services market and the economic value of this economic sector for the EU economy, businesses and Member States. The purpose of this EAVA is to provide evidence-based support for the European Parliament's legislative own-initiative report (2018/2079(INL)) on the expedited settlement of commercial disputes in the EU (Rapporteur: Tadeusz Zwiefka, EPP).¹ The key focus of the study is on the European added value of the expedited settlement of commercial disputes. This study answers the following main question: what European added value can the introduction of EU rules on the expedited settlement of commercial disputes bring to EU businesses and the EU economy?

1.1. Background

There are three main trends affecting the global market for the settlement of commercial disputes. First, increasing competition among jurisdictions.² There has been a gradual shift from a polycentric global market structure where London and New York City are the main jurisdictions for the litigation of high value commercial disputes to a more diverse jurisdictional landscape.³ This traditional set up was conditioned by the structure and dynamics of international business. The current drivers of change are the globalisation of international business, including competitive pressure from other global regions such as Asia, and competitive pressure within the legal services industry itself. In the European context, jurisdictional competition is being fuelled by the possible UK exit from the EU. Second, there has been a shift from the judicial settlement of commercial disputes to alternative dispute resolution.⁴ The main driver of this change is efficiency.⁵ Parties prefer the more efficient and less lengthy procedures that alternative dispute resolution (ADR) promises to deliver. The third trend is the digitalisation of the legal services industry. Digitalisation impacts both the delivery of services and the 'exportability' of legal services abroad. The litigation process has also been

¹ European Parliament legislative own-initiative reports drawn up on the basis of Article 225 of the Treaty on the Functioning of the European Union (TFEU) are accompanied by a European added value assessment (EAVA). This particular EAVA accompanies the legislative own-initiative report prepared by the Parliament's Committee on Legal Affairs (JURI) presenting recommendations to the Commission on the expedited settlement of commercial disputes in the EU.

² Global legal services are still dominated by US law firms. However, as noted in the OECD study, this market is gradually becoming more diverse. The OECD study provides an example: 'In 1980, the world's top law firms were all from the United States but by 2006 there were law firms from five other countries represented in the league table of top 100 global law firms including United Kingdom, Canada, Australia, Netherlands and France', OECD-World Bank Sixth Services Experts Meeting, Sectorial Study on the Impact of Domestic Regulation on Trade in Legal Services, 2007.

³ See for example, discussion on ISDA agreements below.

⁴ Commenting on global trends in litigation over the last decade, Liam Kennedy of A&L Goodbody, leading Irish corporate law firm notes: 'In many jurisdictions there has been a change over the last few years in the way that commercial or contractual disputes are resolved. Many such disputes, save for very high-value or business critical claims, appear to be less likely to give rise to litigation. Such issues are increasingly resolved at an early stage by negotiation or mediation. In addition, where some sectors such as construction frequently give rise to certain types of dispute, clients and their lawyers are resolving more of these issues through conciliation, adjudication or expert determination. Large-scale international contracts are also increasingly resolved by international arbitration' in ['Litigation – the road ahead'](#), 2015.

⁵ See however, for criticism, arguing that there is a crisis in the ADR and that it failed to deliver what is promised.

simplified as a result of digitalisation which makes it easier and more cost-efficient to litigate under foreign jurisdictions.⁶

Globally, the legal services market is the largest market in the professional services category.⁷ The total value of the legal services sector globally in 2017 was €731 billion.⁸ The EU-28, with 22.5 % of global revenues, is the second largest world market in the legal services.⁹ The market for legal services is very dynamic. This traditional sector of professional services is going through fundamental changes. Those changes, among other things, are characterised by increasing competition within the sector itself but also between the regions and world jurisdictions.¹⁰ The competitive pressure puts strong demands on the sector and calls for a dynamic regulatory approach from legislators. Increased competition in the sector combined with globalisation trends also provides new economic opportunities.

Litigation is the largest sector in the global legal services market, with a 31 % of market share. Commercial litigation and connected legal services for B2B is increasingly globalised. This reflects the general trend in international business where commercial counterparties increasingly come from diverse and multiple jurisdictions. Parties in business transactions increasingly select foreign courts and foreign law to govern their obligations and settle disputes. In the global context, London and New York have established themselves as the two main centres of international commercial litigation.¹¹ This practice emerged as a result of multiple factors including for example:

- model agreements with a standard choice of law and choice of forum clauses (e.g. International Swaps and Derivatives Association master agreements)¹² as well as established 'standard' practices in a specific industries (e.g. financial services);
- the legal infrastructure and specialisation of specific courts supported by regulatory action;
- the preferences and advice of lawyers for specific jurisdictions.

⁶ On the impact of technological solutions in the work of leading law firms, on the use of e-discovery software, and other technological tools see for example 'The Global Litigation 50', 2017, www.lawyer.com. The digitalisation of law firms and the court system is still ongoing and not equally distributed among EU Member States. Further empirical evidence and analysis is needed to measure the exact impact of digitalisation on internationalisation of the legal services market.

⁷ Industry subsectors include accounting, architectural services, engineering services, legal services and management consulting. 'The total value of the professional services sector globally in 2014 was \$2 160 billion. Related to a world population of more than 7 billion in 2014 this equates to about \$309 per person globally. Given that World Domestic Product was approximately \$78 trillion in 2014, the market makes up about 2.0 % of the global economy.' Professional Services Global Market Briefing Outlook 2016.

⁸ [Legal Services Global Market Opportunities and Strategies to 2021](#). The comparative data on EU Member States covered in this global report for 2017 was kindly provided by the Business Research Company Consultancy. The estimates in this report are in US dollars. The estimates are converted in euros based on the current (October 2018) US dollar/euro exchange rate.

⁹ Ibid; see also the 2015 [data](#).

¹⁰ For an analysis of global trends in commercial litigation see for example '[6 trends will shape future international commercial disputes](#)', DLA Piper, 2018.

¹¹ On studies analysing choice of law, see e.g. S. Vogenauer, 'Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law. A Business Survey – Final Results', 2008; S. Vogenauer & S. Weatherill, *The Harmonisation of European Contract Law*, Oxford 2006; Gilles Cuniberti, 'The International Market for Contracts: The Most Attractive Contract Laws', University of Luxembourg Law Working Paper Series 2014.

¹² ISDA – International Swaps and Derivatives Association. ISDA master agreements are regularly used to govern over-the-counter derivatives international transactions.

- English, as a business lingua franca, further supports choice of law and choice of forum jurisdictions where English is the main language of commercial transactions and commercial litigation.

This dynamic is however changing, reflecting the globalisation and diversification of the market. For example, in the financial services sector the long-standing practice of using International Swaps and Derivatives Association (ISDA) master agreements has recently been reviewed. In July 2018, the ISDA introduced two additional law choices, Irish and French, to standard master agreements.¹³ Previously, the ISDA master agreements choice of law included only English, State of New York and Japanese (court and jurisdiction). The ISDA's General Counsel, commenting on the introduction of two additional EU choices of law in the master agreements explained: 'There will be good reasons for EU/EEA counterparties to continue using the English law master agreement, and there will be good reasons for them to start using the French and Irish law versions. This is all about providing choice to the market and allowing counterparties to choose the option that best suits their needs'.¹⁴

Similarly, in 2017 and 2018, Belgium, France,¹⁵ Germany and the Netherlands have announced their plans to establish specialised courts to further enhance resolution of international commercial disputes in those jurisdictions.¹⁶ To attract foreign litigants those initiatives aim to offer among other benefits dispute resolution in the English language.¹⁷ This trend arguably signifies a push factor for the emergence of the European market for high value commercial disputes. A market that is currently highly dominated by litigation in the London courts. In that sense the statistical data of English commercial courts is revealing. The data for 2016 to 2017 suggest that 72 % of litigants in the commercial courts came from outside the UK.¹⁸

In addition to Member States' efforts the European Union has taken a number of successful legislative initiatives to facilitate the resolution and enforcement of civil and commercial disputes across the EU. The European Union has taken legislative action in four broad categories: first, the rules on applicable substantive law: contractual and non-contractual obligations;¹⁹ second, the rules on jurisdiction, recognition and enforcement of Member State court judgements;²⁰ third, judicial cooperation proceedings;²¹ and finally, other legislation, including rules on legal aid, mediation and judicial networks.²² The EU's harmonised rules in relation to jurisdiction and the enforcement of

¹³ The International Swaps and Derivatives Association, ISDA Publishes French and Irish Law Master Agreements, 2018.

¹⁴ The International Swaps and Derivatives Association, ISDA Publishes French and Irish Law Master Agreements, 2018.

¹⁵ [Legal High Committee for Financial Markets of Paris \(HCJP\), Mise en place des chambres spécialisées pour le traitement du contentieux international des affaires, 2017.](#)

¹⁶ Ioana Knoll-Tudor, '[Specialised Chambers for International Commercial Disputes: Paris in the Spotlight](#)', Kluwer Arbitration Blog, 14 February 2018.

¹⁷ For overview of the ongoing initiatives see e.g. G. Rühl, Towards a European Commercial Court?, The Conflict of Law. net: News and views in Private international law, 2018.

¹⁸ Portland Communications, [Who uses the Commercial Courts](#), 2017; see also [Legal Excellence, internationally renowned: UK legal services 2017](#), The CityUK, which states that 'Indeed, some 70 % of cases in the Admiralty and Commercial Courts, part of the newly launched Business and Property Courts, were international in nature in the year ending July 2017'.

¹⁹ Regulation EC 593/2008; Regulation EC 864/2007.

²⁰ Regulation (EU) No 1215/2012; Regulation No 44/2001; Regulation (EU) 2015/848; Regulation (EU) 1346/2000.

²¹ Regulation (EC) No 861/2007; Regulation (EC) No 1896/2006; Regulation (EC) No 805/2004; Regulation (EU) No 606/2013; Regulation 1393/2007 and Regulation (EC) No 1206/2001.

²² Directive 2008/52/EC; Directive 2003/8/EC; Decision 2001/470/EC.

Member State court judgements in civil and commercial matters are very successful and are 'widely considered to have been one of the most successful EU initiatives over the last 30 years'.²³

There are however a number of areas where further improvements are necessary to further enhance the competitiveness of the EU legal services market.²⁴ One set of proposed EU measures where action is urgently needed is the procedural rules. Procedural rules that would address the need to simplify and expedite the length of adjudication. One of the conclusions of the expert review of commercial litigation in 161 world jurisdictions stated 'The difference in the time frames in which disputes are resolved in EU Member States is striking: respondents note that in Italy it takes on average four years to secure a first instance judgment, the majority of which are appealed all the way to the Supreme Court, whereas in Ireland it is reported that the average duration of a case in the Commercial Court is only 21 weeks'.²⁵ Similarly, conclusions relating to speed of judicial settlement of commercial disputes is voiced repeatedly in the expert surveys.²⁶

In addition to surveys, economic literature provides empirical evidence on the determinants of court performance and the impact of judicial efficiency on economic performance. Specifically in relation to civil justice, an economic analysis by Palumbo, et.al, focuses on trial length as a key performance indicator for judicial systems. Evidence collected through expert studies in litigation services and economic analysis suggests that there are a number of reasons for differences in litigation time, including for example, court specialisation, the share of the justice budget devoted to computerisation and the systematic production of case-flow statistics.²⁷ In this sense, initiatives at Member State level to introduce specialised commercial courts are an element that could contribute to the bringing down litigation time in the EU. Another element that could reduce litigation time are procedural rules. Procedural efficiency and speed of adjudication, the main focus of this EAVA, are frequently indicated as one of the contributory factors associated with procedural length.²⁸

This calls for consideration and analysis of further possible EU legislative steps and their impacts both from the legal and economics points of view. Professor Giesela Rühl has provided a comprehensive analysis of the current legal framework in which commercial contracts operate, identified problematic areas and identified possible measures that EU can adopt to improve settlement of commercial disputes in the EU.²⁹ The study complements this legal analysis with an economic assessment of the added value that can be generated as a result of suggested EU measures to improve the judicial settlement of commercial disputes in the EU.

