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Editorial

What is the Principle of Autonomy Really About?

Autonomy; EU law; European Court of Justice; International law

The principle of autonomy of EU law is not spelled out in the Treaties. As so much else about the Union, it has emerged over the years from the case-law of the European Court of Justice. Based on the unique features of the EU legal order, its original focus was internal: it was developed in the context of supremacy and was intended to bolster the normative features of the then nascent legal order in order to enable it to withstand challenges from national law. The principle, however, has acquired an external dimension over the years. This has been about protecting one of the main policy characteristics of the mature legal order from interference originating beyond the Union. This dimension started becoming apparent in the early 1990s, when the adjudication system provided in the European Economic Area Agreement was found to pose a "threat … to the autonomy of the Community legal order".[1]

Since the 2000s, the principle of autonomy has attracted considerable attention by practitioners and academics alike due to a small body of case-law that has developed the principle with, at times, spectacular results. These include the annulment of measures that implement United Nations Security Council Resolutions due to incompatibility with EU fundamental human rights law,[2] and the finding that the draft agreement on the Union's accession to the European Convention on Human Rights, negotiated between 2010 and 2013, was incompatible with the exclusive jurisdiction of the Court of Justice.[3]

Whilst apparently distinct, these internal and external functions of autonomy are not easy to distinguish. This is the case not only in conceptual but also in policy terms. After all, the EU's judges render their judgment with an eye to national courts. A case in point is *Kadi*,[4] where the Court ruled in full awareness of the potential role that national judges might be called upon to assume if judicial review in Luxembourg was viewed as deficient.

Be that as it may, the notion of autonomy has become an increasingly prominent and seductively ill-defined principle that raises two interrelated questions about its interpretation and application in the case-law. First, has the principle been instrumentalised in order to shield the jurisdiction of the Court from any claim by other transnational tribunals in areas where international law interacts with EU law? Secondly, does the approach of the EU judges illustrate reluctance to embrace international law, therefore enabling them to be selective in their reliance upon and application of it?[5]

These issues will be revisited shortly in the context of the relationship between international investment law and EU law where, in different contexts, the autonomy of the EU legal order has been brought to the fore. A case in point is *Achmea*[6] where the German Federal Court of

[1] *Opinion 1/91* EU:C:1991:490; [1992] 1 C.M.L.R. 245 at [47].
[2] *Kadi v Council and Commission* (C-402/05 P & C-415/05 P) EU:C:2008:461; [2008] 3 C.M.L.R. 41. See also *European Commission v Kadi* (C-584/10 P C-593/10 P & C-595/10 P) EU:C:2013:518.
[3] *Opinion 2/13* EU:C:2014:2454; [2015] 2 C.M.L.R. 21. See also *Opinion 1/09* EU:C:2011:123 which stresses the role of domestic courts too.
[4] *Kadi v Council and Commission* (C-402/05 P & C-415/05 P) EU:C:2008:461.
[5] See G. de Búrca, "The ECJ and the International Legal Order: A Re-evaluation" in G. de Búrca and J.H.H. Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2012), pp.105–149 and J. Klabbers, "Völkerrechtsfreundlich? International Law and the Union Legal Order" in P. Koutrakos (ed.), *European Foreign Policy—Legal and Political Perspectives* (Cheltenham: E. Elgar, 2011), pp.95–114.
[6] *Slovak Republic v Achmea BV* (C-284/16) 20 May 2014.

Justice (*Bundesgerichtshof*) has raised questions about the compatibility with EU primary law of the arbitration procedure laid down in the BIT between Czechoslovakia and the Netherlands.[7] At the time of writing, Advocate General Wathelet has rendered his Opinion where he sets out a symbiotic relationship between intra-EU BITs and EU law. He argues that neither the principle of autonomy nor the exclusive jurisdiction of the Court is impinged upon by the provision for investment arbitration in BITs between Member States. In his Opinion, EU and BITs are understood as two distinct legal spheres the interactions of which need not threaten the functioning of either.

In developing this approach, his line of reasoning is characterised by a strong realist streak and the avoidance of grand teleological arguments. Advocate General Wathelet draws upon the limited purview of the jurisdiction of arbitral tribunals and the capacity of EU law to deal with any threats to autonomy that may emerge. In relation to the latter, in particular, he points out that the structures and principles of EU law (including, amongst others, the broad scope of Article 267 TFEU and the application of the principle of State liability in damages) are sufficient to absorb any tensions that may arise.

The difficulties raised by some of its specific points notwithstanding, the Opinion in *Achmea* deserves to be read by non-experts in EU external relations law. For all its anchoring on the practice of investment arbitration and the ensuing complexities that may arise, the Opinion is also asking us, indirectly, to reflect on the big questions about a Union that is confident and open to international law: how best to manage the ways in which EU law interacts with the existing and developing structures that govern international co-operation? How tolerant can the Court of Justice be of the jurisdiction of other transnational tribunals? And what is the price to pay, not least for the effectiveness of EU law and legal certainty, for seeking to ensure the harmonious co-existence between distinct but interacting areas of international law? Finally, should the principle of autonomy enable the Union's institutions to guard zealously their powers by restricting their interactions with other transnational bodies? Or should it be construed on the basis of a pragmatic understanding of the position of the EU legal order as a part of a dynamic and constantly evolving international legal environment?

[PK]

[7] See also the enforcement actions brought by the Commission against Austria, the Netherlands, Romania, Slovakia and Sweden for maintaining intra-EU BITs, and the request by Belgium for an Opinion under art.218(11) TFEU on the compatibility of the arbitration procedure laid down in the Comprehensive Economic and Trade Agreement between Canada and the EU and its Member States with EU primary law.

Articles

The Role of the European Central Bank in the Single Supervisory Mechanism: A New Paradigm for EU Governance
Agnese Pizzolla
The institutional design of the Single Supervisory Mechanism (SSM) has been strongly influenced by reliance on art.127(6) TFEU as legal basis for its establishment. By providing for the possibility of attributing specific supervisory tasks to the European Central Bank (ECB), art.127(6) directly affected the role of the ECB within the SSM, in particular with respect to way in which it interacts with national competent authorities. When compared with the role of EU Institutions in other models of governance—the ECB in the European System of Central Banks and the Commission in the European Competition Network—the organisational structure of the SSM appears to be characterised by a unique combination of elements of centralisation and decentralisation, which confirms the SSM as a new paradigm for EU governance.

Full, Adequate and Commensurate Compensation for Damages under EU Law: A Challenge for National Courts?
Katri Havu
This article studies full, adequate and commensurate compensation in EU case law, especially in preliminary rulings by the European Court of Justice. These terms, meant to convey that damages liability for infringements of EU law should be sufficient, are open to interpretation and in practice gain meaning from other concepts, such as recoverable damage. Aspects of the extent of reparation are obscure under EU law and the relevant emphasis of the functions of damages liability—for example, whether a damages award is underpinned by corrective justice or deterrence thinking—are not always clear. National courts dealing with liability issues relating to breaches of EU law must combine EU and national law while evaluating what kind of liability is required. Whether the open nature of the relevant EU law is a problem is open to debate. From a broader perspective, the issue relates to balancing between harmonisation and divergence in the context of the private law effects of breaches of EU law. Requiring full or otherwise sufficient compensation should not be thought to lead to uniform liability across the Union without further clarification of central matters pertaining to, for instance, relevant damage and causal link.

Digital Co-Regulation: Designing a Supranational Legal Framework for the Platform Economy
Michèle Finck
This article examines digital data-driven platforms and their impact on contemporary regulatory paradigms. While these phenomena are increasingly proclaimed as disruptive in many respects, they remain relatively little understood, including in their regulatory dimension. Law-makers around the globe, including the European Commission, are currently trying to make sense of these developments and determine how to regulate digital platforms. In its 2016 Communication on Online Platforms, the European Commission proposed various options for regulating the platform economy, including self-regulatory and co-regulatory models. The Commission's assumption that self-regulation or co-regulation can replace top-down legislative intervention in the platform economy forms the background of this article. It examines these three options and concludes that, given that command-and-control regulation as well as self-regulation raise significant problems in their application to the platform economy, co-regulation emerges as the most adequate option provided that certain conditions are met.

Judicial Harmonisation through Autonomous Concepts of European Union Law: The Example of the European Arrest Warrant Framework Decision
Leandro Mancano
The Court of Justice of the European Union (CJEU) has been a key institutional actor for the promotion of legal integration within the EU. On many occasions, such a function has been performed to fill or supplement the harmonisation gap left, intentionally or not, by the Union legislature. In this sense, an important tool resorted to by the CJEU to achieve closer integration has been the attribution of the status of autonomous concept to provisions of EU law, so as to reduce the discretion of State authorities. Against this background, this article

raises the following question: has the Court used autonomous concepts in order to pursue judicial harmonisation in areas where the main intention of the EU legislature was to preserve Member States' autonomy? The answer put forward in this article is in the affirmative. The hypothesis is tested by analysing the use of the autonomous concepts in the context of the European Arrest Warrant Framework Decision (EAW FD), an instrument adopted in an area extremely sensitive for national sovereignty. By drawing on Tridimas's distinction between outcome, guidance and deference cases, this article shows that the CJEU's use of autonomous concepts in interpreting the EAW FD has had great potential in terms of having a harmonising effect.

