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Editorial

But Seriously, What is the Principle of Autonomy Really About?

Autonomy; Bilateral investment treaties; EU law; International arbitration; Investor-state arbitration

A previous Editorial explored the definition and implications of the principle of autonomy of EU law in the context of international investment law.[1] The trigger was *Achmea* (C-284/16) and, in particular, the thoughtful and pragmatic Opinion of AG Wathelet who sought to reconcile the Investor-State Dispute Settlement (ISDS) system laid down in intra-EU Bilateral Investment Treaties (BITs) with EU primary law.[2] In a short judgment rendered on 6 March 2018, the Grand Chamber of the Court of Justice ignored this Opinion.[3]

The judgment in *Achmea* is the most recent statement on the principle of autonomy. As such it was anticipated with excitement. On the one hand, it was expected to deepen our understanding of an increasingly prominent principle the scope of which has remained somewhat elusive. On the other hand, the context of the case, that is arbitration pursuant to international investment treaties, has been highly politicised and controversial not only amongst decision-makers and lawyers, but also the general public which has viewed the existing ISDP mechanism with scepticism, if not hostility.

It is recalled that *Achmea* is about a constitutional question: does the ISDS mechanism provided for in intra-EU BITs violate three of the main tenets of EU law, namely the principle of non-discrimination (art.18 TEU), the preliminary reference procedure (art.267 TFEU), and the exclusive jurisdiction of the Court of Justice (art.344 TFEU)?

The judgment answered this question in the affirmative (except for the non-discrimination principle which it did not address). This conclusion was reached on the basis of three main considerations. First, as arbitral tribunals take account of domestic law and international treaties between the contracting parties and given that EU law forms part of both these sets of rules, arbitral tribunals may be called on to interpret or apply EU law (including provisions on the freedom of establishment and free movement of capital). Secondly, arbitral tribunals may not refer questions about the interpretation and application of EU law to the Court of Justice as they do not constitute parts of the judicial system of the contracting Member States. Their decisions, therefore, are not subject to the mechanisms that ensure the full effectiveness of EU law. Thirdly, the decisions of arbitral tribunals are not subject to full judicial review by domestic courts which may not, therefore, refer EU law issues pertaining to such decisions to the Court of Justice.

Relying heavily on Opinion 2/13,[4] the thread that brings together these three strands is the principle of autonomy which has now become part of the orthodoxy of EU law. The judgment in *Achmea* illustrates a most orthodox reading of this orthodoxy, as it construes autonomy in

[1] P. Koutrakos, "What is the Principle of Autonomy Really About?" (2018) 43 E.L. Rev. 1.
[2] *Slowakische Republik v Achmea BV* (C-284/16) EU:C:2017:699.
[3] *Slowakische Republik v Achmea BV* (C-284/16) EU:C:2018:158.
[4] *Opinion (2/13)* (re: Accession of the EU to the ECHR) EU:C:2014:2454; [2015] 2 C.M.L.R. 21.

far-reaching terms. There are three main problems with its approach. The first is conceptual: the starting point for the Court's line of reasoning is the fundamental question of whether an EU law issue might be related to the dispute brought before an arbitral tribunal. And yet, this question is too broad. After all, courts deal with issues of law originating in other legal orders as a matter of course. A more narrow criterion would have been more appropriate: this would be whether an arbitral tribunal could bind a Member State to a given interpretation of EU law. Addressing this question would provide a more nuanced picture of the interactions between EU, international, and national law. It would also avoid both the formalism that permeates the judgment in *Achmea* and the maximalist position to which it gives rise.[5] After all, taken literally, it would be difficult to see how the construction of autonomy that emerges from the judgment could sit comfortably with any international system of adjudication to which the EU is a party.

The second issue is the selective reading of some aspects of EU law. For instance, the Court concludes that the exclusive jurisdiction of art.344 TFEU is violated, but nowhere in the judgment is there an analysis of that provision (perhaps because it refers to disputes between Member States only). Consistently with recent case-law,[6] the principle of autonomy that emerges in *Achmea* is all about domestic courts and their jurisdiction to interpret and apply EU law: the latter, the judgment suggests, is threatened by the binding nature of arbitral awards which prevents domestic judges from exercising unlimited judicial review and making a reference under art.267 TFEU. And yet, the *Achmea* judgment itself was rendered in response to a preliminary reference by the *Bundesgerichtshof*.