²³ http://www.allenoverly.com/SiteCollectionDocuments/AO_03_Brexit_Specialist_paper_Jurisdiction_clauses.pdf.

²⁴ For the most recent comprehensive analysis, see Gisela Rühl, Building Competence in Commercial Law in the Member States, European Parliament, PE 604.980, 2018.

²⁵ Allen & Overly, Global Litigation Survey 2015, 2015, p. 64.

²⁶ See for instance the [2008 Oxford Civil Justice Survey](#).

²⁷ Palumbo et. al analysing system factors (i.e. factors relating to the organisation of the judicial system) find based on the extensive review and analysis of available empirical data that: 'Cross-country differences in trial length are related to the shares of the justice budget devoted to computerisation, the systematic production of statistics on case-flow, the active management of the progress of cases by courts, the presence of specialised commercial courts and systems of court governance assigning greater managerial responsibilities to the chief judge'. Palumbo, G. et al., The Economics of Civil Justice: New Cross-country Data and Empirics, OECD Economics Department Working Papers, No 1060, OECD Publishing, Paris, 2013.

²⁸ See e.g. 2008 Oxford Civil Justice Survey, BCG Survey and Allen & Overly, Global Litigation Survey 2015, ; most recently see Lein, E et. al, Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts, British Institute of International and Comparative Law, UK Ministry of Justice, 2015.

²⁹ Giesela Rühl, Building Competence in Commercial Law in the Member States, European Parliament, PE 604.980, 2018.

1.2. Methodology and scope of assessment

Against this background European added value is measured twofold. First, the EAVA assesses the benefits of EU action in terms of direct and indirect economic additional value for the EU commercial B2B litigation market. Second, the EAVA estimates the opportunity costs for European business that could be saved by faster resolution of commercial disputes. Experts in the commercial litigation market have identified procedural rules, and specifically length of procedure, to be key factors generating uncertainty and unnecessary delay costs for businesses. For this reason, the EAVA focuses on the added value that could be generated by enhancing procedural rules. Rules of procedure are considered to be one of the contributory factors impacting length of procedure in general.³⁰

This EAVA is concerned with B2B commercial litigation and does not cover, administrative, criminal or family litigation. Broader social, economic and fundamental rights impacts, while highly relevant, do not fall within the scope of the current assessment and need to be further investigated in the subsequent research work. Neither does this EAVA provide a detailed legal analysis of the possible scope and content of legal provisions relating to the expedited settlement of commercial disputes.³¹

The quantitative analysis is based on statistical data from Eurostat, the OECD, the World Bank, the Council of Europe European Commission for the Efficiency of Justice (CEPEJ), the 2008 Oxford Civil Justice Dataset, the World Justice Project, the Index of Legal Certainty of the Paris Research Centre for Law and Economics, the UK Ministry of Justice, market data and expert surveys by Allen & Overy, the Boston Consulting Group, the Law Society of England and Wales, and a review of secondary literature.³²

The study is structured as follows: first, the EAVA briefly discusses the current EU legislative framework applicable to commercial disputes and EU legal competences to take further action to increase the competitiveness of the EU litigation market (Chapter 2); second, the study analyses the current structure of the EU litigation market and discusses factors that influence the decisions of parties to litigate under specific law, in the specific jurisdiction (Chapter 3); finally, based on the analysis of previous chapters, the study estimates the European added value of taking action at EU level to expedite resolution of commercial cases (Chapter 4).

³⁰ Empirical evidence for commercial disputes in the EU is not available. However, for example, Djakov et al. analysing case law on civil cases related to tenant non-payment disputes in 109 jurisdictions suggest that formalism or the technical complexity of the procedure is directly associated with a higher expected duration of judicial proceedings. Djakov et al., 'Courts', *The Quarterly Journal of Economics*, Volume 118 (2), p. 453–517, 2003. Similarly, Fauvrelle and Almeida find that the 'particularities of the substantive/procedural law do affect judicial productivity through a reduction in the technical component', ['Determinants of judicial change: Evidence from Brazil'](#), *Review of Law and Economics*, 14 (1), 2018, pp. 36 - 42.

³¹ For a detailed legal analysis see the related study by G. Rühl, commissioned to support the same legislative initiative report of the JURI committee

³² References to all these datasets and sources included in the relevant chapters of this EAVA below.

2. Resolution of commercial disputes in the EU – state of play

This chapter focuses on the operation of the EU market for commercial disputes. The EU has adopted a number of measures that affect cross-border commercial relationships directly. These measures are briefly outlined in Section 2.1. Section 2.2 takes a closer look at the EU's competences when it comes to taking further action in the area of commercial litigation.

2.1. EU law and policy: positive efforts to harmonise EU substantive law with procedural rules lagging behind

Close collaboration between Member States' legal systems and the EU legal rules is essential for the competitiveness of the EU commercial litigation market. The choice of a court and applicable law to litigate a commercial case depends on a number of factors that can be clustered into two broad categories. The first set of factors is related to the effectiveness and efficiency of the specific judicial system. It includes elements such as, for example, availability of specialised judges and the professionalism of the courts. This set of factors is linked to Member State competences to organise the administration of justice. The EU has only very limited competences in this area.

The second set of factors relates to the effectiveness and efficiency of access to justice and judicial cooperation in EU cross-border situations. Article 81 of the Treaty on the Functioning of the European Union (TFEU) empowers the EU to adopt measures for the approximation of Member States' rules. Article 81 calls for the development of judicial cooperation in civil and commercial matters having cross-border implications.³³ This article has been successfully applied to facilitate access to justice in the EU and facilitate the resolution and enforcement of civil and commercial disputes across the EU.

The European Union has taken legislative action on private international law and civil procedure in four broad categories.³⁴

³³ For an overview and discussion see for example J. von Hein, 'EU Competence to Legislate in the Area of Private International Law and Law Reforms at the EU level', in P. Beaumont et al., *Cross-Border Litigation in Europe*, Hart Publishing, Oxford, 2017.

³⁴ For a discussion see for example Rühl, G and for an overview see Bux, U.

Table 1 – Overview of the main EU legislative acts in the area of civil and commercial matters³⁵

Rules on applicable substantive law	Regulation (EC) No 593/2008 (Rome I) Regulation (EC) No 864/2007 (Rome II)
Rules on jurisdiction, recognition and enforcement of Member States' court judgments	Regulation (EU) No 1215/2012 (Brussels I Regulation) Regulation No 44/2001 Regulation (EU) 2015/848 Regulation (EU) 1346/2000
Judicial cooperation proceedings	Regulation (EC) No 861/2007 (European small claims procedure) Regulation (EC) No 1896/2006 (European payment order) Regulation (EC) No 805/2004 Regulation (EU) No 606/2013 Regulation 1393/2007 (service of documents) Regulation (EC) No 1206/2001 (evidence)
Other (rules on legal aid, mediation and judicial networks)	Directive 2008/52/EC (mediation) Directive 2003/8/EC (legal aid) Decision 2001/470/EC (European Judicial Network).

2.2. Possible further EU action – adoption of measures to simplify and expedite procedures for the resolution of disputes

The EU's harmonised rules in relation to choice of law and the enforcement of Member States court judgments in civil and commercial matters generally receive a positive evaluation from academics and practitioners.³⁶ These rules have had positive impact on the attractiveness of the EU Member States as a forum for the settlement of disputes.³⁷ The expert survey on the current EU legislative framework concludes: 'The certainty achieved by the harmonisation of these rules (and the rules on governing law) has enabled parties to assess litigation risk and price deals more accurately when negotiating commercial transactions. A commercial party can be confident that its English judgment is as likely as a local judgment to be recognised and enforced in the courts of 27 Member States. This harmonisation has also reduced the risk of having to litigate in multiple jurisdictions when disputes arise (although costly and time-consuming jurisdiction battles are still common)'.³⁸ Further efforts are however necessary to retain and further enhance the competitiveness of the EU legal services market. The two main responses suggested options for action at EU level are the

³⁵ Excluding matrimonial and family matters.

³⁶ Rühl, G, Allen & Overy, [English jurisdiction clauses – should commercial parties change their approach?](#), 2016.

³⁷ See e.g. Allen & Overy, [English jurisdiction clauses – should commercial parties change their approach?](#), 2016.

³⁸ Allen & Overy, [English jurisdiction clauses – should commercial parties change their approach?](#), 2016.

reform of the Rome I Regulation, to remove restrictions that limit commercial parties' freedom to choose applicable law, and the introduction of an EU expedited procedure for cross border commercial cases.³⁹

Delays in adjudication have major costs both for the business involved and for national economies. Lengthy procedures also have a negative impact on the perception of the EU as a competitive market for the resolution of commercial disputes. Based on a comprehensive review of the EU litigation market, Allen & Overy concludes: 'The difference in the time frames in which disputes are resolved in EU Member States is striking: respondents note that in Italy it takes on average four years to secure a first instance judgment, the majority of which are appealed all the way to the Supreme Court, whereas in Ireland it is reported that the average duration of a case in the Commercial Court is only 21 weeks'.

2.2.1. Legal basis

Article 81 TFEU provides powers for the EU to legislate with regard to judicial cooperation in civil matters.⁴⁰

At present the time needed to adjudicate commercial disputes varies a lot among EU Member States. This has a negative impact on the EU market for commercial litigation and on mutual trust in the judicial systems. The effectiveness of judicial resolution of commercial disputes relates both to the quality and professionalism of the judges and to the speediness of the settlement. Lengthy procedures are a barrier to access to justice in the EU. They cause economic costs for the parties and have negative macroeconomic impacts on the proper functioning of the internal market. Consequently, this EAVA assumes, based on the evidence available,⁴¹ that the EU rules to expedite settlement of commercial disputes have the potential, coupled with other initiatives at EU and Member State levels,⁴² to help reduce distortions of the internal market, reduce the economic costs to the parties and enhance mutual trust in the judicial system within the EU.

2.2.2. Proportionality and subsidiarity principles

The objective of the proposal for a regulation on the expedited settlement of commercial disputes in the EU is to simplify and speed up commercial litigation in the EU.⁴³ This objective, cannot be sufficiently accomplished by the Member States themselves. As the current data on the commercial

³⁹ Rühl, G.

⁴⁰ Article 81 (1) TFEU 'The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. Article 81 (2) For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;(b) the cross-border service of judicial and extrajudicial documents;(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;(d) cooperation in the taking of evidence;(e) effective access to justice;(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;(g) the development of alternative methods of dispute settlement;(h) support for the training of the judiciary and judicial staff'.

⁴¹ See for instance the studies cited in footnote 25 above.

⁴² Member State level initiatives include for example the establishment of specialised courts; at EU level reform of Rome I and the establishment of a EU commercial court have been suggested.

⁴³ This EAVA limits itself to a preliminary assessment of the principles of subsidiarity and proportionality as applied to EU action in a given field. It is not possible to evaluate the principles of subsidiarity and proportionality in detail without a detailed text of the specific legislative proposal.

litigation market and length of proceedings suggest there is great divergence between Member States. This creates obstacles to achieving the full potential of the internal market and negatively impacts mutual trust in the judicial systems of the Member States though the EU. EU action is therefore the only way to ensure effective access to justice in litigation of commercial matters throughout the EU.

According to the proposal put forward by the European Parliament Committee on Legal Affairs, EU rules on the expedited settlement of commercial disputes, the 'EU expedited settlement procedure', would be optional and additional to the national procedural law of the Member States. Member States would not be obliged to abandon their national procedural rules but only to make available, if parties opted for it, additional recourse to the EU procedure. Parties would have therefore a choice as to whether to follow national procedural rule or EU procedure for settling commercial disputes in EU Member State courts.