Analysis and Reflections

EU Citizenship as a Constitutional Restraint on the EU's Multilevel Governance of Public Goods
Ernst-Ulrich Petersmann
*This contribution suggests a republican interpretation of EU citizenship rights based on the following three propositions: first, the more globalisation transforms national into transnational public goods, the more democratic and republican constitutionalism requires to design and implement transnational public goods treaties as democratic law empowering citizens to invoke and enforce precise and unconditional multilevel market regulations and the protection of public goods vis-à-vis multilevel governance institutions. Secondly, as EU law, such as arts 2 and 9–12 TEU, requires EU Institutions and Member States to protect constitutional, representative, participatory and deliberative democracy and limits all internal and external EU powers by fundamental rights and protection of public goods (*res publica*), EU citizens rightly challenge EU trade, investment and other treaties that privilege interest groups and undermine the constitutional contract of citizens as codified in the EU Charter of Fundamental Rights. Thirdly, just as common market and competition law inside and beyond the EU protect citizen-driven network governance and rights-based vigilance of EU citizens embedded into comprehensive protection of fundamental rights and a "social market economy" (art.3 TEU), EU institutions should respond to the legitimacy and rule-of-law crises in other areas of EU governance by reconnecting EU law with EU citizens as democratic principals of multilevel governance agents. Anti-citizen clauses in EU free trade agreements with non-European countries (such as art.30.6 CETA) and discriminatory arbitration privileges for foreign investors illustrate the authoritarian disconnect of EU bureaucrats from EU citizens; they risk undermining rule of law, constitutional democracy, and the "social market economy" inside the EU.*

The Next Chapter in the Saga of Renewable Energy Support Schemes: Still "a Certain Degree of Mystery" after *Essent Belgium II*
Sirja-Leena Penttinen
This article analyses the latest chapter in the saga of renewable energy support schemes, namely Essent Belgium *(C-492/14), which was handed down by the European Court of Justice at the end of September 2016. It assesses the judgment in the light of preceding judgments such as* Ålands Vindkraft *and* Essent Belgium *(in which the claimant was the same company as in the present case) delivered in 2014, which dealt with the conformity of renewable energy support schemes with free movement of goods. As is well known, the Court's case law on this topic has been—as emphasised by AG Bot—rather confusing, to say the least. Therefore, this case note examines whether the recently delivered judgment clarifies the current state of play in any respect. The answer seems to be that it comes down to the principle of proportionality and in particular to the design of the support schemes. In addition to discussing the judgment, the article provides some reflections on the so-called "Winter Package" proposals on renewable energy.*

The Preliminaries of a Reference
Graham Butler* and *Urška Šadl
On 11 June 2015, the President of the First Chamber of the Court of Justice of the EU (the Court) issued an order to delete Bogdan Chain v Atlanco Ltd (C-189/14) *from the Registry. This comment and the reflection are thus not motivated by a judgment, but rather by the reasons why the Court after an oral hearing held in the presence of the parties and eight*

intervening Member States, and after hearing the Advocate General, did not deliver one. The comment examines the legal framework, as well as the detailed procedural rules and guidelines that govern the co-operation of national courts in the preliminary reference procedure. It highlights the fact that preliminary references can only work when the preliminaries of a reference—the culture of sincere co-operation and litigation, efficient communication, and flexible procedural rules—are in place.

Book Reviews

Forthcoming in European Law Review

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Revisiting Parental Liability in EU Competition Law
Andriani Kalintiri *Why are parent companies held liable for the infringements committed by their subsidiaries under EU competition law? This article examines the jurisprudence of the EU Courts with a view to illuminating the rationale underpinning parental liability. Taking a closer look at the "single economic unit/undertaking" explanation endorsed by the Courts post-Akzo, it demonstrates that this doctrine lacks the exegetical power assigned to it, insofar as it is based on a fallacious reasoning. With this in mind, two alternative justifications for parental liability are then discussed: the "failure to exercise vigilance" theory and the "enterprise" rationale. As the article illustrates, both justifications have their advantages and limitations. Ultimately, the final choice lies with the EU Courts, but it is submitted that, all things considered, the "failure to exercise vigilance" argument offers a better—or at least more realistic—solution to the problem of developing a coherent explanation for parental liability in EU competition law.*

Sexual Orientation Discrimination and Article 3 of the European Convention on Human Rights: Developing the Protection of Sexual Minorities
Paul Johnson **and** ***Silvia Falcetta*** *In 2012, the European Court of Human Rights held, for the first time, that the discriminatory treatment of an individual on the grounds of his sexual orientation amounted to a violation of Article 3, alone and in conjunction with Article 14, of the European Convention on Human Rights. This judgment is highly significant given that individuals in Europe have been arguing since 1959 that forms of ill-treatment based on sexual orientation amount to a violation of Article 3 of the Convention. In this article we provide a critical analysis of the evolution of the Court's Article 3 jurisprudence in order to assess the ways in which this has developed the protection of sexual minorities in Europe. We identify major gaps in this protection, most notably in respect of asylum, and argue that the Court's Article 3 jurisprudence should be further evolved to address these. Using the example of same-sex marriage, we conclude with a consideration of how sexual minorities might better and more creatively use Article 3 in the future to address discrimination against them.*

Aspects of constitutional pluralism in light of the *Gauweiler* saga
Tomi Tuominen
Despite the increased interaction between the highest national courts of Member States and the European Court of Justice, and the sophisticated literature on constitutional pluralism which conceptualises it, the relationship between these courts remains difficult. The first-ever preliminary reference by the Federal Constitutional Court of Germany is a good example of this. The Gauweiler *saga offers an opportunity to address three constitutional issues underlying this difficult relationship. First,* Gauweiler *is yet another example of how the German court in particular is in a privileged position vis-à-vis other national courts when it comes to interacting with the Court of Justice but also affecting the European-level political process. Secondly, the conceptual distinction between primacy and supremacy of EU law is relevant and may further the protection of individual rights within the Union. Thirdly, "judicial dialogues" may be useful in furthering rights protection, but constitutional pluralists are wrong to assert that such dialogues can settle the inevitable competition between national courts and the Court of Justice.*

The nature and scope of the primary law-making powers of the Union: the Member States as the "masters of the Treaties?"
Katy Sowery
This article explores the nature and the scope of the powers of Treaty amendment (or Union primary law-making.) It sets out two of the prevailing theories in the literature that seek to describe or to prescribe the scope of these powers: one which accords an exclusive role to the Member States in the process, and another which attributes to the Court of Justice the role as the final arbiter of constitutionality in this context. The article explores the practical dynamics of primary law-making and argues that the perspectives in the literature do not accurately capture the political reality of Union primary law-making. Rather, it is necessary to

explore the subtle interactions between different constitutional actors within the Union. Such interactions may create an environment where proactive primary law change by the Member States becomes difficult in practice, even though the Member States' formal authority under art.48 TEU remains largely unchallenged.

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Jafari: Crises Compared

Asylum seekers; Emergencies; EU law; European Court of Justice; Judicial decision-making; Necessity; Third country nationals

Any court faced with the task of applying law in the context of a crisis has two basic options. The first is captured by the maxim *necessitas non habet legem*—necessity knows no law. In other words, the strict application of the relevant legal rules has to give way in a crisis; especially if it is apparent that the rules were not designed for it and that they will not produce a desirable outcome. A court may do this openly or covertly: either articulating expressly what it is doing or claiming to be just applying the law while in reality departing from it. The second option is captured by the expression *fiat justitia, et pereat mundus*—let justice be done, and let the world perish. In other words, the law must be applied, no matter the price. Even in a crisis, a judge must apply normal legal rules regardless of the outcome. Interestingly, both attitudes were on display in the recent *Jafari* case.[1] However, when *Jafari* is compared with earlier crisis judgments such as *Pringle* and *Gauweiler*,[2] a more nuanced picture emerges.

The Jafari sisters left Afghanistan with their children in December 2015 and crossed the border between Serbia and Croatia in early 2016, at the height of the so called refugee crisis. The Croatian authorities bussed them to the Slovenian border. From there, they continued to Austria, where they lodged applications for international protection. The Austrian authorities took the view that according to the Dublin III Regulation[3] it was for Croatia to deal with the applications. In particular, under art.13(1), if a person seeking international protection has "irregularly crossed the border into a Member State … having come from a third country, the Member State thus entered shall be responsible". However, the key question was whether the crossing from Serbia to Croatia was in fact irregular. Under art.5(4)(c) of the Schengen Borders Code[4] third-country nationals may be authorised to enter on humanitarian grounds. It was argued that the crossing was not irregular at all, but perfectly in line with that express derogation.

Advocate General Sharpston veered towards the option of departing from the normal application of Dublin III.[5] She argued that the Regulation contained no criteria specifically addressing a sudden massive inflow of third-country nationals, and that it was unlikely the legislature had contemplated such a situation. There was a vacuum. A strict interpretation of art.13(1) would ignore the realities of the crisis—*necessitas non habet legem*. Croatia would have been overwhelmed by the numbers, given that nearly 700,000 people had entered the country in late 2015 and early 2016, and its asylum system would have been overburdened. This could still happen if it was required to receive a large number of applicants who had previously transited through Croatia. The application should be considered by Austria.

[1] *Proceedings Brought by Jafari* (C-646/16) EU:C:2017:586; [2018] 1 W.L.R. 773.
[2] *Pringle v Ireland* (C-370/12) EU:C:2012:756; [2013] 2 C.M.L.R. 2 and *Gauweiler v Deutscher Bundestag* (C-62/14) EU:C:2015:400; [2016] 1 C.M.L.R. 1.
[3] Regulation 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31.
[4] Regulation 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders [2006] OJ L105/1, as amended by Regulation 610/2013 of the European Parliament and of the Council [2013] OJ L182/1.
[5] *Jafari* (C-646/16) EU:C:2017:443.