The third issue with the judgment is the high level of abstraction in which its language is couched. This makes it difficult to gauge the precise content of the principle of autonomy and its implications for the Union's broader investment policy. Taken at face value, the principle may appear to be all about conflict: it builds an antagonistic relationship with international law and does not see any space for EU law to be understood and applied in pragmatic co-existence with international dispute settlement systems.

While the abstract language in *Achmea* invites its own misreadings, it may also support a more pragmatic reading of autonomy. This is based on two aspects of the judgment. The first is about the prominent role of the duty of mutual trust in the Court's line of reasoning.[7] The second is about the legal context within which the judgment was rendered: intra-EU BITs may be viewed, in essence, as an arrangement between two Member States to deprive domestic courts of their jurisdiction to apply EU law in certain disputes brought by investors against domestic authorities. This is not the case when it comes to the EU's agreements with third countries, where the choice of dispute settlement is driven by different policy choices. In fact, in its final paragraph, the judgment seeks to distinguish between intra-EU and extra-EU agreements.[8]

[PK]

[5] The Arbitral Tribunal in *Achmea* pointed out that "[w]hat the ECJ has is a monopoly on the final and authoritative interpretation of EU law": *Eureko BV v Slovak Republic* (PCA Case No.2008-13) Award on Jurisdiction, Arbitrability and Suspension (26 October 2010) para.282.
[6] See, for instance, *Opinion 1/09* (re: European and Community Patents Courts) EU:C:2011:123.
[7] *Achmea* (C-284/16) EU:C:2018:158 at [34] and [58].
[8] *Achmea* (C-284/16) at [58].
[9] [2017] OJ L11/23 art.8.31(2) CETA.

Articles

Does Staying Together Mean Playing Together? The Influence of EU law on Co-operation between EU and non-EU States: the Nordic Example
Päivi Leino* and *Liisa Leppävirta
How co-operation between EU States and non-EU States (such as the UK post-Brexit) can be arranged is a question with which the Nordic States have struggled for a long time. Various kinds of legal arrangements have been used to secure the application of uniform rules in the whole Nordic area, with the ambition of making the Nordic region the most integrated area in the world. Today, co-operation increasingly takes place by expanding and building on EU co-operation. We first introduce the legal framework governing the relationship between EU and non-EU States in general, and EU–Nordic relations, in particular. This article then considers the effect of EU law on four key policy areas of Nordic co-operation, which also figure high on the future UK agenda, since they affect the lives of individuals living in another State: free movement of persons and co-operation in criminal matters, social security and family law. The Nordic solutions also illustrate the influence of non-EU States around the EU negotiating table, either based on specific arrangements with the EU or through individual EU States. Finally, the article considers the effect of the evolving understanding of EU external competence on many of the existing Nordic solutions. The options for making legally solid arrangements of comprehensive co-operation across the EU border but outside the EU framework are extremely limited. In short, if a non-EU State wishes to play with EU States, it needs to follow the EU rules.

The Division of Public Contracts into Lots under Directive 2014/24: Minimum Harmonisation and Impact on SMEs in Public Procurement?
Martin Trybus
Small and medium-sized enterprises (SME) are at the heart of the economies of all Member States. However, many deem their share of public contracts insufficient. This article provides a detailed discussion of the most important "innovation" of the EU Public Sector Directive 2014/24 directed at increasing the participation of SMEs in public procurement: the regime on the division of larger contracts into smaller lots. The analysis considers economic theory and a selection of national laws transposing the Directive. It is argued that, owing to a low level of harmonisation, no substantial change occurred compared with the previous Directive. It is thus unlikely that SME participation in public procurement will increase in many Member States through this regime on division into lots.