This legislative arrangement would on the one hand facilitate a common minimum level of efficiency in settling commercial disputes in EU courts and on the other leave Member States the autonomy to retain and further improve domestic procedural systems. It would be left to the parties to the dispute to decide on the preferred procedural rules. The procedure would be limited to disputes with cross border implications. Consequently this arrangement would be consistent with the principle of subsidiarity and proportionality.

3. The EU market for resolution of commercial disputes

In order to understand the current EU market for commercial litigation this EAVA analyses first the key market indicators and value of the relevant market (Section 3.1) and second the factors that impact the choice of parties to litigate in a given jurisdiction, under a specific law (Section 3.2).⁴⁴ The EU Member States' legal systems are evaluated against those factors to better understand the intra-EU distribution of the market, the relative strength of individual jurisdictions and the potential elasticity of the EU market for litigation of commercial disputes.

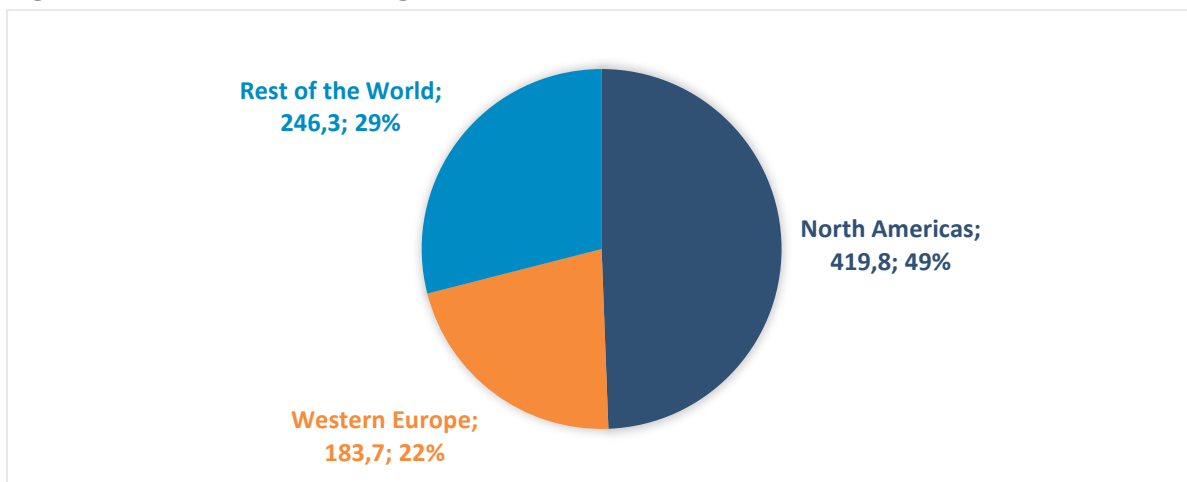
3.1. Key legal services market indicators

In order to estimate the size of the commercial litigation segment, the study presents the available data on the size of the legal services market globally (Section 3.1.1) and in the EU (Section 3.1.2). Then based on the available sources the study estimates the relative size of the segment of commercial B2B litigation (Chapter 4).

3.1.1. Global market in legal services

The legal services market is dynamic and growing. It is the largest segment of the professional services market and as such makes a significant contribution to the economy. North America (49.4 % of the total) and Western Europe (21.6 %) were the two largest regions in the legal services market in 2017.⁴⁵ The two largest countries in legal services are the USA and the UK. In 2017, the USA accounted for 40.3 % of the total market.⁴⁶ The UK was the second largest country accounting for 6.5 % of the global market share.⁴⁷

Figure 1 – Global market in legal services, 2017 (US\$ billion)



⁴⁴ There is no systematically collected, reliable, comparative data on the size of the commercial litigation segment in the EU legal services market. There is even less comparative data across the EU to estimate the percentage of commercial litigation that is settled in the courts where one party comes from a foreign jurisdiction or where both parties are non-resident. This holds true subject to a notable exception, the United Kingdom. The UK keeps very detailed statistical data on courts, discussed later in Chapter 4.

⁴⁵ Global Legal Services Market (2017, by region), Legal Services Global Market Report 2018.

⁴⁶ *ibid.*

⁴⁷ *ibid.*

Source: 2017 Legal Services Global Market Report.

The leading global role of the USA, according to the Legal Services Global Market Report 'can be due to the size of the economy, an aggressively litigious culture and the fact that US law is the basis for many international business contracts, which then need to be processed in the US if there are disagreements'.⁴⁸

3.1.2. EU market

Focusing more closely on the EU legal services market, the key performance indicators are the following:

Table 2 – Key indicators: legal services, EU-28 (2015)

	2013	2014	2015
Number of enterprises (million)	0.55	0.57	0.60
Number of persons employed (million)	2.38	2.47	2.50
Turnover (billion EUR)	129.4	137.0	147.3

Source: Eurostat, Annual detailed enterprise statistics for services, (sbs_na_1a_se_r2)⁴⁹

The data provided by the US International Trade Commission, provides a more detailed breakdown of market distribution by region and country. Europe, measured as a region, includes the EU Member States and other European non-EU Member States, has 27.2% of the global share.⁵⁰

⁴⁸ Global Legal Services Market (2017, by country), Legal Services Global Market Report 2018.

⁴⁹ For definitions of the scope of each category please see Eurostat, [Structural Business Statistics](#).

⁵⁰ According to the methodology adopted by the US International Trade Commission, for Table 3 (above) 'Europe' estimates include Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Norway, Poland, Portugal, Russia, Spain, Sweden, Switzerland, Turkey, and the UK.

Table 3 – Global and country or regional shares in global legal services (2015)

Country or region	Growth, 2015 (%)	Share of global revenue, 2015 (%)	Share of regional revenue, 2015 (%)
United States	4.0	48.8	*
Europe	3.4	27.2	*
United Kingdom	7.5	8.3	30.7
France	2.4	4.2	15.4
Germany	0.4	3.8	14.1
Italy	*	3.5	13.0
Spain	*	1.7	6.3
Rest of Europe	*	5.5	20.4
Asia-Pacific (A-P)	3.9	14.4	*
China	*	6.7	46.7
Australia	-2.0	2.4	16.4
India	*	1.5	10.3
South Korea	*	0.9	6.1
Japan	0.2	0.5	3.5
Rest of A-P	*	2.4	17.0
Middle East	*	1.0	*
Rest of the world	*	8.6	*
Total	3.7	100.0	*

Source: US International Trade Commission 2017, Table 5.1.⁵¹

More up to the date analysis of the EU market leaders in the legal services market is provided in the 2017 Global Legal Services Market Report. The 2017 data further confirms the 2015 data in terms of the distribution of the EU market in legal services.

⁵¹ United States International Trade Commission, Recent Trends in US Services Trade 2017 Annual Report, Legal Services, 2017.

Table 4 – Legal services market in selected EU Member States (2017)

Country	2017 (in billion US\$)	2021 (expected) (in billion US\$)	CAGR	Comments
United Kingdom	54.8	70.5	6.49%	Despite the uncertainties in the market due to the impact of Brexit, UK will continue to be one of the largest markets for legal services during the forecast period. The factors contributing to this will be globalisation, and increase in revenues and M&A activity related to its large financial centre in London.
Germany	28.1	34.1	5.00%	The Market for legal services in Germany will see a growth due to factors such as investments in advanced technologies, regulatory changes made by EU despite moderate M&A activity and restricted demand for legal deal consultation.
France	27.2	30.9	3.29%	The volume and size of leverage buyouts and domestic mergers and acquisitions will be the factors contributing to the growth of the legal services market in France during the forecast period.
Italy	17.4	18.0	0.73%	The slow growth can be due to the rising foreign investments, recovering economy and reforms in the domestic judicial system.
Spain	11.1	11.7	1.29%	The demand for refinancing-related legal work, rising M&A activity and the improving economy will help in the growth of the legal services market in Spain during the forecasted period.

Source: Global Legal Services Market (2017, By Country), Legal Services Global Market Report 2018.

The data suggest that the UK is currently the EU market leader in legal services, followed by Germany and France. The UK share is considerable, currently standing close to 30 % of the EU legal services market.

The legal services market reflects major trends in international business transaction flows. The OECD notes that the international legal services market has grown rapidly over the past decades: 'this has happened because legal services are principally a business input and so the international legal services market has expanded on the back of the growth in world trade and capital flows'.⁵² Similarly, based on a review of literature, Bielen and Marneffe note on the relationship between litigation and GDP that 'a higher GDP per capita not only implies a higher number of transactions but also more complex transactions, which in turn augments the potential for conflicts'.⁵³

Accordingly, the shares of legal services market revenues in principle should reflect the economic share. Therefore, it is useful to compare how the relative share of EU Member States' GDP correlates with the relative share of the legal services market.

⁵² OECD-World Bank Sixth Services Experts Meeting, Sectorial Study on the Impact of Domestic Regulation on Trade in Legal Services, 2007.

⁵³ S. Bielen and W. Marneffe, 'Testing the Lawyer-Induced Litigation Hypothesis in Europe', *Applied Economics* 50 (16), 2017.

The EU total GDP in 2017 was €14.877 billion⁵⁴ accounting for 22 % of global GDP.⁵⁵

Table 5 – Gross domestic product in current prices, € billion

Country group name	2016	2017
World	64 879	68 644
European Union	14 190	14 877

Source: IMF, World Economic Outlook Database, April 2018.⁵⁶

Therefore, at aggregate EU level the relative global GDP share and legal services market share closely correlate. The EU accounts for approximately 22 % of world GDP and about 22 % of revenues in legal services.⁵⁷ However, the distribution of legal service revenues between EU Member States does not reflect the dynamics of the GDP.

A more detailed analysis of GDP distribution among EU Member States suggests that over half of the EU's 2017 GDP was generated by three Member States: Germany, the United Kingdom and France.⁵⁸ In terms of GDP, Germany holds a leading position in the EU economy, accounting for over 21 % of EU GDP. It is followed by the United Kingdom (15.2 %), France (14.9 %), Italy (11.2 %), Spain (7.6 %) and the Netherlands (4.8 %).⁵⁹

Therefore in terms of correlation between GDP/legal services share there is a big divergence. Table 6 below compares the relative shares of the Member States.

Table 6 – Share of GDP and share in EU legal services market revenues in selected EU Member States

Country	Share of EU GDP (%)	Share of EU legal services market revenues (%) (2016)
United Kingdom	15.2	29.6
France	14.9	15.6
Germany	21	15.6
Italy	11.2	10.5
Spain	7.6	6.6

Source: author's own work based on IMF (GDP) and Eurostat (legal services) data.⁶⁰

⁵⁴ Eurostat, [GDP and main components \(output, expenditure and income\)](#). Data table, [nama_10_gdp].

⁵⁵ IMF, World Economic Outlook Database, April 2018

⁵⁶ IMF data is given using the US\$/€ conversion rate used for this table and throughout the report: 0.8595 US\$/€.

⁵⁷ As indicated in Table 3 – Global and country or regional revenues from legal services, Europe in total accounts for 27.2 %. Five EU Member States (UK, Germany, France, Italy and Spain) jointly account for 21.7 % of revenues.

⁵⁸ Eurostat, Which Member States have the largest share of EU's GDP?, May 2018.

⁵⁹ Eurostat, Which Member States have the largest share of EU's GDP?, May 2018.

⁶⁰ The intra-EU distribution slightly differs from the data in Table 3. Table 3 includes data for 2015 and covers the European market, which includes EU and non-EU countries, see footnote 36 above.

As the overall EU market for legal services stands now, the UK's share is almost twice the weight of its relative GDP share. France is also slightly over-weighted in the relative distribution. Germany is however significantly underweighted.

For a better understanding of the current intra-EU distribution of the market share, the next section looks in more detail at the qualitative decision making criteria that determine choice of law and choice of forum among litigation parties. The factors that influence these choices in commercial disputes are central to understanding the current intra-EU distribution of the market and the elasticity of the market, and are also needed to estimate a possible relative shift in market share between the EU Member States.