By contrast, the Grand Chamber insisted on the normal application of the rules. The border crossings were indeed irregular under Dublin III when the usual meaning of the concept was considered against the overall context, general scheme and objectives of the Regulation. The unusual situation could not affect the interpretation or the application of art.13(1)—*fiat justitia, et pereat mundus*. In fact, the EU legislature had already taken account of the possibility of a crisis. The Regulation itself contained a mechanism for early warning, preparedness and crisis management. Under art.78(3) TFEU the Council could adopt provisional measures, which had indeed been put in place for Greece and Italy. The other Member States could step up and voluntarily assist Croatia. And if the Croatian system really did get overwhelmed to the extent that there was a genuine risk of inhuman or degrading treatment, the failsafe established by the *NS* ruling would kick in and the other Member States would have to stop sending applicants back to Croatia.[6] In other words, the responsibility for considering the application of *Jafari* did rest with Croatia, in accordance with the normal operation of the Dublin system.

It is interesting to contrast *Jafari* with the key ruling on the euro crisis: *Pringle*. This case concerned the legality of the European Stability Mechanism, a crisis management tool which had been set up outside the EU legal framework. The argument was, inter alia, that it violated the "no bail-out clause" of art.125 TFEU. In its judgment the Full Court gave the ESM a clean bill of health. The ruling is considered by some scholars to circumvent the basic scheme of the Treaty,[7] according to which each Member State is responsible for its own debts. They view it as a decision motivated by the maxim *necessitas non habet legem*, where the Court abandoned the rule of law.

If the analysis of *Pringle* is correct, why the difference? The most obvious answer is timing—the worst crisis was over at the time of *Jafari* but still ongoing at the time of *Pringle*. It is easier to insist on a strict reading of the law after a crisis than when it is raging. However, the third key crisis ruling, *Gauweiler*, suggests another interpretation. In *Gauweiler*, at issue was the legality of the outright monetary transactions programme of the ECB. It was alleged inter alia that the Bank had overstepped its powers. The Court disagreed, emphasising the autonomous role of the Bank and the limits of judicial review.

The thread that connects *Jafari*, *Pringle* and *Gauweiler* is the Court's deference to the political and expert decision makers. The Court is being modest; it does not want to take the matters into its own hands. In *Jafari*, this meant respecting the system that has been set up as well as the potential for its future reform, or action under art.78(3) TFEU. In *Pringle* this meant upholding the ESM, in *Gauweiler* a light touch review of the ECB. The Court recognises the limits of its capacity and focuses on ensuring that its rulings do no immediate harm to the system that has been established. However, none of the judgments gives a blank check to the Member States or the EU institutions. In *Jafari*, the Court issued a reminder that the operation of the system must stop if there are grave human rights concerns. In *Pringle* it established the principle of euro area financial stability that must be respected. In *Gauweiler*, the principle of proportionality was used to set limits to the discretion of the ECB. This then seems to be the role that the Court has selected for itself in a crisis: careful not to get in the way, but prepared to lay down the ultimate limits beyond which none must stray.

[JS]

[6] *R. (on the application of NS) v Secretary of State for the Home Department* (C-411 and C-493/10) EU:C:2011:865; [2012] 2 C.M.L.R. 9.
[7] E.g. G. Beck, "The Court of Justice, Legal Reasoning, and the *Pringle* Case—Law as the Continuation of Politics by Other Means" (2014) 39 E.L. Rev. 234.

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States becomes difficult in practice, even though the Member States' formal authority under art.48 TEU remains largely unchallenged.

Analysis and Reflections

The Principle of Mutual Recognition: It Doesn't Work, Because It Doesn't Exist
Stephen Weatherill
Noria Distribution Srl*, a judgment of the First Chamber of the Court delivered on 27 April 2017, appears trivial. The company had been prosecuted in France for supplying products which were not authorised; the Court found a violation of EU law because the relevant French law offered the company no adequate procedures through which to challenge this impediment to its commercial activity. And it is trivial. That, however, is where the interest lies. How can such a straightforward and obvious blockage to the functioning of the internal market be cluttering up the courts in 2017, a quarter of a century since the EU's internal market was supposed to be complete? The reasons lie in the structure of EU free movement law—most of all, that there is no principle of mutual recognition, but rather only a conditional or non-absolute principle of mutual recognition. This means that the internal market requires management, in order to sift out and, better still, prevent barriers to inter-State trade which cannot be shown to meet the standards of justification embedded in the conditional pattern of mutual recognition asserted by EU law. The EU's most obvious instrument for controlling intervention of the type pursued by the French authorities is Regulation 764/2008, the (unfortunately named) "Mutual Recognition Regulation", which lays down procedures relating to the application of national technical rules to products lawfully marketed in another Member State. Yet the Regulation is not even mentioned in the questions referred or in the answers given in* Noria*. This deepens the intrigue attached to this trivial but illuminating ruling.*

Bona Fide and Revocation of Withdrawal: How Article 50 TEU Handles the Potential Abuse of a Unilateral Revocation of Withdrawal
Daniel Benrath
One of the major unsolved issues regarding art.50 TEU is the permissibility of unilateral revocation of withdrawal. In this context, the potential of abuse of a unilateral revocation, especially by revoking and then re-notifying, is of great concern. This concern leads some commentators to deny unilateral revocability and other voices to demand bona fide as a condition for unilateral revocation. A closer inspection of art.50 TEU in its systematic context reveals that, despite the lack of explicit and clear rules, art.50 TEU provides a nuanced procedure for revocation and re-notification. This procedure safeguards a broad discretion in handling the declarations of the Member State in question and secures the interest of the EU as well as the rights of the other Member States. Thus, the potential for abuse is vastly mitigated and there is no need for general bona fide constraints or even refusing the permissibility of unilateral revocation for this reason.

Some Preliminary Thoughts on the Cyprus Bail-In Litigation: A Commentary on *Mallis* and *Ledra*
Stéphanie Laulhé Shaelou* and *Anastasia Karatzia
In 2013, Cyprus received financial assistance from the European Stability Mechanism after a restructuring and downsizing of the country's troubled banking sector which included the contribution of uninsured bank depositors of the two biggest Cypriot banks through a bail-in. This article discusses the first two judgments of the European Court of Justice in cases brought by Cypriot depositors challenging the legality of the haircut of deposits and claiming damages from EU Institutions. The article examines the judgments with regard to what are arguably the most important issues raised: effective judicial protection, and the right to compensation. It draws lessons from the cases both in the context of the Cyprus bail-in and, more generally, with regard to the interplay between EU Courts and national courts concerning the justiciability of crisis-management or austerity measures.

Judicial Majoritarianism Revisited: "We, the *Other* Court"?
Robert Schütze
Twenty years ago, an interesting—and swiftly famous—answer to the legitimacy question in relation to the judicial creation of the EU internal market was offered by Miguel Poiares Maduro. Heavily influenced by the "representation-reinforcing theory of judicial review",

developed by J.H. Ely, and ingeniously entitled We, the Court*, the book argued that the jurisprudence of the Court of Justice had been seriously misunderstood when identified with neo-liberal deregulation—a phenomenon that Maduro associated with the US idea of "economic due process". For instead of protecting minority economic rights against national (democratic) regulation, the European Court showed a "majoritarian activism". The judicial review of State legislation by the Court was thus characterised as "a kind of [Union] legislative process", in which the Court operates as a quasi-legislature that judicially harmonises diverse national rules "in accordance with an 'ideally drafted' representation of all States' interests". How correct was that description then (and now), and what normative arguments did Maduro propose to justify—and limit—the idea of "judicial majoritarianism"? This late "review" revisits the central premises of the famous monograph and subjects them, with the benefit of 20 years of hindsight, to critical scrutiny in the hope of re-opening discussions on the legitimacy of and justice in the internal market.*

Book Reviews

Forthcoming in European Law Review

Analysis and Reflections

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, 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 paper assesses the compatibility of such decisions with the powers of NCAs under art.5 Regulation 1/2003, as interpreted in the CJEU's Tele2 Polska *case law. The paper shows how the CJEU's interpretation of art.5 Regulation 1/2003 has contributed to the development of the "dark matter" in the decentralized system of EU competition law enforcement, which affects the ability of the EU Commission to monitor the enforcement activities of the NCAs.*

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 in 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 paper will assess to what extent the principle of environmental integration (PEI) 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 environmentally sound interpretation of EU secondary legislation.

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: (i) the impact of the judgment on the damages actions women have brought against TÜV Rheinland before national courts; (ii) the future regulation of medical devices in the EU; and (iii) 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.

***Gutiérrez Naranjo*—On Limits in Law and Limits of Law**
Chantal Mak
While private law defines limits to the effects of contracts, there are also 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 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.

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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

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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.*

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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.

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Editorial

Do Fundamental Rights Determine the Scope of EU Law?

Citizenship; EU law; EU nationals; Fundamental rights; Internal market; Jurisprudence

It is well-recognised that EU fundamental rights apply within the scope of EU law, as established for general principles in *ERT* and for the Charter in *Åkerberg Fransson*.[1] But can fundamental rights influence the scope of EU law? On the one hand, the whole idea seems odd. If fundamental rights only apply within the scope of EU law, using them to determine that scope involves circular logic. On the other hand, it seems normal to interpret the Treaty in the light of fundamental rights. If this is applied to the four freedoms and to EU citizenship, the inevitable consequence is that fundamental rights help to settle its reach.