EU Payment Surcharges Rules Lacking Teeth: Evidence from Empirical Studies into the Control of Surcharges in the EU and UK Travel Industry
Christine Riefa
This article explores the effectiveness of EU legislation at controlling the use of payment surcharges. Using original empirical studies conducted in the travel industry, it demonstrates that not only have the successive attempts of EU legislation failed to tackle the problem, but the latest instalment of reforms is also lacking teeth. This disappointing state of affairs is mainly due to the Payment Services Directive 2015/2366, which bans certain payments, while it subjects others to a cap on "excessive" surcharges. The latter cap was introduced by the Consumer Rights Directive 2011/83, which had not, however, provided for an effective mechanism either. This article suggests that effective consumer protection relies on an EU-wide ban, across all sectors and on all payment methods, regardless of the geographical location of the trader's acquiring bank.

The Legal Basis for EU Criminal Law Harmonisation: A Question of Federalism?
Jacob Öberg
Article 83(2) TFEU, introduced by the Treaty of Lisbon, confers a power on the EU to harmonise Member States' legislation to define criminal offences and criminal sanctions. Nonetheless, uncertainty persists as to whether this provision exhaustively determines the EU's power to adopt criminal law to enforce its policies. The article outlines the core case for

viewing art.83(2) TFEU as a lex specialis*. It argues that the post-Lisbon constitutional design, alongside principled and teleological considerations, support a Member State centred approach for criminal law competence. This is particularly the case with regard to the adoption of harmonisation measures.*

Analysis and Reflections

The Liability of Notified Bodies under the EU's New Approach: The Implications of the PIP Breast Implants Case
Paul Verbruggen* and *Barend van Leeuwen
In this article, we analyse the consequences of the CJEU's judgment in Schmitt, a preliminary reference concerning the potential liability of the notified body TÜV Rheinland vis-à-vis women who had received breast implants produced by the French manufacturer Poly Implant Prothèse SA (PIP). Our discussion focuses on (1) the impact of the judgment on the damages actions that women have brought against TÜV Rheinland before national courts; (2) the future regulation of medical devices in the EU; and (3) the regulation of private standardisation and certification in EU law. We argue that Schmitt can be seen as part of a broader trend in the case law of the CJEU, in which private regulatory activities are gradually submitted to fundamental principles of EU law. While this "constitutionalisation" of private regulation strengthens the public accountability of these alternative forms of regulation, it also poses fundamental challenges to their current design and internal governance.

The Role of the Principle of Environmental Integration (Article 11 TFEU) in Maximising the "Greening" of the Common Agricultural Policy
Luchino Ferraris
Aware of the harmful effect that agriculture can have on the environment—and particularly on global warming—EU policy-makers in the last three decades have been trying to integrate sustainable development into the design of EU agriculture. However, notwithstanding the measures taken in the 2013 reform to "green" the Common Agricultural Policy (CAP), the overall delivery of environmental benefits appears to be very limited. Taking as a point of departure the absence of any mention of sustainable development in the overarching goals of EU agricultural policy, this article will assess to what extent the principle of environmental integration may be able to bridge this gap, if at all. In this connection, an in-depth analysis will be carried out on the influence that the principle may exert on the EU legislator and its potential role in triggering judicial review and an environmentally sound interpretation of EU secondary legislation.

The "Dark Matter" in EU Competition Law: Non-Infringement Decisions in the New EU Member States before and after *Tele2 Polska*
Alexandr Svetlicinii, Maciej Bernatt and Marco Botta
Under art.11 Regulation 1/2003, every national competition authority (NCA) of the EU Member States must notify the EU Commission about the opening of formal investigations for a potential infringement of arts 101–102 TFEU and the envisaged decisions in that regard. The enforcement statistics for the first decade of Regulation 1/2003 indicate that the number of notified envisaged decisions is only about 50 per cent of the number of investigations opened under EU competition law. The authors explore the resulting "dark matter" in EU competition law by looking specifically at the non-infringement and closure decisions adopted by NCAs under national competition rules. The article assesses the compatibility of such decisions with the powers of NCAs under art.5 Regulation 1/2003, as interpreted in the ECJ's Tele2 Polska *case law. The article shows how the ECJ's interpretation of art.5 Regulation 1/2003 has contributed to the development of the "dark matter" in the decentralised system of EU competition law enforcement, which affects the ability of the EU Commission to monitor the enforcement activities of the NCAs.*