3.2. Factors influencing choice of law and choice of forum

According to the expert survey by Allen & Overy 'The choice of court is of critical importance in commercial disputes. Where a party fights its battles can impact not only the length and cost of any proceedings but, more substantively, the reliability and enforceability of any resulting judgment'.⁶¹ Similarly, the 2008 survey of European businesses revealed that for 97 % of respondents the possibility for choice of forum was important or very important.

What determines the choice of a specific law and forum in the EU context is less clear. Few empirical studies have attempted to understand the main factors influencing the choice of law and the choice of forum in litigation. The two main EU comparative, empirical contributions on parties' choice of law and choice of forum preferences in commercial matters are the 2005⁶² and 2008⁶³ Oxford European and Comparative Law / Clifford Chance studies.⁶⁴ The two studies were based on expert surveys. The 2005 study surveyed 175 businesses from eight EU Member States. The 2008 study surveyed 100 businesses from eight EU Member States. More recent, comparative empirical studies, focused on arbitration.⁶⁵ According to the 2008 survey the most important factors are: quality of the chosen contract law, the fairness of outcomes, absence of corruption and predictability. Other important factors included quality of judges and courts, speed of dispute resolution, costs of proceedings and quality of lawyers.

⁶¹ Allen & Overy, English jurisdiction clauses – should commercial parties change their approach?, 2016.

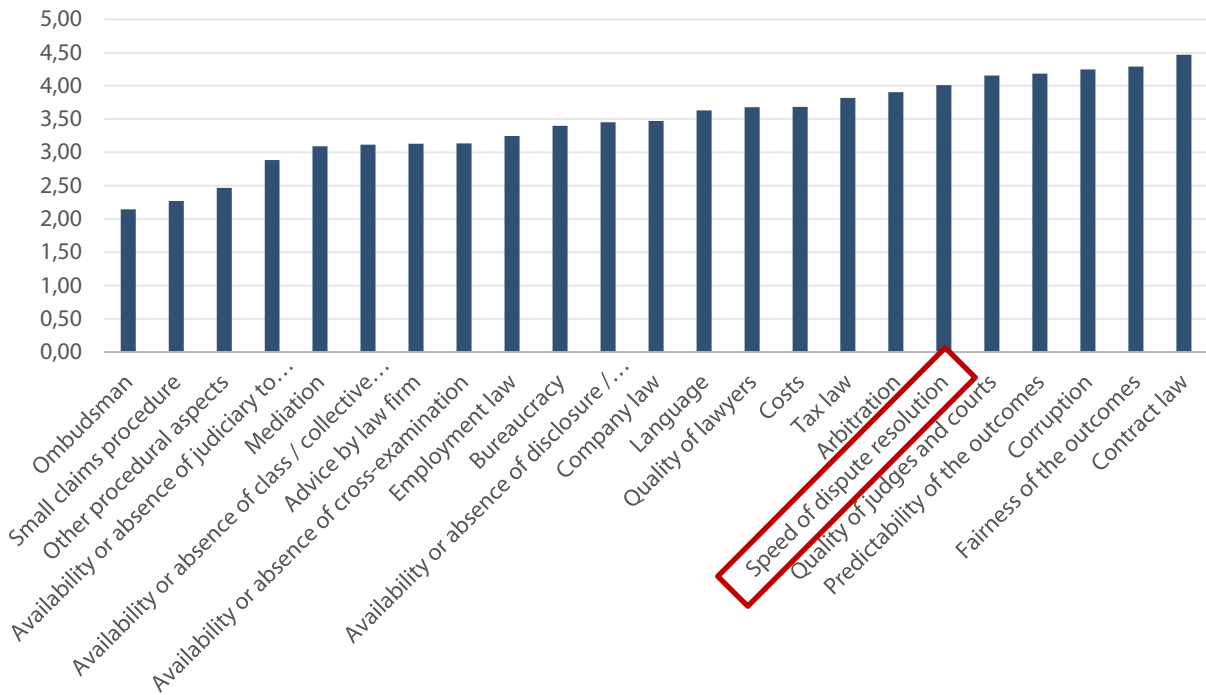
⁶² The results of the 2005 Survey are presented and discussed in S. Vogenauer and S. Weatherill (eds.), *Harmonization of European Contract Law: Implications for European Private Laws, Business and Legal Practice*, Hart Publishing, Oxford, 2006.

⁶³ For the summary of the methodology and the results see the [2008 Oxford Civil Justice Survey](#).

⁶⁴ For a comparative overview of the available empirical studies see also S. Vogenauer, *Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence* in Horst Eidenmüller (eds.), *Regulatory Competition in Contract Law and Dispute Resolution*, Hart Publishing, Oxford, 2013.

⁶⁵ G. Cuniberti, 'The International Market for Contracts: The Most Attractive Contract Laws', *Northwestern Journal of International Law & Business*, 34 (3), 2014.

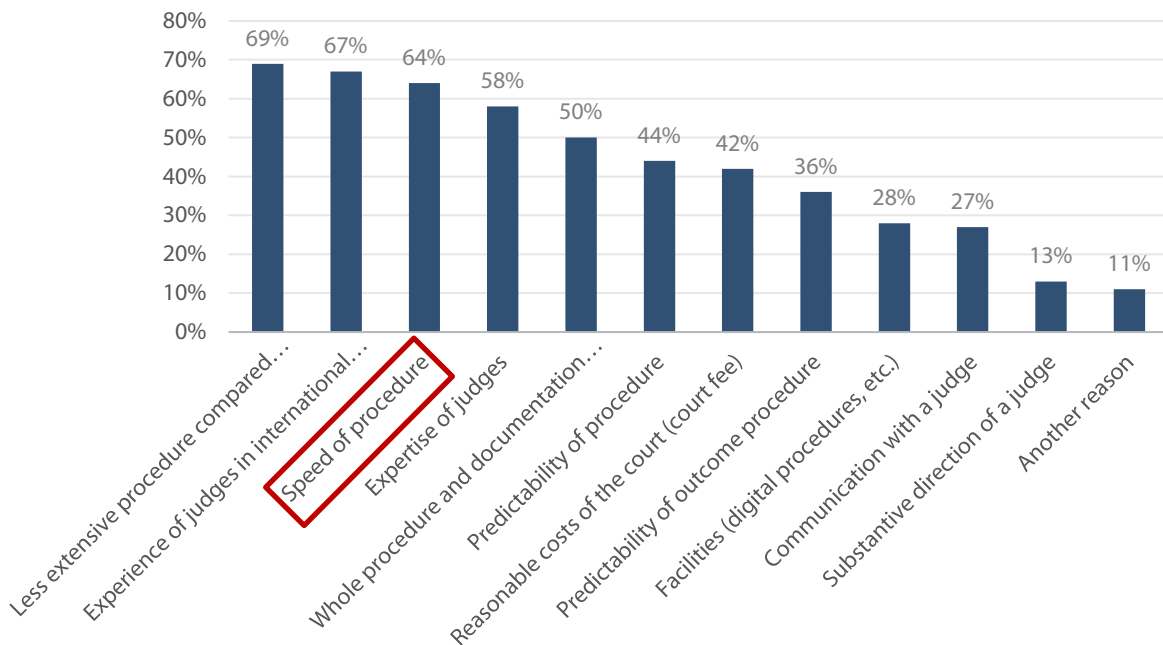
Figure 2 – Factors that impact parties' decision to litigate a case in a specific jurisdiction (Oxford Survey, 2008)



Source: 2008 Oxford Survey.

Similarly, in 2016, based on expert surveys, the Boston Consulting Group found the following factors to be important in determining parties' choice of law and choice of forum:

Figure 3 – Factors that impact parties' decisions to litigate cases in a specific jurisdiction (BCG Survey, 2016)



Source: BCG, Marktverkenning, Figure 2.

Based on insights from the research available, this EAVA identifies four key decision-making factors and assesses how EU Member States compare with each other in relation to those factors.⁶⁶ The aim is to provide a comparative analysis of the performance of EU Member States along key decision criteria and to assess whether and to what extent these factors explain the current market structure.

The key decision-making factor groups that impact parties' choice include:

- (1) quality of the legal system and the law applicable to commercial disputes **[quality]**;
- (2) the time needed to resolve a dispute **[speed]**;
- (3) predictability, fairness and certainty of outcomes **[outcome]; and**
- (4) the costs of proceedings **[cost]**.

3.2.1. Quality of the legal system and the rule of law

The quality of the legal system and the rule of law are general underlying factors that impact the decision of litigants to bring a case to a specific jurisdiction. Legal system quality has been indicated as an important factor in all available empirical studies. The most comprehensive global dataset on the rule of law is the World Justice Project Rule of Law Index (WJP Index).⁶⁷ This index collects primary data from 113 world jurisdictions. The index includes 44 indicators.⁶⁸ It is based on household and expert surveys and measures how the rule of law is experienced and perceived worldwide.⁶⁹ This index covers 20 EU Member States, including the UK, Germany, France, Italy and Spain.⁷⁰ The higher the score, the better the country's overall performance. In the EU-wide context, Denmark is the leader (0.89 index score), followed by Finland (0.87) and Sweden (0.86). Denmark is also the global leader with best overall global rank. Among the 20 EU Member States for which data is available, Germany is ranked fifth and the UK is ranked seventh. In the global ranking Germany comes sixth and the UK eleventh out of 113 countries.

⁶⁶ This is not an exhaustive list of factors, but rather four major categories.

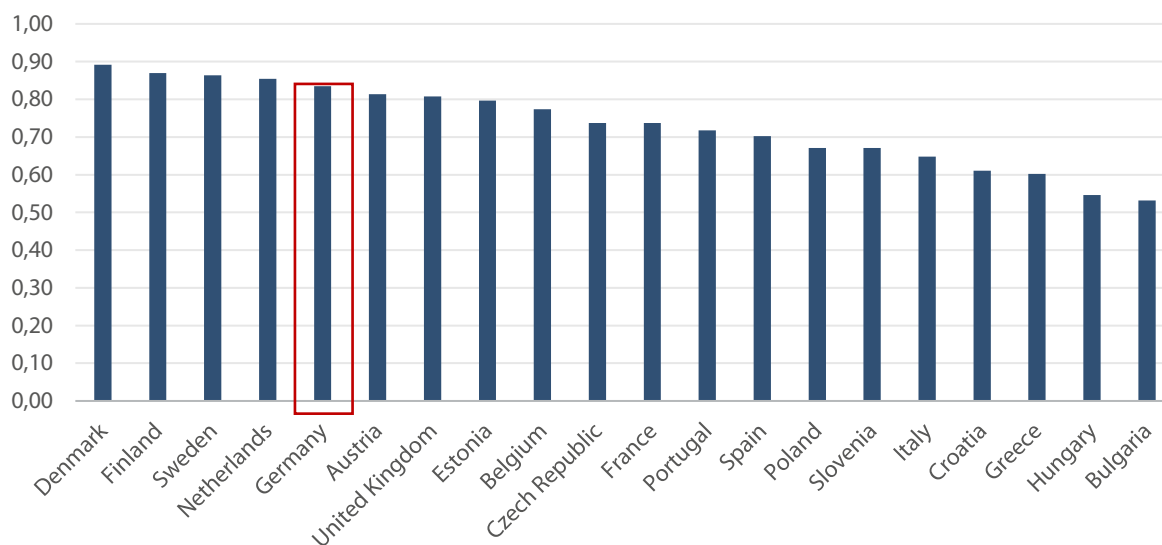
⁶⁷ <http://data.worldjusticeproject.org/>.

⁶⁸ Eight rule of law categories include: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice.

⁶⁹ On the detailed description of methodology please see <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017%E2%80%932018/methodology>.

⁷⁰ The EU countries that are not covered are: Cyprus, Ireland, Latvia, Lithuania, Luxemburg, Malta, Romania and Slovakia.

Figure 4 – The World Justice Project - Rule of Law Index (20 EU Member States)



Source: World Justice Project Rule of Law Index.