The Court's case law has waxed and waned, and its reasoning has often remained studiedly ambiguous. In the earlier case law, the prime example is the ruling in *Carpenter*,[2] one of the most criticised free movement rulings ever, where the Court held that the UK immigration rules had a detrimental effect on the family life of the Carpenters and therefore on the conditions under which the free movement of services was exercised. In the words of Vassilios Skouris, a former President of the Court, the difficult task of the Court to reconcile the four freedoms and fundamental rights "becomes even more delicate when fundamental rights are used to interpret and expand the scope of a fundamental freedom".[3]

At Lisbon, the Member States were alert to the possibility of the Charter being used to expand the reach of EU law, and wrote down safeguards against it. Particularly important is art.51(2) CFR, according to which the "Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties." The Court took this limitation seriously in the Grand Chamber ruling in *Dereci*.[4] It firmly refused to extend the reach of art.20 TFEU on EU citizenship on grounds of the right to family life. Instead a two-step approach was adopted: the applicability of the citizenship rules was to be determined first, and only if they were applicable would the EU law right to family life be of any relevance. To have done otherwise, explained President Lenaerts extra-judicially, would have violated art.51(2) CFR.[5]

In the last couple of years the firmness of *Dereci* has been replaced by a more ambiguous state of affairs both for the internal market and for citizenship. In *AGET Iraklis* on the reach of art.49 TFEU, Advocate General Wahl straightforwardly argued that the right of establishment needed to be interpreted expansively due to the freedom to conduct a business enshrined in art.16 CFR.[6] The Grand Chamber followed him in substance, devoting a paragraph to "certain freedoms which economic operators generally enjoy",[7] although it did not mention the Charter by name.

In the field of citizenship, in the case of *NA,* AG Wathelet firmly rejected the idea of

[1] *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis (DEP)* (C-260/89) EU:C:1991:254; [1994] 4 C.M.L.R. 540; *Åkerberg Fransson* (C-617/10) EU:C:2013:105; [2013] 2 C.M.L.R. 46.
[2] *Carpenter v Secretary of State for the Home Department* (C-60/00) EU:C:2002:434; [2002] 2 C.M.L.R. 64.
[3] V. Skouris, "Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance" (2006) 17 E.B.L.R. 225, 239.
[4] *Dereci v Bundesministerium für Inneres* (C-256/11) EU:C:2011:734; [2012] 1 C.M.L.R. 45. The case concerned the principle established in *Ruiz Zambrano v Office National de l'Emploi (ONEm)* (C-34/09) EU:C:2011:124; [2011] 2 C.M.L.R. 46, like all the citizenship rulings discussed in this editorial.
[5] K. Lenaerts, "The Court's Outer and Inner Selves" in M. Adams et al (eds), *Judging Europe's Judges* (Oxford: Hart Publishing, 2013), p.53.
[6] *AGET Iraklis* (C-201/15) EU:C:2016:429 at [49].
[7] *AGET Iraklis* (C-201/15) EU:C:2016:972 at [55].

interpreting art.20TFEU in the light of the Charter.[8] The Grand Chamber decided not to follow that advice in *Chavez*.[9] Instead, it held that when assessing whether art.20 TFEU had been breached in the first place, the authorities must take account of the right to respect for family life, as stated in art.7 CFR, read in conjunction with art.24(2) CFR on the best interests of the child. This is now becoming settled case law. In *KA* the Grand Chamber cited *Chavez* with approval and again tasked the authorities to assess the existence of a violation of art.20 TFEU in the light of the Charter.[10]

At first glance, the approach of the Court makes sense. It is normal to use fundamental rights to interpret the Treaty—it is one of their key roles and well recognised in long-standing case law.[11] It may also be attractive on the facts. In an art.20 TFEU case where a third-country national mother of an EU national child is facing deportation on grounds that a separated EU national father could in principle assume custody, any judge with a heart is likely to wish to interject a consideration of the best interest of the child into the assessment. The argument of the national government that the father is assumed not to be able to care for the child if he is dead, in jail or confined to an institution[12] may not fully reassure.

Yet there are reasons for caution. From the perspective of the black letter law, the Court is doing what art.6(1) TEU and art.51(2) CFR were meant to prevent. As a matter of logic, it is relying on a circular argument where rights applying within the scope of the Treaty serve to determine that scope. This also has the capacity to drive a coach and horses through the Court's interpretation of art.51(1) CFR. Any insistence that the limits to the Charter's application are respected by confining it to the scope of EU law are unconvincing if that scope itself is influenced by the Charter. From the perspective of free movement law, the development casts doubts on the few remaining limits to the scope of the four freedoms. If free movement of goods is interpreted in the light of the freedom to conduct a business, how can it not apply to national rules that operate even-handedly and relate to selling arrangements or exports? For citizenship, the right to family life has the potential to push the application of *Ruiz Zambrano* from an exception to a rule with significant consequences for national immigration regimes.

It is also doubtful whether the extension is truly needed. *AGET Iraklis* could have been decided on more traditional grounds. It is well-recognised in competition law that barriers to exit, which were in issue, also act as barriers to entry. A company contemplating entry to a market will always consider whether an exit is possible if the entry proves unsuccessful. It is easy to view an exit restriction as an obstacle to market access; there was no need to bring the freedom to conduct a business into the equation. In the citizenship cases it must be remembered that the Court is not supposed to act as a general human rights court. If national immigration rules result in human rights violations, that is in the main a matter for national courts and the ECtHR, as the Court itself remarked in *Dereci*. Fundamental rights are of critical importance for the EU legal order, but so are the jurisdictional limits that the EU's system of divided government depends upon. Undermining these limits is risky, even when it is done in the name of fundamental rights.

[JS]

[8] *Secretary of State for the Home Department v NA* (C-115/15) EU:C:2016:259 at [125]–[126].
[9] *Chavez-Vilchez v Raad van Bestuur van de Sociale Verzekeringsbank* (C-133/15) EU:C:2017:354, in particular at [70]. For a detailed analysis, see H. van Eijken and P. Phoa, "The Scope of Article 20 TFEU Clarified in *Chavez-Vilchez*: Are the Fundamental Rights of Minor EU Citizens Coming of Age?" (2018) 43 E.L. Rev. forthcoming.
[10] *KA v Belgium* (C-82/16) EU:C:2018:308 at [71].
[11] See e.g. *Unión de Pequeños Agricultores v Council of the European Union* (C-50/00 P) EU:C:2002:462 at [44].
[12] *Chavez* (C-133/15) EU:C:2017:354 at [67].

Articles

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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 has shown a tendency towards mixing different approaches from earlier judgments. This article takes a critical view of 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 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.

Analysis and Reflections

Reinforcing the Public Law Taboo: A Note on *Hellenic Republic v Nikiforidis*
Edoardo Avato and Matteo Winkler
This article hinges on the preliminary ruling rendered by the Court of Justice of the EU (CJEU) (Grand Chamber) on 18 October 2016 and the related judgment of the German Federal Labour Court of 26 April 2017 in the Nikiforidis *case to investigate an area of private international law that is undergoing a substantial development: overriding mandatory provisions. In* Nikiforidis*, the CJEU excluded that two Greek laws cutting the salary of public employees may be enforced against a teacher working in Germany for the Greek Government under an employment contract governed by German law. The question addressed to the CJEU was whether the said laws were "overriding mandatory provisions" according to the Rome I Regulation. The Court denied it, and left to the referring court to determine whether they could nevertheless operate "as matter of fact" under the governing law. This article explains how the CJEU's conclusion has broader implications by regulating third countries' interference in international business transactions. Starting with an analysis of the case, the article examines the history and nature of overriding mandatory provisions under EU private international law and argues that the solution embraced by the CJEU leaves room for uncertainty and unpredictability in the operation of foreign mandatory provisions.*

EU Exclusive Jurisdiction on Surveillance Related to Terrorism and Serious Transnational Crime: Case Review on Opinion 1/15
Elspeth Guild and Elif Mendos Kuşkonmaz
This case review examines the Opinion by the Court of Justice of the EU (CJEU) published on 26 July 2017 on the legal basis of an international agreement signed between the EU and Canada providing for the transfer of information on passengers taking flights from the EU to Canada and the compatibility of that Agreement with the EU fundamental rights, particularly the rights to respect for private life and to protect personal data. Rather spectacularly, the CJEU struck down the Agreement, finding the legal basis inadequate and the terms incompatible with the EU privacy and data protection guarantees. This case review starts by providing a backdrop for the conclusion of the PNR Agreement concerned and for the CJEU's Opinion on that Agreement. Then it moves on to analysing the procedural and substantive aspects of the Opinion, and finishes with an analysis of the consequences regarding counter-terrorism measures and for the future of the exchange of personal data in the field of fight against terrorism and serious transnational crime. It is argued here that although Opinion 1/15 *deviated from the standard of judicial review established by the CJEU in* Digital Rights Ireland*,* Schrems*, and* Tele2*, it should be considered as a step towards protecting the EU fundamental rights owing to the tight procedural conditions for the legality of data sharing agreements it introduced and the high risk of litigation following it.*

What is "Sport"? Reflections on *The English Bridge Union*
Samuli Miettinen
"Sport" may defy definition. Nevertheless, as an autonomous concept of EU law, the term is found in hundreds of directives, regulations and decisions, as well as the Treaty on the Functioning of the EU. In The English Bridge Union *(C-90/16), the CJEU provides an interpretation of "sport" for a national court applying art.132(1)(m) of the VAT Directive 2006/112. Bridge is not a "sport" because sport necessarily requires a "not negligible" element of physical activity. The judgment and the Opinion of AG Szpunar provide detailed guidance on defining "sport" which is likely to spill over to other contexts and may influence the development of new activities such as e-sport. This judgment and the recent* British Film Institute *judgment also raise questions about the uniformity of VAT treatment and the extent to which individuals can rely on the directive when national VAT rules are applied.*

Book Reviews

Forthcoming in European Law Review

The EU and Western Sahara: An Assessment of Recent Developments
Eva Kassoti
The purpose of this comment is to take stock of recent developments regarding the EU's relationship with Western Sahara by discussing the recent Front Polisario *judgments, their reception in the literature and their possible repercussions on the pending litigation regarding the territory before the Union Courts. The comment not only sheds light on these important developments, but also directly feeds into the burgeoning debate regarding the CJEU's approach to international law by examining how the Court approached questions of interpretation and application of cardinal principles of international law, such as the principle of self-determination.*

The ERTA Pre-emption Effects of Minimum and Partial Harmonization Directives: Insights from Opinion 3/15 on the Competence to Conclude the Marrakesh Treaty
Amedeo Arena
In Opinion 3/15, the Court of Justice ruled that the conclusion of the Marrakesh Treaty, aimed at facilitating access to published works by people with visual disabilities, falls within the exclusive competence of the European Union insofar as that agreement may "alter the scope" of the provisions set out in Directive 2001/29, on the harmonization of certain aspects of copyright and related rights in the information society. This comment examines the application of the ERTA *rule in Opinion 3/15 as well as the Court of Justice's assessment of the external pre-emptive effects of minimum and partial harmonisation directives.*

European Law in the United Kingdom
Jonathan Faull
The study and practice of EU law will continue to be of great importance in and for the United Kingdom. Its terminology and concepts are embedded in domestic law and will remain so.