***Gutiérrez Naranjo*: On Limits in Law and Limits of Law**
Chantal Mak
While private law defines limits to the effects of contracts, there also are limits to what the law can achieve. This article reflects on the implications of the CJEU's judgment in the Spanish case of Gutiérrez Naranjo*, concerning the temporal effects of the nullity of unfair "floor clauses" in mortgage contracts. To what extent can the powers of national highest courts be*

restricted by the CJEU in fields that are governed by a combination of national rules of private law and EU law, and to what extent should socio-economic factors be taken into account in adjudication? In particular, attention is paid to questions of Kompetenz-Kompetenz*, the importance of the socio-economic context of the case, the ideas of justice underlying the interaction of national private law and EU law, and the added value of transnational judicial dialogues for handling complex legal questions on the interface of different legal orders.*

Book Reviews

Forthcoming in European Law Review

Reconnecting Free Movement of Workers and Equal Treatment in an Unequal Europe
Niamh Nic Shuibhne
This article argues that free movement rights for workers should be more consciously reconnected to the prohibition on nationality discrimination in EU law. It questions whether the principal aim of achieving the greatest possible freedom of movement detracts from the fundamental objective of equal treatment, using proposals agreed in February 2016 as part of the renegotiation of the UK's membership of the EU to demonstrate the risks of privileging movement in a more abstract sense over how workers who do move are actually treated. One implication of emphasising equal treatment is that disconnecting national criteria from the definition of work/worker is more difficult to defend. However, in the absence of harmonised definitions of these concepts in EU legislation, engaging the shared responsibility of the Member States can be rationalised within the wider system of free movement law and would also enable deeper reflection on whether the current framework is adequately attuned to the rapidly changing reality of work.

A Federal Question Doctrine for EU Fundamental Rights Law: Making sense of Articles 51 and 53 of the Charter of Fundamental Rights
Konstanze Von Papp
The EU Fundamental Rights Charter should be understood as acknowledging that fundamental rights are the foundation of European democracies and thus underlying EU integration, and that the division of powers between the EU and its Member States is ultimately in the interest of people. This would leave room for the overprotection of rights as a matter of national or international law. Such a rights *based approach would respect international human rights law and fit into EU internal market, citizenship and private law. Respect for Member State* powers *would serve as a limiting factor to this approach by limiting the extent of judicial review by the Court of Justice of the EU.*

Abuse of Law in the Context of EU Law
Sudabeh Kamanabrou
Abuse of law in the context of EU law has been a subject of some debate. In recent cases the European Court of Justice shows a tendency towards mixing different approaches from earlier judgments. This article takes a critical view on this development. It points out that, relating to abuse in the context of EU law, two groups of cases can and should be distinguished: on the one hand, the inappropriate use of a provision of EU law and, on the other hand, the inappropriate use of national law with the help of EU law. This differentiation has an impact on the handling of abuse cases. It is the decisive factor in deciding how to introduce the concept of abuse into the application of law. Furthermore, it affects the answer to the question if national law or a general principle of EU law is to be applied.

Defining Concessions in EU Public-Procurement Law: has Directive 2014/23 missed another opportunity for conceptual clarification?
John Kitsos
A key issue for the successful application of Directive 2014/23 lies in the proper interpretation of its new definition of concessions, which is marked by legal complexity and technical difficulty. Irrespective of how pioneering the newly-introduced regulatory framework is, it has been developed on a dysfunctional conceptual foundation which constitutes a source of further legal uncertainty regarding the already-complicated distinction between public contracts and concession contracts. These interpretational deficiencies cannot effectively ''cut the Gordian knot'' of legal uncertainty that typifies concessions, ultimately having a detrimental effect on attracting long-desired private-sector investments destined for European public infrastructure. This critical analysis mainly focuses on the legalistic-theoretical approach chosen by the EU legislator in order to describe the new concession definition. In light of this approach, it is to be expected that Member States will implement the new concession rules in different ways on the basis of divergent interpretations of the relevant definition.