Focusing on the five EU Member States with the largest share of EU GDP and the EU legal services market, in terms of the overall rule of law index, they are distributed as follows: Germany, UK, France, Spain and Italy.

Table 7 – The World Justice Project Rule of Law Index (five EU Member States)

Criteria	Germany	France	Italy	Spain	UK	EU market leaders
Aggregate rule of law index	1	3	5	4	2	Denmark Finland Sweden

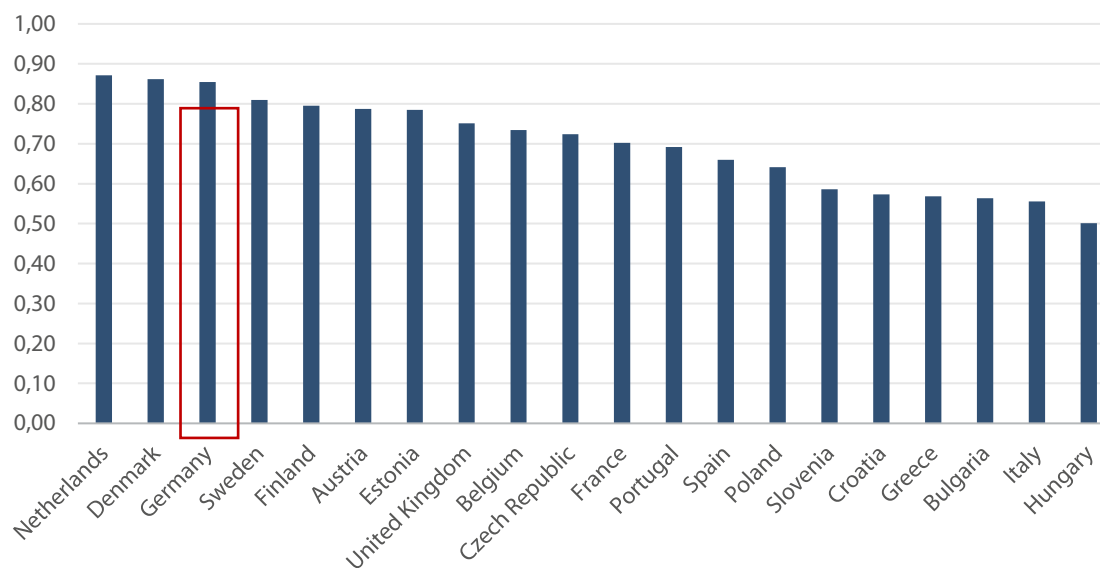
Source: author/ based on the WJP data.⁷¹

The same WJP Index provides more detailed, comparative data on civil justice.⁷² The civil justice index score is based on seven qualitative criteria: people can access and afford civil justice; civil justice is free of discrimination; civil justice is free of corruption; civil justice is free of improper government influence; civil justice is not subject to unreasonable delays; civil justice is effectively enforced; and alternative dispute resolution is accessible, impartial, and effective. Based on this seven criteria EU Member States are ranked as follows:

⁷¹ 1 is the best performer and 5 the worst performer among five selected EU Member States.

⁷² Source <http://data.worldjusticeproject.org/>.

Figure 5 – The World Justice Project – Civil Justice Index (20 EU Member States)



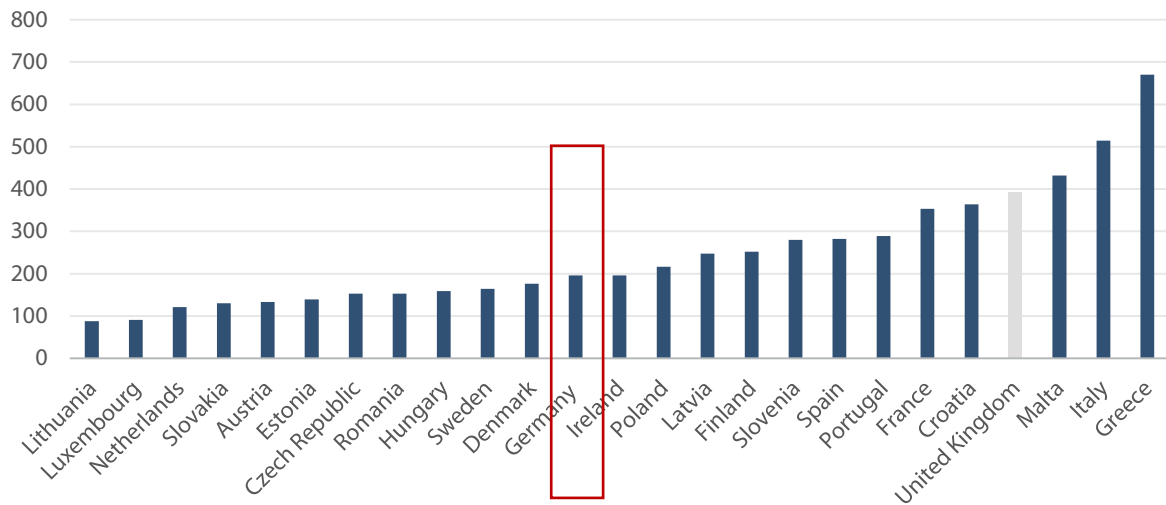
In the EU-wide context, the Netherlands is the leader (0.87 index score) in the civil justice index, followed by Denmark (0.86) and Germany (0.85). Denmark is also global leader, with overall best global rank. Among the 20 EU Member States for which data is available, Germany is ranked third and the UK eighth (0.75). In the global ranking Germany is ranked third and the UK 14th of 113 countries.

3.2.2. Speed of civil justice

The second central factor influencing litigants' choice is speed. The economic literature suggests that 'lengthy trials undermine certainty of transactions and investment returns, and impose heavy costs on firms'.⁷³ The differences in the time needed to resolve a civil or commercial case in the EU are striking. Figure 6 below indicates the average length of procedure in a court of first instance in EU Member States.

⁷³ See for instance, 'What makes civil justice effective?', OECD Economics Department Policy Notes, No 18 June 2013.

Figure 6 – Time needed to resolve litigious civil and commercial cases in courts of first instance in 2016 (in days)



Source: CEPEJ Study and UK Ministry of Justice.⁷⁴

Lithuania is the leader with an average disposition time of 88 days for litigious cases of the first instance. Among the five EU Member States with the largest share of the EU legal services market, Germany has an average of 196 days necessary to resolve litigious civil and commercial cases. There is no directly comparable data for the UK. The information available from the UK Ministry of Justice however suggests that on average 392 days are needed to resolve civil and commercial cases in the UK courts.⁷⁵

3.2.3. Predictability, legal certainty of the outcome

Fairness and predictability of outcomes are factors that scored very high in the 2008 survey. The qualitative studies on the litigation choices of the parties likewise refer to predictability and certainty as key factors.⁷⁶ The 2015 Legal Certainty Index provides a valuable, comparative, in depth analysis of legal certainty.⁷⁷ The index adopts a complex methodology to measure legal certainty. The essential elements of the adopted measurement tool are 'accessibility of the applicable law', 'predictability', 'reasonable stability over time' and 'balance of interests'. In providing a scoring method for different elements of certainty the index attempts to adopt a 'practitioner / economic operator' perceptive. The note on the rationale of the index explains: 'legal certainty is one factor of economic appeal. Companies' needs for stability and predictability are greater at a time when the globalisation of trade is accompanied by greater competition. 'Know and predict' have become

⁷⁴ Data for Belgium, Bulgaria, Cyprus and Ireland is not available. Data for the UK is based on the statistical data available at the UK Ministry of Justice. European Commission for the Efficiency of Justice (CEPEJ), Study on the functioning of judicial systems in the European Union Member States, European Commission, 2018, Table 3.2.1.2 (2016), p. 202.

⁷⁵ The 2013 OECD study, calculates an average time for the UK case as 350 days.

⁷⁶ see e.g. Lein, E et. al, Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts, British Institute of International and Comparative Law, UK Ministry of Justice, 2015.

⁷⁷ Legal High Committee for Financial Markets of Paris (HCJP), Mise en place des chambres spécialisées pour le traitement du contentieux international des affaires, 2017.

major imperatives, and risk evaluation – particularly of disputes – is a factor in any financial decision'.⁷⁸

The index's in-depth comparative analysis of legal certainty focuses on different areas including dispute settlement, and contract and corporate law. The first edition of the index includes 13 world jurisdictions including four EU Member States: Germany, France, the United Kingdom and Italy.

Table 8 – 2015 Legal Certainty Index

Rank	Country	Average	Contract	Disputes	Property	Liability	Corporate	Employment
1	Norway	7.19	7.81	6.34	7.77	5.98	6.86	8.36
2	Germany	6.93	8.13	7.03	8.28	6.59	5.43	6.11
3	France	6.82	5.31	6.96	7.54	6.54	7.79	6.80
4	United Kingdom	6.56	8.03	6.29	5.98	5.91	5.89	7.26
5	China	6.41	6.23	6.89	5.29	4.85	8.79	6.39
6	Morocco	6.38	6.56	7.08	7.10	4.54	6.88	6.14
7	Senegal	6.35	7.49	6.17	5.99	5.86	7.24	5.32
8	Italy	6.19	5.52	6.29	5.09	5.57	6.99	7.69
9	Canada	6.13	6.56	5.24	5.46	6.89		6.47
10	Argentina	6.03	5.46	6.21	6.60	6.20	5.69	
11	Japan	5.97	5.95	5.66	5.82	6.47	5.55	6.39
12	United States	5.75	7.03	5.93	5.90	4.92	6.24	4.48
13	Brazil	5.63	5.47	5.86	7.03	4.12	6.37	4.96

Source: Index of Legal Certainty.

The best performing country is Norway with Germany scoring second overall. The results suggest that of the four EU countries included Germany is the leader in the dispute settlement and contract categories. France scores considerably higher in the corporate category.

3.2.4. Costs

The overall cost of litigation scored as less important than the other factors discussed above though it is still an important factor of consideration. The most comprehensive, comparative study on the cost and funding of civil litigation is 2009 Oxford study.⁷⁹

⁷⁸ Index of Legal Certainty, Foreword, p. 7.

⁷⁹ C. Hodges, S. Vogenauer, and M. Tulibacka (eds.), *The Costs and Funding of Civil Litigation: A Comparative Perspective*, Hart Publishing, Oxford, 2010.