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Editorial

Is there More to Say about the Direct Effect of Directives?

Direct effect; Directives; EU law

The principle of direct effect of directives has not had an easy life. Its introduction was controversial, and its development long and convoluted. And yet, despite the heavy criticism levelled against the compromises struck by the current state of the law, there have been no surprises for some time. Is there, therefore, more to say about the direct effect of directives?

The recent case law of the Grand Chamber of the Court of Justice answers this question in the affirmative. A case in point is the notion of "an emanation of the State". In *Farrell*,[1] the Court confirmed that the term should be interpreted broadly: the well-known criteria laid down in *Foster* twenty eight years ago[2] are not cumulative, and a body or organisation would be deemed to constitute an emanation of the State if it is subject to the authority of the State or has special powers beyond those which result from the normal rules applicable to relations between individuals. This would be the case "either because they are legal persons governed by public law that are part of the State in the broad sense, or because they are subject to the authority or control of a public body, or because they have been required, by such a body, to perform a task in the public interest and have been given, for that purpose, such special powers".[3]

This interpretation by no means suggests a departure from the *Foster* judgment: it is entirely consistent with and confirms the broad construction of the notion of the emanation of the State that was articulated in the latter judgment. This view has always been an inherent part of the Court's approach to the direct effect of directives. After all, such interpretation, along with the other principles introduced over the years, namely the indirect and incidental effects, has been necessary in order to compensate for the denial of horizontal direct effect.

Viewed from this angle, the judgment in *Farrell* provides a useful clarification of the broad scope of the vertical direct effect of directives. It also raises the question of how to interpret the "special powers" that domestic bodies may have in order to enable individuals to invoke directives against them. Neither prior case law nor the judgment in *Farrell* answers this question. In her Opinion, AG Sharpston had pointed out, on the one hand, the need for the term to have an autonomous meaning in EU law and, on the other hand, the absence of such a meaning in the case law.[4]

How is, then, the concept of special powers to be construed? The Court does not appear particularly keen to provide a definition: it either relies on other parts of the *Foster* formula or refers to specific characteristics of the body in question. Recent case law illustrates this approach. In *Anisimovienė*, the Court (albeit not the Grand Chamber) held that the body responsible in Lithuania for guaranteeing the protection of deposits and investments in the event of the insolvency of investment firms was a legal person governed by public law, "so that it can without more be treated as comparable to the State".[5] In *Grenville Hampshire*,[6] another Chamber provided more detail in order to conclude that Directive 2008/94 on the

[1] *Farrell v Whitty* (C-413/15) EU:C:2017:745; [2018] 1 C.M.L.R. 46 at [27]–[28].
[2] *Foster v British Gas Plc* (C-188/89) EU:C:1990:313; [1990] 2 C.M.L.R. 833 at [18]–[20].
[3] *Farrell* (C-413/15) at [34].
[4] AG Opinion in *Farrell v Whitty* (C-413/15) EU:C:2017:49 at [135].
[5] *Anisimovienė v bankas Snoras AB* (C-688/15 and C-109/16) EU:C:2018:209; [2018] 3 C.M.L.R. 9 at [110]. AG Campos Sánchez-Bordona, however, had left the determination of this issue to the referring court (EU:C:2017:475 at [151]).
[6] *Grenville Hampshire v The Board of the Pension Protection Fund* (C-17/17) EU:C:2018:674.

protection of employees in the event of the insolvency of their employer[7] may be invoked against the Pension Protection Fund (PPF), that is, the body responsible in the United Kingdom for employees' claims under a supplementary occupational pension scheme. The Court held that the body had been entrusted with special powers "since it imposes levies on eligible supplementary occupational pension schemes and has the right to issue those schemes with the necessary directions in connection with their winding up. In addition, by approving the valuation of the protected liabilities of a supplementary occupational pension scheme, the Board of the PPF sets the level of protection of each employee as regards his accrued entitlement to old-age benefits, both where the PPF assumes responsibility for the scheme and where the scheme may be wound up outside the PPF".[8]

There appears to be a whiff of "I recognise it when I see it" test in this approach. While far from ideal in terms of legal certainty, it is, nonetheless, difficult to envisage a different way of settling this issue. After all, is it realistic to expect an overall definition which would be both broad enough to capture the different ways in which powers are granted by the State to organisations or bodies in all their variety, complexity and sophistication and precise enough to be applied with confidence by domestic courts? The test is bound to be understood properly in a fact-specific context.

Viewed against the judgment in *Foster*, the broad definition of the emanation of the State in *Farrell* is by no means surprising. It is, nonetheless, important. It enhances the legal position of private parties and makes it easier for them to convince domestic courts of the wide vertical direct effect of directives.[9] This is all the more so, given the emphasis on reaffirming and clarifying the state of the law in another recent judgment by the Grand Chamber, namely *Smith*.[10] This takes us back to the beginning of the development of the direct effect of directives, and explains the various twists along the way: for instance, it clarifies the narrow and exceptional set of circumstances where the so-called principle of incidental effect would be relevant[11]; it confirms the *ratio* of the *Mangold* principle[12] and distinguishes it from the legal context of the case[13]; and it reminds us of the role of the principle of State liability for violations of EU law in order to fill in the gaps that emerge in the private enforcement of directives within the domestic legal orders. Viewed alongside *Farrell*, the judgment in *Smith* suggests that no surprises are forthcoming in the design of the legal effects of directives. This in itself is noteworthy. As is the confirmation of the wide scope of their vertical direct effect. And there is more to say about that.

[PK]

[7] [2008] OJ L283/36.
[8] *Grenville* (C-17/17) EU:C:2018:674 at [66].
[9] In September 2018, the High Court of England and Wales held that previous domestic case law had been superseded by *Farrell* and concluded that the Motor Insurer's Bureau was an emanation of the State in the context of Directive 2009/103 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability ([2009] OJ L263/11): *Lewis v Tindale* [2018] EWHC 2376 (QB).
[10] *Smith v Meade* (C-122/17) EU:C:2018:631.
[11] *Smith* (C-122/17) at [51]–[54] (with reference to *CIA Security International SA v Signalson SA* (C-194/94) EU:C:1996:172; [1996] 2 C.M.L.R. 781 and *Unilever Italia SpA v Central Food SpA* (C443/98) EU:C:2000:496; [2001] 1 C.M.L.R. 21).
[12] *Mangold v Helm* (C-144/04) EU:C:2005:709; [2006] 1 C.M.L.R. 43.
[13] *Smith* (C-122/17) at [46]–[49] (with reference to *Dansk Industri (DI) v Rasmussen's Estate* (C-441/14) EU:C:2016:278; [2016] 3 C.M.L.R. 27).

Articles

Fiscal Stabilisation for EMU: Managing Incompleteness
Päivi Leino* and *Tuomas Saarenheimo
The dominant narrative presents the Economic and Monetary Union (EMU) as an incomplete structure. According to this narrative, to operate stably EMU needs to be supplemented by deeper fiscal integration and, in particular, a fiscal mechanism to smooth the effects of asymmetric shocks on Member States. We study recent proposals for such mechanisms from a multi-disciplinary viewpoint. We show that, with respect to their aims and implementation, most proposed mechanisms are novel, essentially without precedent in established federations. While possible to construct, at least in a limited form, within the current Treaties, the economic benefits of the proposed mechanisms are likely to fall short of the anticipated goals, and the enforcement of the eligibility conditions will almost certainly turn out to be politically difficult. We argue that while the narrative of incompleteness is, in some sense, correct, the proposed remedies are misguided. The fundamental nature of EMU's incompleteness is not economic but political, the lack of integrated political structures required to legitimise the use of public power by the Union. Deeper fiscal integration would not solve this incompleteness but would merely change the ways it manifests itself.

UK–EU Civil Judicial Co-operation after Brexit: Five Models
Zheng Sophia Tang
The EU has established a comprehensive and successful judicial co-operation framework that applies between EU Member States to facilitate cross-border relationships. This framework harmonises and simplifies the rules in ascertaining the applicable law and competent court in cross-border disputes, and enables judgments rendered by the courts of one Member States to be recognised and enforced in other EU Member States. The 2016 EU referendum resulted in the UK triggering art.50 TEU to exit the EU by the end of March 2019. Upon Brexit and without special arrangements, relevant EU judicial co-operation instruments, in principle, would stop being effective in the UK. This article examines the potential consequence of Brexit and explores the possibilities for post-Brexit judicial co-operation between the UK and EU. After analysing the five potential models, this article proposes that the optimal model is for the UK and EU to enter into a special arrangement based on the existing EU judicial co-operation law, and the UK should follow CJEU (Court of Justice of the Europe Union) judgments as closely as possible, with diversion in exceptional circumstances. If this model is not achievable, the UK could transpose the unilateral applicable EU private international law into its domestic law and at the same time ratify relevant international conventions to re-shape the post-Brexit judicial co-operation with the EU.