Table 9 – Large commercial cases (in US\$)

Country	Claimant costs	Defendant costs	Total	Percentage
England and Wales	1 529 820	1 529 461	3 059 281	100.00 %
Romania	1 191 137	1 044 313	2 235 450	73.07 %
Bulgaria	557 012	1 220 291	1 777 303	58.10 %
Hungary	590 591	577 179	1 167 770	38.17 %
Scotland	351 145	351 145	702 290	22.96 %
Austria	243 200	131 076	374 276	12.23 %
Denmark	168 136	150 500	318 636	10.42 %
Spain	132 778	132 778	265 556	8.68 %
Ireland	131 303	131 303	262 606	8.58 %
Germany	159 902	78 512	238 414	7.79 %
Estonia	187 224	18 438	205 662	6.72 %
Czech Republic	80 904	11 222	92 126	3.01 %
Greece	70 805	2 284	73 089	2.39 %
Finland	27 352	27 352	54 704	1.79 %
Poland	50 786	3 407	54 193	1.77 %
Lithuania	27 152	10 860	38 012	1.24 %
Belgium	8 571	8 571	17 142	0.56 %
Portugal	3 159	3 159	6 318	0.21 %

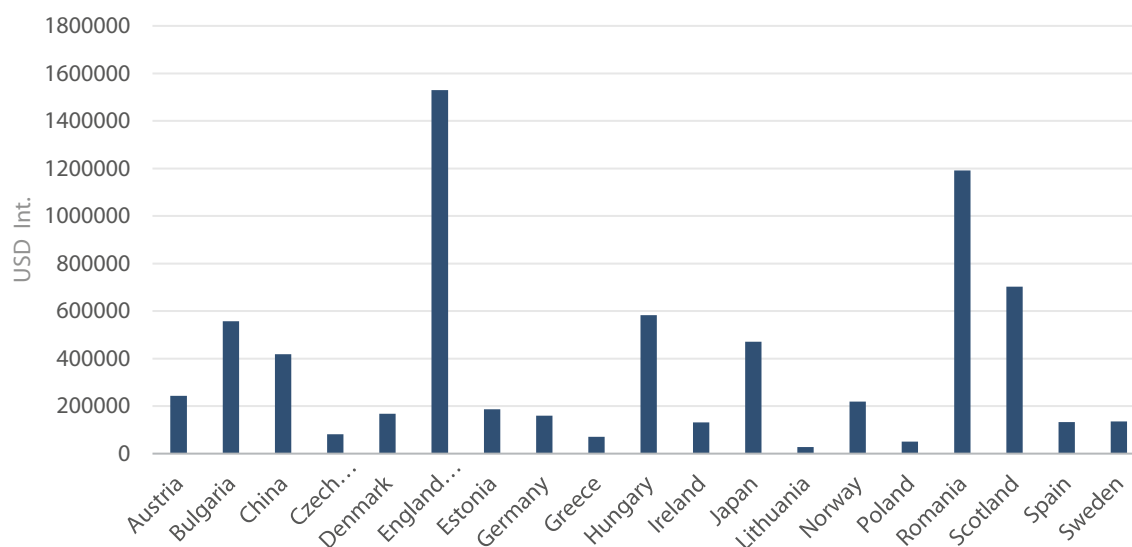
Source: Hodges et al., Case Study 7, pp. 172-175.⁸⁰

The costs of litigation provided in the table above are all based on a hypothetical dispute worth €2 million with a €5 million loss of profit. The cost of litigation of such a dispute would be 12 times higher in England than in Germany.

The largest share of the cost in England is determined by lawyers' fees.

⁸⁰ The last column is the author's calculation based on the data by Hodges et al. The cost of litigation in England and Wales is the highest and is taken as 100 %.

Figure 7 – Total (minimum) costs including lawyer and court fees (Oxford 2010 Costs Study)



Source: Based on data from Oxford 2010 Costs Study, pp. 134-157.

3.2.5. Other factors

The above list of factors is not exhaustive. Figures 2 and 3 above provide a list of various other factors that impact parties' choices. In addition to the factors listed above, for example, in the financial services sector, standard clauses on the choice of law are very common.⁸¹

Until recently, ISDA master agreements provided only for English, State of New York or Japanese choice of law and jurisdiction.⁸² In July 2018, ISDA introduced Irish and French law and courts as additional options, to supplement the existing master agreements. Katherine Tew Darras, ISDA's General Counsel explains the recent change: 'There will be good reasons for EU/EEA counterparties to continue using the English law master agreement, and there will be good reasons for them to start using the French and Irish law versions. This is all about providing choice to the market and allowing counterparties to choose the option that best suits their needs'.⁸³

Discussing additional choice of law and choice of forum clauses in the existing master agreements the ISDA outlined the following reasons why parties may shift from the UK to other EU jurisdictions:

⁸¹ International Swaps and Derivatives Association. 'ISDA has more than 900 member institutions from 68 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Membership types are Primary (dealer firms), Associate (service providers) and Subscriber (end-users).' For a general examination of the ISDA agreements see for instance B.K. Jomadar, *The ISDA Master Agreement - The Rise and Fall of a Major Financial Instrument*, 2007.

⁸² [ISDA explains](#) the current status related to the ISDA Master agreements 'As it currently stands, virtually all of the ISDA Master Agreements entered into between counterparties based in the EU or EEA are governed by English law. Counterparties typically also submit to the jurisdiction of the English courts. Because the UK is part of the EU and EEA, any English court judgment is automatically recognised and enforced across all Member States'

⁸³ ISDA, [ISDA Publishes French and Irish Law Master Agreements](#), July 2018.

- 'Without some type of deal that replicates the effects of EU/EEA membership, English law would become a third-country law after Brexit. One of the consequences is that English court judgments would not be automatically recognised in EU/EEA countries.'⁸⁴
- 'Counterparties may also want to retain specific benefits of EU legislation – for example, protections under certain EU national insolvency laws that require use of an EU Member-State-law agreement in order to receive those protections.'⁸⁵
- '... some EU/EEA counterparties may want to retain that automatic recognition and enforcement when trading with each other. There are other reasons why entities may want to carry on trading under EU/EEA law agreements. For instance, EU/EEA credit institutions are required to insert contractual recognition of bail-in into third-country law governed contracts under Article 55 of the EU Bank Recovery and Resolution Directive – and without some type of deal, this would include English law governed ISDA master agreements after Brexit. This wouldn't be an issue for agreements governed by the law of an EU/EEA Member State'.⁸⁶

3.2.6. Conclusions

The current intra-EU market distribution in commercial litigation cannot be explained solely by objective factors relating to quality, certainty, speed or cost of procedure. For example, German courts in terms of indicators relating to quality, speed, certainty and cost generally outperform the UK courts.

Table 10 – Factors impacting choice of law/choice of forum – comparative assessment of five EU Member States

Criteria	Measure	UK	Germany	France	Italy	Spain	EU market leader
quality	Rule of law index/ civil justice	2	1	3	5	4	Denmark
speed	CEPEJ	4	1	3	5	2	Lithuania
certainty	Index of Legal Certainty	3	1	2	4	-	Germany
cost	2010 Oxford study	5	1	-	-	2	Portugal

Source: Author's own work based on the above discussion and data.

Based on the review of 11 available empirical studies in the EU and US relating to choice of law and choice of forum, Vogenauer concluded in 2013 that the dominant role of the UK litigation market is largely explained by the 'image' of English legal certainty.⁸⁷ Vogenauer identifies four key variables that determine the leading role of the UK in the current litigation market: the English language; a

⁸⁴ ISDA, [Brexit and the ISDA Master Agreement](#), 2018.

⁸⁵ [Ibid.](#)

⁸⁶ [Ibid.](#)

⁸⁷ For an overview, see Table 1 in Chapter 9, Vogenauer *Regulatory Competition in Contract Law and Dispute Resolution*, pp. 257.

major financial services market that traditionally relies on UK law and UK courts; the fact that EU law 'enjoys aura of stability' and strong network effects.⁸⁸

On the basis of this comparative analysis of factors relating to the quality, certainty, speed and cost of commercial litigation in the EU, as well as the review of secondary literature, it can be concluded that the strong market position of the EU is based on a combination of the image, branding and network effects of the UK legal services market as well as in part because the EU's harmonised rules (i.e. Rome and Brussels regulations and strong enforcement across EU). The analysis by TheCityUK concludes 'this primacy, and the ability of UK-based practitioners to provide best-in-class legal and advisory guidance for global clients, could be impacted by Brexit. The mutual recognition and enforcement of court judgments is critical to the international use of English law.'⁸⁹

Considering market changes in the global and EU legal services market and legal uncertainty relating to the application of EU harmonised rules in the UK courts, it may be reasonable to expect a certain re-distribution of commercial litigation in the EU to take place. The exact pattern of this re-distribution would depend on a number of factors that are not yet known. The next chapter discusses possible trends and their economic impacts.

⁸⁸ See Vogenauer in Regulatory Competition in Contract Law and Dispute Resolution, p. 261.

⁸⁹ [Legal excellence, internationally renowned: UK legal services 2017](#), The CityUK.

4. European added value assessment

4.1. Analytical framework

This study adopts a twofold analytical model to estimate the European added value of EU measures to expedite the settlement of commercial disputes. First, the EAVA estimates the economic impact of attracting additional litigation business to the EU-27 legal services market. Second, the EAVA measures the economic value that could be generated as a result of a reduction of delays in adjudicating a commercial dispute. This twofold approach for assessing European added value is justified by general trends in the legal services market and the main gaps identified by global legal services expert providers.

In terms of market trends, there is clear economic evidence to suggest that the current market for legal services is going through fundamental changes. The market is becoming increasingly global and competitive. This opens new opportunities for Member States and regions. The OECD/World Bank Reports have noted that 'the overall international market for legal services is becoming more competitive through a combination of factors such as new entrants, outsourcing, greater specialisation and competition to move further up value chain'.⁹⁰ There are also initiatives in a number of EU Member States, including Belgium, France, Germany and the Netherlands that have the potential to impact the redistribution of the commercial litigation market in the current EU-28.

In terms of identified barriers to commercial litigation, length of proceedings is an issue (among others, see the section on factors above) that is consistently identified by the experts as problematic. The divergences between Member States regarding the time taken to adjudicate a commercial dispute are well known. Length of proceedings is the biggest problem but also the biggest opportunity for generating added value.

Accordingly, this study develops an analytical model that includes calculations and projections for the potential development of the commercial B2B litigation market and the savings to be generated by reducing adjudication delays. The analytical model is based on secondary data and expert assumptions. The key underlying assumption of this model is that by taking further measures to enhance EU procedural rules on the settlement of commercial disputes, the EU-27 would be able to attract additional litigation from other jurisdictions. This assumption is justified by the analysis of the factors in Chapter 3 above, the review of the secondary literature and the current initiatives in the Member States to establish commercial courts.

4.2. Economic impact of attracting additional litigation business to the EU legal services market

In order to estimate the potential economic value of additional B2B commercial litigation business for the EU-27 that could be generated as a result of EU action to expedite procedure, it is necessary to have an overview on the current size of B2B commercial litigation and to develop possible scenarios as to how this market could develop.

The potential B2B commercial litigation market development is estimated based on the following underlying assumptions:

⁹⁰ OECD-World Bank Sixth Services Experts Meeting, [Sectorial Study on the Impact of Domestic Regulation on Trade in Legal Services](#), 2007.

- The Member States will intensify efforts to establish specialised courts, along the lines of ongoing initiatives in Belgium, the Netherlands, Germany and France, and the EU will adopt measures to enhance the competitiveness of the EU legal services market;
- the EU will adopt, among other possible measures, procedures to expedite the settlement of commercial disputes.

Based on an analysis of the market dynamics and structural factors that impact the decision of commercial parties to litigate in a specific jurisdiction, as discussed in Chapter 3 above, the EAVA reasonably assumes that EU action has the potential to attract additional litigation business to the EU-27. In order to estimate the possible range of the economic value gain that could be generated as a result of EU action the EAVA develops three scenarios.

All the three scenarios

- presuppose the same EU action, but are based on different assumptions as to how the EU-27 market might evolve. In other words, three scenarios represent the range of potential benefits that the EU commercial litigation market can gain as a result of EU action to expedite the settlement of commercial disputes;
- consider a combination of potential direct additional revenues as well as indirect impacts on the broader economy through a multiplier effect. The same multiplier effect applies to all three scenarios.

4.2.1. Size of the current commercial B2B litigation market

The EAVA quantifies the size of the litigation market based on 2017 Global Legal Services Survey data.⁹¹ The EAVA uses the global survey because it provides a comparative estimate of Europe vis-à-vis the other global regions as well as the most recent data. This global survey values the EU legal services market at US\$191 billion / €164 billion, with the UK share, 6.5 % globally.

This global survey also estimates that the current size of the litigation market globally represents 31 % of the legal services market. B2B litigation accounts for 48 % of the litigation market. There is no available estimate of the share represented by cross-border cases in the total EU B2B litigation market. The Member States' estimates diverge widely. The UK Commercial Court reports that 72 % of all cases settled by the UK Commercial Courts involve at least one non-UK party. The 2018 Deloitte financial study supporting the European Commission impact assessment on the service of documents in civil and commercial matters assumes a 4-15 % range of cross-border cases.⁹² This range includes all areas of law where service of documents in cross-border situations might potentially be necessary. Therefore, it does not reflect the state of play in commercial B2B litigation and probably may be considered to underestimate B2B commercial litigation. Considering the maximum as reported in the UK and a minimum as reported by the Deloitte study as well as secondary sources, the EAVA makes an assumption of 33 %. This is the medium-range estimate that the EAVA applies for the overall EU B2B litigation market.