The Applicability of *Schrems* Principles to the Member States: National Security and Data Protection within the EU Context
Serena Crespi
This article examines whether the principles set out in the Schrems *judgment apply only in the specific context of an adequacy decision concerning the international transfer of data or also to access to data by EU Member State intelligence authorities. This is a pertinent question, given that art.4(2) TEU provides that national security remains the sole responsibility of each Member State. This article analyses art.4(2) TEU and art.8 of the Charter, the new Data Protection Regulation 2016/679, along with the relevant case law of the CJEU (e.g.* Digital Rights Ireland*,* Tele2*) and of the ECHR (e.g.* Zakharov*,* Szabo and Vissy*) in order to assess whether, and if so, and to what extent, EU law requirements may affect the activities of Member States in the area of national security.*

Private Autonomy and Protection of the Weaker Party in Financial Consumer Contracts: an EU and International Law Perspective
Iris Benöhr
The global financial crisis has demonstrated how vulnerable financial consumers can be, in particular those who hold a credit or mortgage contract. Although a decade has passed, the EU legislation seems limited in providing effective protection as financial markets still experience large mis-selling cases and growing individual debt. This article examines the multi-faceted consumer credit approach adopted by the EU regulator, and the concurrent role played by recent case law in reshaping consumer protection. The article argues that, if

financial consumer law is to be both effective and growth-promoting, a careful balance is required between the principles of private autonomy and the protection of the weaker party. The analysis will provide suggestions as to how this objective can be achieved, proposing a new perspective on financial consumer protection that is influenced by recent international guidelines, fundamental rights developments and behavioural economics.

The Scope of the Inviolability of the ECB's Archives Revisited
Heiko Sauer
The issue of the inviolability of the archives of the European Central Bank (ECB) has gained practical relevance with the seizure of ECB documents held by Banka Slovenije, the national central bank of Slovenia. Suddenly the largely unexamined scope of the privileges and immunities of the EU has appeared on the agenda. Whereas an extremely narrow interpretation of those privileges and immunities has been strongly advocated recently in this Review, this article foregrounds the functional conception of the EU's privileges and immunities and illustrates its consequences. The author takes the view that the responsible entity behind both the European System of Central Banks (ESCB) and the Eurosystem is the EU, and that the national central banks (NCBs) are vested with virtually no autonomy when they perform tasks within these systems. Accordingly, the ECB documents they hold do not forfeit their inviolability. Similar considerations apply for the national competent authorities (NCAs) in the field of banking supervision when they act within the Single Supervisory Mechanism (SSM). The inviolability of the ECB's archives even extends to documents originating from NCBs if they relate to functions within the ESCB/Eurosystem. From a functional perspective, national authorities closely interrelated with the ECB in substance thus have two different archives of which one enjoys protection under EU law.

Analysis and Reflections

***Intel* and the Rule of Reason in Abuse of Dominance Cases**
Nicolas Petit
This article discusses the judgment of the CJEU (Court of Justice of the European Union) of 6 September 2017 in the Intel *case. It argues that the case law of the CJEU has now embraced the rule of reason for the assessment of the legality of dominant undertakings' exclusivity rebate systems in particular, and for the analysis of exclusionary practices in general. The judgment also establishes that efficiency is the public policy behind the abuse of dominance law. This evolution of the case law is likely to produce consequences in competition enforcement, by increasing reliance on tools such as the "as efficient competitor" test, if not to make recourse to it unavoidable when the competition agency has publicly expressed a policy preference for this framework of analysis.*

The EU and Western Sahara: An Assessment of Recent Developments
Eva Kassoti
The purpose of this comment is to take stock of recent developments regarding the EU's relationship with Western Sahara by discussing the recent Front Polisario *judgments, their reception in the literature and their possible repercussions on the pending litigation regarding the territory before the Union Courts. The comment not only sheds light on these important developments, but also directly feeds into the burgeoning debate regarding the CJEU's approach to international law by examining how the Court approached questions of interpretation and application of cardinal principles of international law, such as the principle of self-determination.*

The *ERTA* Pre-emption Effects of Minimum and Partial Harmonisation Directives: Insights from Opinion 3/15 on the Competence to Conclude the Marrakesh Treaty
Amedeo Arena
In Opinion 3/15, the European Court of Justice (ECJ) ruled that the conclusion of the Marrakesh Treaty, aimed at facilitating access to published works by people with visual disabilities, falls within the exclusive competence of the EU insofar as that agreement may "alter the scope" of the provisions set out in Directive 2001/29, on the harmonisation of certain aspects of copyright and related rights in the information society. This comment examines the application of the ERTA rule in Opinion 3/15 as well as the ECJ's assessment of the external pre-emptive effects of minimum and partial harmonisation directives.

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The study and practice of EU law will continue to be of great importance in and for the UK. Its terminology and concepts are embedded in domestic law and will remain so.

Book Reviews

Forthcoming in European Law Review

Liberalisation and the Pursuit of the Internal Market
Niamh Dunne
Economic liberalisation operates both as functional process and disputed ideological touchstone within the pursuit of the EU's internal market. This article evaluates liberalisation efforts to date, addressing both positive and normative perspectives. It considers the meaning of liberalisation; discusses the legal instruments that exist within EU law; suggests explanations for its prominence and explores the extent to which ideologically-oriented understandings of such reforms are reflected in the resultant character of the internal market. In doing so, the article aims to identify and analyse the deeper implications of the recurrent use of liberalisation as a tool of economic integration within the EU.

Striking a Balance of Power between the Court of Justice and the EU Legislature: The Law on Competition Damages Actions as a Paradigm
Jens-Uwe Franck
The framework of EU law on cartel damages actions consists in part of rules established by the ECJ based on arts 101 and 102 TFEU in conjunction with the principle of effectiveness. These rules are an integral part of EU primary law. The notion of institutional balance, however, requires the Court to consider its own inherent limits on democratic legitimacy, accountability and expertise. In particular, the Court has to ensure that adequate scope remains for the EU legislature to exercise its legislative power pursuant to art.103 TFEU. It is argued that the ECJ has disregarded these restrictions and overstretched the principle of effectiveness—for instance, in its adjudication on liability for umbrella pricing and on access to leniency files, respectively. Consequently, the EU legislature must not consider itself bound by these standards.

Advisory Opinions in the EEA: The Icelandic Supreme Court and the EFTA Court
Ólafur Ísberg Hannesson
The present article seeks to define how the Icelandic Supreme Court has applied the facility provided by art.34 SCA for obtaining advisory opinions from the EFTA Court on questions of EEA law. In order to define the approach of the Supreme Court to EEA law in different legal areas, and thereby find a possible qualitative explanation for the number of references from the Icelandic courts, the criteria which form the basis of the assessment of the Supreme Court in the decision on whether to refer will be analysed. Given the context of the article, the outcome of this analysis forms part of the answer to the more general question of how and when the Supreme Court applies EEA law.

Tackling Aggressive Commercial Practices: Court of Justice Case Law on the Unfair Commercial Practices Directive Ten Years On
Fausto Caronna
The ban on aggressive practices in the Unfair Commercial Practices Directive plays a key role in ensuring a high level of consumer protection. Despite this objective and the full harmonisation nature of the Directive, the rules on aggressive practices are by no means clear. This article provides guidance on these complex rules in light of the case law of the Court of Justice of the European Union, drawing inspiration from relevant Italian case law. It analyses the extent to which there is a professional diligence defence, vulnerable consumers are protected, and Member States can go beyond the Directive and ban conduct that they consider to be against consumer interests. The article also addresses the question where there is the dividing line between aggressive and misleading practices.

The Working Language of the CJEU: Time for a Change?
Anthony Arnull
It is well known that the working language of the CJEU is French. For many years, the status of French was unquestioned, but this is now changing. This article considers how French came to be chosen as the CJEU's working language; the effect of that choice on the CJEU's judicial method; and the feasibility and desirability of a change in the CJEU's language practices. Has French become an impediment to the CJEU's capacity to communicate effectively with its stakeholders? Should French be replaced or supplemented? If so, by what? Would any potential benefits that might accrue from changing the CJEU's language

practices be outweighed by the disruption that would be caused? Or do the political sensitivities in play simply make reform impossible?

Too Important to be Entrusted to Neighbours? The Dynamics of Security of Electricity Supply and Mutual Trust in EU law
Kaisa Huhta
The EU's internal electricity market is founded upon the assumption that a competitive EU-wide market is the most efficient means of ensuring the availability of sustainable electricity to all Europeans. This approach requires willingness on the part of Member States to surrender the traditional pursuit of energy autarky in exchange for efficiency and competitive prices. This shift from national independence to greater interdependence requires mutual trust between EU Member States. The article analyses the role of the principle of mutual trust in ensuring security of electricity supply in the internal electricity market. This legal analysis is conducted using capacity mechanisms as a topical example of how the principle of mutual trust is integrated in the structures of EU energy law and how ensuring the uninterrupted availability of affordable electricity can be used to justify limitations on mutual trust.