⁹¹ 2016 data from Eurostat estimates the value of the EU legal services market as €151 billion.

⁹² Commission Staff Working Document SWD(2018) 287 final.

Table 11 – Current commercial B2B litigation – basic assumptions

Assumption	Assumed value	Source
Size of the litigation market in the overall legal services market	31 %	Global Legal Services Survey
Proportion of B2B litigation	48 %	Global Legal Services Survey
Proportion of cross-border cases in B2B commercial litigation market	33 %	Own estimate, considering the min. range (Deloitte) and maximum range (UK Statistical Office).

Source: Author's own work.

Based on those estimates and assumptions the current revenues of the market for B2B cross border commercial litigation is €8.1 billion for the EU-28 and €35.9 billion globally.

Table 12 – Size of the B2B commercial litigation market in 2017 (in € billion)

2017, € billion	EU-27 (excluding UK)	UK	Global
Total legal services market	117.4	47.1	731.0
- of which litigation (31 %)	36.4	14.6	226.6
- of which B2B (48 %)	17.5	7.0	108.8
- of which cross-border (33 %)	5.8	2.3	35.9

Source: Author's own work based on data; see Table 11, Basic Assumptions.

4.2.2. Direct economic value

The potential EU-27 value gain in relation to the current market share in B2B commercial litigation is estimated on the basis of three possible scenarios ranging from a conservative estimate assuming only modest shift in the current market structure (Scenario 1) to a more ambitious scenario that assumes a major shift in the current litigation market (Scenario 3).

Scenario 1: attracting new cross border cases to the EU

In order to estimate economic impact, for this scenario the EAVA uses in-depth research by the Boston Consulting Group (BCG).⁹³ The BCG study estimated the economic impact for the Netherlands economy of establishing a specialised commercial court. The BCG study estimated the market growth potential based on the expert survey and in-depth interviews with practitioners, i.e. Dutch lawyers active in international legal practices, legal councils in international companies representing a fair mix of Dutch economic actors. Based on this analysis and taking into consideration various economic factors, the BCG study concludes that the estimated annual economic impact on the Dutch economy would be in the range of €38 to 75 million. This impact is based on the €25-50 million direct revenues of the Dutch commercial B2B litigation market as well as on €13-25 million cost savings for litigation parties. This estimate is based on the assumption that

⁹³ Marktverkenning Netherlands Commercial Court, The Boston Consulting Group, 2015.

the Netherlands would be able to attract new B2B commercial cross-border cases that are currently not litigated in there.⁹⁴ The survey respondents clearly expressed the need for more competition among EU jurisdictions in settling commercial disputes.

For Scenario 1 the Netherlands assumptions for potential market growth (the lowest range estimate) is extrapolated to the EU-27. This extrapolation is based on the Netherlands share of EU-27 GDP. The Netherlands represents a good proxy for the EU-27, indicating potential to attract new commercial cases. The Netherlands is a middle-sized EU economy with a stable well performing judicial system. At the same time the Netherlands is not a leading financial centre and is not currently among the EU top five legal service market leaders in terms of revenue. However, the Netherlands economy is highly international, with considerable trade flow activity, many headquarters of international firms and an efficient judicial system, operating above the EU average. This is why the EAVA takes more conservative, lower range estimates for the EU-27-wide extrapolation.

Based on this rather modest scenario, European added value would be in the range of €0.7 billion annually, measured in terms of additional revenues for the EU-27 commercial B2B litigation market. This represents a 12 % increase approximately versus today's EU-27 revenues from cross-border B2B litigation.

Table 13 – Scenario 1 (in € million per year)

	Additional revenues	legal	Cost savings for litigants	Total economic impact	GDP share
Netherlands impact – max	50		25	75	6 %
Netherlands impact – min	25		13	38	6 %
Extrapolated EU-27 impact	442		230	671	100 %

Source: Author's own calculations.

Scenario 2: realising the natural share of the legal services market as compared with GDP

This scenario is based on the general assumption that the legal services market largely reflects global GDP distribution. The legal services market, and commercial litigation in particular, is closely linked to commercial business flows.

The market share of the EU-27 in the global legal services market (16.1 %) is currently lower than what would be expected in terms of the EU's economic weight as measured by its share of global GDP (18.4%). The EAVA assumes that if the EU took further action to enhance the competitiveness of the litigation market, the EU-27 would be able to align its market share in legal services with its share in global GDP. The EU-27 would thus grow its market share by 2.3% – from the current 16.1 % to 18.4 % – representing €0.8 billion. In this analysis the UK market share was not considered. This represents an increase of approximately 14 % on current EU-27 revenues in cross-border B2B litigation.

⁹⁴ The BCG NL study assumes this effect is likely to emerge in three to five years as it takes time to build judicial infrastructure and attract new cases, p. 16.

Table 14 – Scenario 2: legal services market/ GDP global share

Region	Legal services market		GDP		Difference (%)
	Market size (€ billion)	Share	GDP (€ billion)	Share	
Global	731.0	100 %	68.644	100 %	-
EU-28	164.5	22.5 %	14.877	21.7 %	0.8 %
UK	47.1	6.4 %	2.256	3.3 %	3.2 %
EU-28 (excl. UK)	117.4	16.1 %	12.621	18.4 %	-2.3 %

Source: Author's own work.

Scenario 3: major shift in the European litigation market

This scenario is based on the assumption that there will be a major shift in cross-border commercial litigation practices. It assumes that the EU-27 would be able to attract a substantial share of the litigation business that is currently generated in London.

Currently (see Table 14) the UK market share in global legal services is 6.4 %, while its global GDP share is 3.2 %. This suggests that the excess UK market share in the global legal services market is 3.2 %. This can be assumed to be generated mainly by cross-border international litigation, and explained by traditional perception of the UK judicial system as being most favourable to the resolution of international commercial disputes and by the fact that EU rules simplify enforcement of the judicial decisions in the EU. Current trends in the litigation market, including, for example, the establishment in the EU Member States of specialised commercial courts that would arguably be able to provide effective and cost-efficient resolution of commercial disputes, changing practices in the model contract agreements, and the possible adoption of an EU 'package' to expedite and simplify the procedure, if effective, could potentially shift a bulk share of the UK revenues from commercial litigation to other EU Member States. This possible shift is subject to many pre-conditions and in the best case scenario would take some years to realise. However, based on the available and current trends it cannot be ruled out. This scenario implies that the UK share of the legal services market would gradually represent its actual natural share of global GDP.

For the EU-27 this would entail €1.1 billion in additional revenues from legal services. This represents an approximate increase of 20 % compared with current EU-27 revenues in cross-border B2B litigation.

4.2.3. Wider economic value for the EU economy

In addition to the direct increase in legal service revenues (as estimated above in three scenarios), the economic literature also suggests that an increase in demand for legal services would support additional spending across the EU economy.⁹⁵ This benefit is referred to as a multiplier effect. The multiplier effect is calculated on the basis of a number of macroeconomic indicators and specific market characteristics. For the legal services market, the Law Society of England and Wales, estimates the multiplier at 2.39. The multiplier can be broken down into the direct effect of a €1.00

⁹⁵ For discussion and analysis, see for instance [Economic Value of the Legal Services Sector, The Law Society of England and Wales](#), March 2016.

increase in demand for legal services, a €0.41 indirect effect of the purchase of inputs from suppliers to provide legal services, and an induced effect of €0.98 from consequent household expenditure. This multiplier is estimated on the basis of a combination of two approaches, a static input-output analysis by Cambridge Econometrics, and dynamic modelling by Oxford Economics. This estimated multiplier of 2.39 is consistent with other economics studies. For example, Micronomics, based on the IMPLAN model, estimated a multiplier of 2.59 for the US legal services market.⁹⁶ In order to assess the wider economic value of the direct increase in the commercial litigation market the EAVA assumes a 2.39 multiplier.

Bringing this together, the total economic value, including the direct economic contribution of cross border B2B litigation market and wider economic value from multiplier effects, could be estimated in the range of €1.6 to 2.7 billion annually. This total economic value is based only on the quantitative analysis and does not fully consider other important non-quantified advantages for the wider economy, such as for example, increased trust in the judicial systems of the EU Member States or improved access to justice.

Table 15 – Summary of direct and indirect economic impacts stemming from extra demand for EU commercial dispute resolution services (in € billion per year)

Scenario	Direct impact (2017, € billion)	Indirect and induced impacts (in € billion)	Total economic value
Scenario 1: attracting new cross-border cases to the EU	0.7	0.9	1.6
Scenario 2: realising fair share of legal services vs GDP	0.8	1.1	1.9
Scenario 3: major shift in the current litigation market	1.1	1.6	2.7

Source: Author's own elaboration.

4.3. Economic opportunity cost reduction through faster procedure

Delays in adjudication create uncertainty among parties and generate economic costs.⁹⁷ They have negative impacts on competition, firms growth, investment and business development, and constrain the availability of capital. Inability to access funds frozen as a result of ongoing litigation can be considered an opportunity cost of delayed adjudication.⁹⁸ In order to estimate this

⁹⁶ On the IMPLAL model see www.implan.com. Weinstein Roy, et al., Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with US District Court Proceeding, Micronomics Economic Research and Consulting, 2017.

⁹⁷ For an economic literature review see for instance Stefan Voigt, 2016. 'Determinants of judicial efficiency: a survey', *European Journal of Law and Economics*, Springer, Vol. 42(2), pp. 183-208; Giuseppe di Vita, 'Factors Determining the Duration of Legal Disputes: An Empirical Analysis with Micro Data', *Journal of Institutional and Theoretical Economics*, 168 (4), 2012; Palumbo, G. et al., The Economics of Civil Justice: New Cross-country Data and Empirics, OECD Economics Department Working Papers, No 1060, OECD Publishing, Paris, 2013.

⁹⁸ Weinstein et al. explain 'Delays to adjudication are not without cost. During the period required to resolve disputes, resources at issue between litigants can be thought of as removed from circulation. When litigation takes longer to resolve, these resources remain unavailable in the sense that neither party can count on receiving them and putting them to use. [...] Both parties are thus constrained; the funds are unavailable to either; both parties experience a loss

opportunity cost the EAVA relies on the Weinstein et al. methodology adjusted to the EU context and accounting for the delays in adjudication. The methodology used by Weinstein et al. has been developed to measure the economic losses associated with delays in dispute resolution in the US, focusing on time difference gain between arbitration and adjudication. The EAVA adjusts this methodology to assess the time gain of expedited adjudication and applies it to the EU litigation market.

In essence this method estimates the opportunity cost as a foregone investment return on frozen funds that are idle due to delayed adjudication. The European value added can then be understood as a reduction in opportunity costs gained thanks to the reduction of time necessary to adjudicate the case. The reduction of opportunity costs is assessed considering three parameters: the amount at issue (total funds frozen), the reduction in average time necessary to adjudicate the case, and unrealised investment return.

4.3.1. Direct economic impact

Amount at issue

The most detailed statistics on the amount of funds at issue involved in commercial litigation is only available for the UK courts. The UK commercial courts publish yearly statistics on the number of commercial court cases by value.⁹⁹ The EAVA takes this data as a starting point to estimate possible EU-wide value at issue in commercial litigation.¹⁰⁰ Purely domestic cases (28 %) are excluded from the total UK amount. Considering the UK market share (30.7 %) in total EU-28 legal services market, when the EU-27 amount is deducted the total amount at issue for the EU-27 can be estimated at €29.6 billion.

Potential reduction of the time of dispute resolution

According to the CEPEJ dataset¹⁰¹ there is a large divergence between EU-Member States in the time necessary to adjudicate civil and commercial cases, ranging from less than 100 days in Lithuania and Luxemburg to over 500 days in Italy and Greece. Based on this data, the weighted average by GDP (to account for the economic size of the Member States) for the EU-27 is 273 days for the adjudication of litigious cases at the court of first instance.

The EAVA runs three scenarios on the possible time reduction. First scenario, assumes that by introducing EU measures to expedite the resolution of commercial disputes the average time can be reduced to at least the current median (196 days); scenario two to six months (182 days) and scenario three to the first quartile of the EU-27 (153 days). On an EU-wide scale this implies a reduction in the weighted average duration between 88 days (in scenario one) and of 123 days or 0.34 years (in scenario three).

until the dispute is resolve', Weinstein Roy, et.al, Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with US District Court Proceeding, Micronomics Economic Research and Consulting, 2017, pp. 3-4.

⁹⁹ See statistical table available at UK Commercial Courts statistics.

¹⁰⁰ The UK data shows the number of cases broken down into eight categories. The value at issue is calculated by multiplying the number of cases by category by the average value by category. Each category represents a range of value at issue. The EAVA takes a midpoint of this range and corrects the total for the category of cases where the value is unknown. To adjust for yearly fluctuations the EAVA takes the 2014 to 2017 average amount at value.

¹⁰¹ The European Commission for the Efficiency of Justice (CEPEJ) [database](#), Council of Europe, includes data on the flow of cases, including data on the time necessary to resolve litigious civil and commercial cases in the court of first instance. The dataset, for this specific indicator, does not include data for Belgium, Bulgaria, Cyprus, Ireland or the UK.

For comparison purposes the EAVA has also applied a similar methodology, bringing EU MS to first quartile, using the World Bank Doing Business Index, Enforcing contracts indicator.¹⁰² This indicator measures the time needed to resolve a commercial dispute through the local court of first instance.¹⁰³ The most recent data collection was completed in June 2017 and resulted in a similar improvement of 129 days.

Foregone return

In order to estimate the foregone return the EAVA uses a measure of how much return companies could have realised had they been able to invest the amount at issue in their business operations. To estimate the return on the amount at issue the EAVA uses the average return on Eurostoxx-600 in the last three years (2015-2018), which was 12.5 %.

4.3.2. Total opportunity cost

The multiplication of the three parameters results in a direct opportunity cost reduction of €1.3 billion (see Table 14 below). Applying the multiplier effect (see para 4.2.1 above) results in an additional €1.7 billion of indirect and induced economic consequences of delay in adjudication. This brings in a total opportunity cost reduction of €3 billion per year for the EU-27.

Table 16 – Total opportunity costs of EU measures to expedite the settlement of commercial disputes (in € billion)

	time saving	direct opportunity costs reduction	indirect + induced costs reduction	Total
Scenario I (median)	273 --> 196 days	0.9	1.2	2.1
Scenario II (half a year)	273 --> 182 days	1.0	1.4	2.4
Scenario III	273 --> 150 days	1.3	1.7	3.0

4.4. Total potential economic and efficiency benefit of EU measures to expedite the settlement of commercial disputes

Table 16 below brings together two elements of the potential European added value of EU measures to expedite the settlement of commercial disputes. The first element of the analysis focuses on the benefits for the EU-27 economy in terms of additional value that can be generated by attracting additional commercial litigation to the EU market. The second element of the analysis focuses on the opportunity costs for business and wider economy and estimates the economic value that could be generated by reducing of delays in adjudicating a commercial dispute. This twofold approach quantifies and measures only part of the possible benefits that could be generated as a result of EU measures to simplify and expedite the resolution of B2B commercial disputes in the EU. More specifically, the quantification is limited to the time saving of opportunity costs for adjudication in

¹⁰² World Bank, [Doing Business dataset](#).

¹⁰³ For methodology, see <http://www.doingbusiness.org/en/methodology/enforcing-contracts>.

courts of first instance. The analysis also does not measure important qualitative benefits that could be generated as a result of EU action, including mutual trust in judicial systems, legal certainty and access to justice. Further research is necessary to assess those qualitative benefits in more detail. Against this background the quantification of European added value in this study should be considered as partial, though clear, evidence of the total potential European added value that could be generated by EU action.

Table 17 – Potential economic and efficiency benefits of EU measures to expedite the settlement of commercial disputes (in € billion)

1. European added value that could be generated by increased demand for litigation services (annually, in € billion)

	Direct impact (2017, € billion)	Indirect induced and impacts (in € billion)	Total economic value
impacts stemming from extra demand for the EU commercial dispute resolution services	0.7 -1.1	0.9-1.6	1.6-2.7

2. European added value that can be generated by reduction in opportunity costs of delayed adjudication at the courts of first instance

2.1. Direct opportunity cost reduction		
Estimated amount at issue (EU-28)	29.6	€ billion
X (multiplied by/ in years)		
Potential reduction in time of procedure	123	Days
- Weighted average time (2016)	273	Days
- Weighted average time when Member States brought to median Scenario I	196	Days
- Weighted average time when Member States brought to half a year Scenario II	182	Days
- Weighted average time when Member States brought to 1st quartile Scenario III	150	Days
Opportunity cost (return on Eurostoxx-600 in 2015-18)	12.5 %	Average annual return
Direct opportunity cost reduction	0.9 - 1.3	€ billion

2.2. Indirect opportunity cost due to multiplier effects		
Multiplier	2.39	
Indirect opportunity cost reduction	1.2 - 1.7	€ billion

2.3. Total opportunity costs reduction (annually)		
Direct opportunity cost reduction	0.9 - 1.3	€ billion
Indirect opportunity cost reduction	1.2 - 1.7	€ billion

Total opportunity cost reduction	2.1 - 3.0	€ billion
----------------------------------	-----------	-----------

REFERENCES

- Allen & Overy, [English jurisdiction clauses – should commercial parties change their approach?](#), 2016.
- Allen & Overy, Global Litigation Survey 2015, 2015.
- Bielen S. and Marneffe W., 'Testing the Lawyer-Induced Litigation Hypothesis in Europe', *Applied Economics*, Vol. 50 (16), 2017.
- Bux U., [Judicial cooperation in civil matters](#), European Parliament, 2018.
- Chao C., [6 trends will shape future international commercial disputes](#), DLA Piper, 2018.
- Cuniberti G., 'The International Market for Contracts: The Most Attractive Contract Laws', *Northwestern Journal of International Law & Business*, 34 (3), 2014.
- Cuniberti G., The International Market for Contracts: The Most Attractive Contract Laws, University of Luxembourg Law Working Paper Series, 2014.
- di Vita G., 'Factors Determining the Duration of Legal Disputes: An Empirical Analysis with Micro Data', *Journal of Institutional and Theoretical Economics*, Vol. 168 (4), 2012.
- Djakov et al., 'Courts', *The Quarterly Journal of Economics*, Vol. 118 (2), pp. 453-517, 2003.
- European Commission for the Efficiency of Justice (CEPEJ), [Study on the functioning of judicial systems in the European Union Member States](#), European Commission, 2018.
- European Commission, Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), SWD(2018) 287 final.
- European Parliament, Draft report with recommendations to the Commission on expedited settlement of commercial disputes, Legal Affairs Committee, PE 627.896, 2018.
- Eurostat, GDP and main components (output, expenditure and income), Dataset [nama_10_gdp], May 2018.
- Eurostat, [Which Member States have the largest share of EU's GDP?](#), May 2018.
- Fauvrelle and Almeida, 'Determinants of judicial change: Evidence from Brazil', *Review of Law and Economics*, 14 (1), 2018, pp. 36 - 42.
- Hodges C., Vogenauer S. and Tulibacka M. (eds.), *The Costs and Funding of Civil Litigation: A Comparative Perspective*, Hart Publishing, Oxford, 2010.
- International Monetary Fund, World Economic Outlook Database, April 2018.
- Jomadar B.K., [The ISDA Master Agreement - The Rise and Fall of Major Financial Instrument](#), 2007.
- Kennedy L., [Litigation - the road ahead](#), WWL, 2015.
- Knoll-Tudor I., [Specialised Chambers for International Commercial Disputes: Paris in the Spotlight](#), Kluwer Arbitration Blog, February 14, 2018.
- Legal High Committee for Financial Markets of Paris (HCJP), [Mise en place des chambres spécialisées pour le traitement du contentieux international des affaires](#), 2017.

- Lein E. et al., [Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts](#), British Institute of International and Comparative Law, UK Ministry of Justice, 2015.
- Organisation for Economic Co-operation and Development and World Bank, Sixth Services Experts Meeting, Sectorial Study on the Impact of Domestic Regulation on Trade in Legal Services, 2007.
- Organisation for Economic Co-operation and Development, What makes civil justice effective?, OECD Economics Department Policy Notes, No 18 June 2013.
- Palumbo G. et al., The Economics of Civil Justice: New Cross-country Data and Empirics, OECD Economics Department Working Papers, No 1060, OECD Publishing, Paris, 2013.
- Portland Communications, [Who uses the Commercial Courts](#), 2017.
- Research and Markets, [Legal Services Global Market Opportunities And Strategies to 2021](#), 2018.
- Research and Markets, [Legal Services Global Market Report 2018](#), 2018.
- Research and Markets, [Professional Services Global Market Briefing 2016](#), 2017.
- Rühl G., Building Competence in Commercial Law in the Member States, European Parliament, Policy Department, PE 604.980, 2018.
- Rühl G. [Towards a European Commercial Court?](#), The Conflict of Law. net: News and views in Private international law, 2018.
- The Boston Consulting Group, Marktverkenning Netherlands Commercial Court, 2015.
- The CityUK, [Legal Excellence, internationally renowned: UK Legal Services 2017](#), 2017.
- The International Swaps and Derivatives Association, [ISDA Publishes French and Irish Law Master Agreements](#), 2018.
- The Law Society of England and Wales, Economic Value of the Legal Services Sector, March 2016.
- The Lawyer, [The Global Litigation 50](#), 2017.
- The World Justice Project, [Rule of Law Index 2017-2018](#), 2018.
- United States [International Trade Commission, Recent Trends in US Services Trade 2017 Annual Report, Legal Services](#), 2017.
- Vogenaer S. and Weatherill S. (eds.), *Harmonization of European Contract Law: Implications for European Private Laws, Business and Legal Practice*, Hart Publishing, Oxford, 2006.
- Vogenaer S., [Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law. A Business Survey – Final Results](#), 2008.
- Vogenaer S., 'Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence', in Eidenmüller H. (ed.), *Regulatory Competition in Contract Law and Dispute Resolution*, Beck Publishing, 2013.
- Voigt S., 'Determinants of judicial efficiency: a survey', *European Journal of Law and Economics*, Springer, Vol. 42(2), 2016.
- von Hein J., 'EU Competence to Legislate in the Area of Private International Law and Law Reforms at the EU level', in Beaumont P. et al., *Cross-Border Litigation in Europe*, Hart Publishing, Oxford, 2017.
- Weinstein R., et al., Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with US District Court Proceeding, Micronomics Economic Research and Consulting, 2017.
- World Bank, [Doing Business: Enforcing Contracts](#), 2016 dataset, 2016.

This European Added Value Assessment (EAVA) argues that an EU procedure for the expedited settlement of commercial disputes could generate European added value for the EU economy and businesses in the range of €3.7 to 5.7 billion annually. This includes direct economic impacts of between €1.6 and 2.4 billion, and in additional €2.1 to 3.3 billion in indirect and induced benefits for the wider economy. European added value can be created through increases in the direct contribution of revenue from litigation services to the EU economy (€1.6 to 2.7 billion) and through a reduction in opportunity costs to business associated with the duration of judicial proceedings (€2.1 to 3.0 billion).

This is a publication of the European Added Value Unit
EPRS | European Parliamentary Research Service

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.



PDF ISBN 978-92-846-3352-4 | doi: 10.2861/801421 | QA-03-18-336-EN-N