***European Federation for Cosmetic Ingredients v Secretary of State for Business, Innovation and Skills*: A Global Message Concerning Animal Tested Cosmetic Products**
Yen-Lin Agnes Chiu
This case study analyses a prominent ruling dealing with the controversial marketing ban stipulated in Cosmetics Regulation 1223/2009. After prior attempts to invalidate the disputed provision, the European Court of Justice held that animal test results originating from third countries must not be used to prove the safety of imported cosmetic products. The decision merits a detailed discussion, as it balances and reconciles a range of competing concerns (i.e. protection of the internal market, public health and animal welfare), while highlighting the EU's mission to share its values and objectives with the whole world. The author explores the practical significance and implications of this milestone judgment from a global perspective and in conclusion provides a summary of lessons that can be derived from the present dispute.

The scope of Article 20 TFEU clarified in *Chavez-Vilchez*: Are the fundamental rights of minor EU citizens coming of age?
Hanneke van Eijken* and *Pauline Phoa
In Chavez-Vilchez *the CJEU decided on the circumstances under which a minor, dependent EU citizen is forced to leave the territory of the European Union, if his/her third-country national parent is refused the right to reside in a Member State.* Chavez-Vilchez *continues where the case of* Ruiz Zambrano *left certain questions open. One of the questions was how to assess under what circumstances EU minor citizens are forced to leave the EU and what aspects need to be considered in that assessment. In this analysis of* Chavez-Vilchez*, the relation with previous case law of the CJEU is examined and discussed. Specific attention will be paid to the relation of dependency between the EU citizen and the third-country national parent, the inclusion of family life and the rights of the child in the assessment, as well as the relation between art.20 and art.21 TFEU.*

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Editorial

Still United Despite Diversity?

Budgets; Common policies; European Union; Harmonisation; Italy; Member States; Poland

The motto of the defunct Constitutional Treaty was “United in Diversity”. It was meant to reflect the somewhat paradoxical nature of the European civilization: widely differing states that share some essential qualities. Yet the seemingly never-ending crises that buffet the European construction continue to pose the question whether there is sufficient unity to keep the project from being blown apart?

The divisions along the north-south axis have manifested again in the draft budget presented by the Italian government in October 2018 and rejected, for the first time ever, by the European Commission.[1] At the time of writing, the Italian government stands steadfastly behind its draft, while the Commission holds that the rejection was the only available course of action under the commonly agreed rules.

At issue is the draft budgetary plan submitted by Italy under art.6(1) of Regulation 473/2013 on enhanced monitoring of budgetary policies in the euro area.[2] The Council and the European Council had earlier issued recommendations to Italy under the Stability and Growth Pact. The detail of these recommendations was informed by the country’s high public debt, which stands at more than double the 60 per cent reference value of the Treaty. The draft budget of the new Italian government does not comply with those recommendations, or with the commitments Italy had presented before the new government took office. It includes items such as a rollback of pension reform and the creation of a citizenship income that stretch public finances. The Commission therefore requested the submission of a suitably revised budgetary plan under art.7(2) of the Regulation. If Italy fails to comply, it faces being struck by the preventive and corrective arms of the Stability and Growth Pact, potentially resulting in sanctions such as a deposit of 0.2 per cent of GDP which may be converted to a fine.

There are different aspects to this conflict. At one level, it seems like a clash between a government seeking to fulfil its democratic mandate and a technocratic institution seeking to uphold a set of rules that are often described as obscure and arcane.[3] Yet the rules, as obscure and arcane as they may be, and the recommendations based on them were commonly agreed. On a broader level, they reflect a democratic European consensus that goes beyond a single Member State. As a result, the Italian government is not facing just the Commission: there is a coalition of Member States that is urging action. The uncomfortable role that the Commission has to play is an intermediary in a conflict between states and societies that have different views of how economies should be managed. If it were to bow to the will of a populist government of the South, it would certainly provide grist to the mill of the populists in the North.

A few days earlier in October 2018, the divisions along the east-west axis manifested themselves at the Court of Justice. The Commission has taken various steps against Poland on the issue of rule of law. The most recent clash concerns the composition of the Supreme Court of Poland. The Commission requested the Court to order Poland to halt its measures. The Vice-President of the Court provisionally granted all the Commission’s requests.[4]

[1] Commission Opinion on the Draft Budgetary Plan of Italy and requesting Italy to submit a revised Draft Budgetary Plan C(2018) 7510 final.
[2] Regulation 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L140/11.
[3] See Z. Darvasa, P. Martin and X. Ragot, “European Fiscal Rules Require a Major Overhaul”, *Les notes du conseil d’analyse économique*, No.47, September 2018, available at *http://www.astrid-online.it/static/upload/cae-/cae-note047-en.pdf* [Accessed 22 November 2018].
[4] *Commission v Poland* (C-619/18) EU:C:2018:85.

At issue is the new Polish law that lowers the retirement age of the judges of the Supreme Court to 65. This has resulted in a forced retirement of a significant number of sitting judges. The President of the country has the power to extend the service of a judge, but can do so at his discretion without being bound by any criteria. At the same time, the number of judges has been increased and judicial vacancies advertised. To many, this looks like a purge followed by court-packing.

Again, the conflict has different aspects. The Polish government says it is seeking to fulfil its democratic mandate by reforming the judicial system that is a remnant from the communist times. On the other side is the Commission, seeking to ensure that Poland abides by the rules enshrined in art.19 TEU and art.47 CFR that ultimately reflect the rule of law the Union is built upon. Again, the Commission does not stand alone. Many Member States share and support its concerns. Yet Poland is not alone either—it has allies, especially among some of the eastern Member States. So far this has stymied the efforts to deal with the conflict via the political route under art.7 TEU procedure and forces the issue into the judicial channel. Again, the Commission and the Court find themselves as intermediaries. This time the conflict is between the different views of what a victor in elections is allowed to do. Liberal democracies of the West hold that checks and balances that protect the minority from the majority must be upheld. Those rejecting the liberal idea claim to channel the will of the people that must be allowed to rule unconstrained.

The function of European law in these conflicts is to transform naked clashes to processes governed by procedures and rules. The European institutions become the antagonists, instead of national governments facing off each other. The success of the system depends on the participants playing by the rules and respecting the common institutions. So far, this has worked at least to a degree—for example, Poland has promised to abide by the Order of the Court. Yet it is easy to attack and vilify the EU institutions. Worryingly, this kind of tactic seems to carry electoral benefits rather than costs: in Italy, opinion polls show a surge of support for the hard right Lega.[5] In Poland, the ruling party was not punished in the recent regional elections.[6] There are also questions concerning the effectiveness of the Union's response mechanisms: how realistic and useful are fines, and is it possible to rely on art.7 TEU in practice?

The broader question for the integration project is whether the diversity is starting to overwhelm the unity. How long can the Union survive open challenges to its central policies and most fundamental rules from large Member States? At the conflict's heart is the difficulty of accommodating integration, national sovereignty and mass politics at the same time.[7]

For the moment, the greatest practical danger is one of contagion, and it is this that the Union must combat. Italy is already being punished by the markets. If the market reactions were to spread to countries following sound policies, the EU must be ready to unleash its admittedly incomplete arsenal of support mechanisms in their aid. If Poland were to demonstrate that the rule of law procedures are all bark and no bite, other governments will take note and may act accordingly. This the Union would not survive.

[JS]

[5] *https://www.bloomberg.com/news/articles/2018-10-01/why-the-league-is-new-bane-of-italy-s-establishment-quicktake* [Accessed 22 November 2018].
[6] J. Shotter, "Poland's Law and Justice makes gains in local elections" *Financial Times*, 25 October 2018.
[7] See J. Snell, "The Trilemma of European Economic and Monetary Integration, and Its Consequences" (2016) 22 E.L.J. 157 for an extended discussion applying the work of Dani Rodrik. See also P. Leino and T. Saarenheimo, "Fiscal Stabilisation for EMU: Managing Incompleteness" (2018) 43 E.L. Rev. 623 who share much of the diagnosis, but not necessarily the prescriptions.

Articles

Liberalisation and the Pursuit of the Internal Market
Niamh Dunne
Economic liberalisation operates both as a functional process and a disputed ideological touchstone within the pursuit of the EU's internal market. This article evaluates liberalisation efforts to date, addressing both positive and normative perspectives. It considers the meaning of liberalisation; discusses the legal instruments that exist within EU law; suggests explanations for its prominence; and explores the extent to which ideologically oriented understandings of such reforms are reflected in the resultant character of the internal market. In doing so, the article aims to identify and analyse the deeper implications of the recurrent use of liberalisation as a tool of economic integration within the EU.

Striking a Balance of Power between the Court of Justice and the EU Legislature: The Law on Competition Damages Actions as a Paradigm
Jens-Uwe Franck
The framework of EU law on cartel damages actions consists in part of rules established by the ECJ based on arts 101 and 102 TFEU in conjunction with the principle of effectiveness. These rules are an integral part of EU primary law. The notion of institutional balance, however, requires the Court to consider its own inherent limits on democratic legitimacy, accountability and expertise. In particular, the Court has to ensure that adequate scope remains for the EU legislature to exercise its legislative power pursuant to art.103 TFEU. It is argued that the ECJ has disregarded these restrictions and overstretched the principle of effectiveness—for instance, in its adjudication on liability for umbrella pricing and on access to leniency files, respectively. Consequently, the EU legislature must not consider itself bound by these standards.

Advisory Opinions in the EEA: The Icelandic Supreme Court and the EFTA Court
Ólafur Ísberg Hannesson
The present article seeks to define how the Icelandic Supreme Court has applied the facility provided by art.34 SCA for obtaining advisory opinions from the EFTA Court on questions of EEA law. In order to define the approach of the Supreme Court to EEA law in different legal areas, and thereby find a possible qualitative explanation for the number of references from the Icelandic courts, the criteria which form the basis of the assessment of the Supreme Court in the decision on whether to refer will be analysed. Given the context of the article, the outcome of this analysis forms part of the answer to the more general question of how and when the Supreme Court applies EEA law.

Tackling Aggressive Commercial Practices: Court of Justice Case Law on the Unfair Commercial Practices Directive 10 Years On
Fausto Caronna
The ban on aggressive practices in the Unfair Commercial Practices Directive plays a key role in ensuring a high level of consumer protection. Despite this objective and the full harmonisation nature of the Directive, the rules on aggressive practices are by no means clear. This article provides guidance on these complex rules in light of the case law of the Court of Justice of the EU, drawing inspiration from relevant Italian case law. It analyses the extent to which there is a professional diligence defence, vulnerable consumers are protected, and Member States can go beyond the Directive and ban conduct that they consider to be against consumer interests. The article also addresses the question of where the dividing line is between aggressive and misleading practices.

Analysis and Reflections

The Working Language of the CJEU: Time for a Change?
Anthony Arnull
It is well known that the working language of the CJEU is French. For many years, the status of French was unquestioned, but this is now changing. This article considers how French came to be chosen as the CJEU's working language; the effect of that choice on the CJEU's judicial method; and the feasibility and desirability of a change in the CJEU's language practices. Has French become an impediment to the CJEU's capacity to communicate

effectively with its stakeholders? Should French be replaced or supplemented? If so, by what? Would any potential benefits that might accrue from changing the CJEU's language practices be outweighed by the disruption that would be caused? Or do the political sensitivities in play simply make reform impossible?

Too Important to Be Entrusted to Neighbours? The Dynamics of Security of Electricity Supply and Mutual Trust in EU law
Kaisa Huhta
The EU's internal electricity market is founded upon the assumption that a competitive EU-wide market is the most efficient means of ensuring the availability of sustainable electricity to all Europeans. This approach requires willingness on the part of Member States to surrender the traditional pursuit of energy autarky in exchange for efficiency and competitive prices. This shift from national independence to greater interdependence requires mutual trust between EU Member States. The article analyses the role of the principle of mutual trust in ensuring the security of electricity supply in the internal electricity market. This legal analysis is conducted using capacity mechanisms as a topical example of how the principle of mutual trust is integrated in the structures of EU energy law and how ensuring the uninterrupted availability of affordable electricity can be used to justify limitations on mutual trust.

***European Federation for Cosmetic Ingredients v Secretary of State for Business, Innovation and Skills*: A Global Message Concerning Animal Tested Cosmetic Products**
Yen-Lin Agnes Chiu
This case study analyses a prominent ruling dealing with the controversial marketing ban stipulated in Cosmetics Regulation 1223/2009. After prior attempts to invalidate the disputed provision, the European Court of Justice (ECJ) held that animal test results originating from third countries must not be used to prove the safety of imported cosmetic products. The decision merits a detailed discussion, as it balances and reconciles a range of competing concerns (i.e. protection of the internal market, public health and animal welfare), while highlighting the EU's mission to share its values and objectives with the whole world. The author explores the practical significance and implications of this milestone judgment from a global perspective and in conclusion provides a summary of lessons that can be derived from the present dispute.

The Scope of Article 20 TFEU Clarified in *Chavez-Vilchez*: Are the Fundamental Rights of Minor EU Citizens Coming of Age?
Hanneke van Eijken* and *Pauline Phoa
In Chavez-Vilchez *the CJEU decided on the circumstances under which a minor, dependent EU citizen is forced to leave the territory of the European Union, if his/her third-country national parent is refused the right to reside in a Member State.* Chavez-Vilchez *continues where the case of Ruiz Zambrano left certain questions open. One of the questions was how to assess under what circumstances EU minor citizens are forced to leave the EU and what aspects need to be considered in that assessment. In this analysis of* Chavez-Vilchez*, the relationship with previous case law of the CJEU is examined and discussed. Specific attention will be paid to the relation of dependency between the EU citizen and the third-country national parent, the inclusion of family life and the rights of the child in the assessment, as well as the relationship between art.20 and art.21 TFEU.*

Book Reviews

Forthcoming in European Law Review

Towards a Meaningful Prudential Supervision Dialogue in the Euro Area? A Study of the Interaction between the European Parliament and the European Central Bank in the Single Supervisory Mechanism
Fabian Amtenbrink* and *Menelaos Markakis
In the context of the introduction of the Single Supervisory Mechanism (SSM) as part of the European Banking Union, the European Central Bank (ECB) has been assigned specific supervisory tasks relating to credit institutions established primarily in the Euro area. One particularly remarkable feature of this new legislation, notably when compared to the monetary policy tasks of the ECB, is the introduction of an explicit accountability framework with a particular focus on the relationship between the ECB and the European Parliament. It is this relationship and mainly the so-called supervisory dialogue that forms the focal point of this contribution, which offers an assessment of the legal framework, as well as of the actual practice in these first years of the existence of the SSM, against a clearly-defined notion of accountability. With regard to the actual practice, the contribution focuses on the exchanges between the Chair of the ECB's main decision-preparing body on SSM matters, i.e. the Supervisory Board, and the European Parliament's Committee on Economic and Monetary Affairs.

Towards a European Framework for Foreign Investment Reviews
Jochem de Kok
The Commission's proposal to establish a European framework for the screening of foreign direct investments into the EU follows a reignited debate on whether foreign investments, in particular from China, should be placed under greater scrutiny for their potential impact on security. While national security review mechanisms already exist in many Member States, a European approach is lacking. The proposed framework allows for a more coordinated approach, a limited degree of harmonisation and the first step towards a European review mechanism by assigning a formal role to the Commission. While leaving the ultimate authority to decide on whether to allow or block a transaction to the Member States concerned, the proposed competence for the Commission to issue non-binding opinions is likely to place the Commission in a central role in investment screening.

European Constitutionalism and Constituent Power
George Duke
This article argues that attempts to construct a mixed constituent power fit for the purpose of grounding the legitimacy of the EU constitutional order are not only descriptively implausible, but also fail at the level of reconstructive normative justification. The source of this justificatory inadequacy is the notion of constituent power itself, which lacks the normative content to serve as the foundation for an account of constitutional legitimacy. Following a discussion of the motivations for the application of the concept of constituent power to Europe, the paper argues that the concept is of little assistance for those seeking a normative justification for the Lisbon Treaty's constitutional status.

The European Disability Rights Revolution
Jeffrey Miller
Until recently, an EU citizen's legal standing to challenge disability discrimination was non-existent or sharply curtailed in most jurisdictions. The situation changed drastically with the adoption of Directive 2000/78, also known as the Employment Equality Directive. Most academic commentary has been highly critical of the judgements of the Court of Justice of the European Union (CJEU), taking it to task for failing to embrace the "social model of disability". In this article, I seek to demonstrate the value of analysing CJEU case-law from a perspective other than the dominant paradigm, and to show how a different methodological approach can provide new insights into our understanding of the trajectory of the CJEU's jurisprudence. Instead of using the social model of disability to benchmark how the CJEU's case-law has developed, I compare Directive 2000/78 and CJEU judgments to the Americans with Disabilities Act and decisions of US courts.

After *Uber Spain*: The EU's Approach on the Sharing Economy in Need of Review?
Vassilis Hatzopoulos
The rapid development of the collaborative (or sharing) economy has disruptive effects both on the economic and the legal landscape of the EU and its Member States. While national regulators and courts have adopted greatly divergent approaches, Uber Spain *is the first occasion in which the CJEU discusses and qualifies the relationships developing in the two (or multi-) sided markets which characterise the collaborative economy. In so doing, the CJEU establishes the criteria which take the online platforms outside their mere intermediation function and into the provision of the underlying service. On this qualification rest the conditions under which online platforms should gain market access in the EU internal market; it may further have an impact on consumer protection and labour law. Because the criteria used by the Court are not all too clear and may not be applied in an all-encompassing manner and, further, run counter the approach followed, so far, by the Commission and by national authorities, fragmentation of the internal market emerges as real risk. By refusing to acknowledge the disruptive effects of the collaborative economy, the Court implicitly but clearly calls in the EU legislature.*

The Judicial Interpretation of Harmonised Standards: *Anstar*
Pierluigi Cuccuru
The James Elliott *ruling opened the Court of Justice's doors to the interpretation of harmonised standards, i.e. technical specifications issued by private parties in implementation of EU law. Yet, in that occasion no real judicial engagement with the content of the standard occurred. The* Anstar *judgment represents the first occurrence of this type. The decision is remarkable as it outlines a brief* vademecum *on the interpretation of harmonised standards, enucleating the basic elements that courts take into account when exercising their hermeneutic discretion. Moreover, the judgment confirms the Court's willingness to enter into technical standardisation and indirectly offers a chance to reflect on the interplay between judicial and scientific authorities within the European Standardisation System.*

The Faroe Islands: Possible Lessons for Scotland in a Post-Brexit Devolution Settlement
Jacques Hartmann
The Brexit referendum saw millions of people voting to "take back control" from Brussels. The decision to leave the EU and the return of powers to the UK has created new constitutional complexity, especially for Scotland, which overwhelmingly voted to remain. The Scottish Government has made it clear that, despite the overall result, it wants to retain key benefits of EU membership, even if the rest of the UK leaves the EU and the Single Market. The difficulty now is finding a constitutional compromise that addresses the concerns of the Scottish Government as the UK leaves the EU in March 2019. The Faroe Islands' reserved powers model can potentially yield important lessons for Scotland. Despite refusing to accede with Denmark in 1972, the Faroes has developed a close relationship with the EU. The case of the Faroes shows that there are no legal barriers in EU or international law for Scotland to follow a similar path. A constitutional compromise can be achieved through the use of international legal personality and the political will to find a settlement.