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Editorial

More on Autonomy—Opinion 1/17 (CETA)

Autonomy; Canada; Dispute resolution; EU law; Free trade agreements; International tribunals

That this is the third editorial in this Review on the autonomy of EU law in the last year and a half[1] may only be partly attributed to the lack of imagination of this Editor. It is Opinion 1/17 of the European Court of Justice on the EU-Canada Comprehensive Economic and Trade Agreement (CETA) that keeps the principle topical. Handed down by the Full Court on 30 April 2019, it held that the establishment of the CETA Tribunal and Appellate Tribunal for disputes between investors and the contracting parties would be consistent with EU law.[2] In particular, it would not violate the principles of autonomy, equal treatment, and effectiveness.

The Opinion was eagerly anticipated in the light of *Achmea*[3] and the uncertainty, if not confusion, about the implications of that controversial judgment. Opinion 1/17 reads as if it is seeking to address some of the uncertainty. For instance, its analysis of autonomy is preceded by a section entitled "principles" that provides one of the most comprehensive statements on the topic in the Court's case-law.[4] Its conclusion is based firmly on the various CETA provisions which are unambiguous about their objective to define the jurisdiction of the CETA Tribunal as narrowly as possible (the Tribunal would not apply EU law, it could only examine it as a matter of fact, and would not have the power to examine the legality of EU or national acts in the light of EU law).[5] These provisions read as if the drafters of CETA took utmost care to give as little ammunition as possible to any concern about impinging on the Court's jurisdiction. The contrast, therefore, with the unusually broad jurisdiction clause that had been examined in *Achmea* was striking. What is central in the Opinion is the principle that the tribunal in question would not have the power to bind the CJEU on matters of EU law.

Three interrelated threads emerge. The first is about pragmatism. A case in point: the jurisdiction of international courts to interpret international treaties concluded by the EU in a manner that would bind the EU itself is underlined. Whilst this was acknowledged in prior case-law,[6] the Court has been distinctly reluctant to accept it as a matter of practice. Opinion 1/17, instead, is emphatic about the role of such tribunals, as well as the "reciprocal nature of international agreements".[7] In recognising the powers of other, non-EU, courts to interpret agreements concluded by the EU, the Court refers expressly to "the need to maintain the powers of the Union in international relations".[8] This is yet another illustration of pragmatism, given the ongoing effort of the Union to reform the traditional investment arbitration model and replace it, ultimately, with a Multilateral Investment Court, a matter that is currently under UNCITRAL negotiations. The Opinion, therefore, acknowledges the intense policy context of the underlying issues and the active role that the EU has assumed in the area: it would have been a remarkably bold decision for the Court to make the Union unravel its policy on this matter.

The second theme is the leap of faith in relation to the jurisdiction of the CETA Tribunal. On the one hand, CETA is convincingly distinguished from past instances where autonomy trumped dispute settlement mechanisms brought before the Court: the CETA Tribunal would not have jurisdiction to interpret and apply EU law (as opposed to Opinion 1/09), it would not

[1] P. Koutrakos, "What is the Principle of Autonomy About?" and "But Seriously, What is the Principle of Autonomy Really About?" Editorials in (2018) 43 E.L. Rev. 1 and (2018) 43 E.L. Rev. 293 respectively.
[2] Opinion 1/17 EU:C:2019:341.
[3] *Slovak Republic v Achmea BV* (C-284/16) EU:C:2018:158; [2018] 2 C.M.L.R. 40.
[4] Opinion 1/17 at [106]–[119].
[5] CETA arts 8.31.1 and 8.31.2.
[6] For instance, Opinion 2/13 EU:C:2014:2454; [2015] 2 C.M.L.R. 21 at [182].
[7] Opinion 1/17 at [117]. See also [116], [134] and [135].
[8] Opinion 1/17 at [117].

be set up by a treaty between Member States and, therefore, the principle of mutual trust would be irrelevant (as opposed to *Achmea*), and it would not have the power to determine whether the EU or a Member State would be responsible for a breach (as opposed to Opinion 2/13). On the other hand, there is a distinct shift of tone: the formalism and distrust that permeated Opinion 2/13 is absent, even though there are instances that would justify a more probing look.[9]

Thirdly, the Court adds another layer to the definition of autonomy by ruling that the CETA Tribunal would have no jurisdiction to call into question the level of protection that the EU institutions choose about fundamental interests such as public security and public morals.[10] This conclusion is reached on the basis of various CETA provisions protecting the regulatory autonomy of the parties,[11] as well as the circumscribed scope of the Tribunal's jurisdiction.[12] This is a substantive, rather than a jurisdictional/procedural, constraint on what autonomy dictates. As such, it is noteworthy, not only because in most previous cases autonomy had a self-referential dimension understood in terms of jurisdictional power, but also as it is accompanied by a number of references to the democratic process governing EU decision-making. The context within which the Opinion was rendered sheds some light on the emphasis on ensuring the choices of the EU institutions as to how to protect public interest. This part of the Opinion draws heavily on the Joint Interpretative Instrument, adopted in late 2016 in order to assuage the concerns that had fed and been fuelled by the Walloon Parliament's approach to CETA. It is recalled that those concerns were about the potentially pernicious impact of the CETA dispute settlement mechanism on EU policy-making, about which Belgium asked a specific question in its request for an Opinion. Viewed against this context, the emphasis on the EU's regulatory autonomy is a nod to the heavily politicised context within which the Opinion was handed down.

The political astuteness illustrated by the above approach comes, however, at the expense of clarity. In dealing with the substantive dimension of autonomy, the Opinion oscillates between the circumscribed jurisdiction of the CETA Tribunal and the regulatory autonomy of the parties. There are also questions about the wider implications of autonomy. In the context of extra-EU agreements, few dispute settlement provisions are drafted as carefully as these in CETA. As for intra-EU BITs, the role of investment arbitration is also far from over, irrespective of the Member States' Declarations that they would revoke such agreements by the end of 2019, and that they withdrew their consent to arbitration with immediate effect. It by no means follows that arbitral tribunals would accept such drastic and immediate effect. There is also the question of managing the claims that have already been brought under the relevant BITs. Finally, we are none the wiser about what autonomy means for the Energy Charter Treaty. This is an important question, not least because arbitral tribunals have consistently refused to accept the relevance of *Achmea* in that context. While, therefore, autonomy means different things in different contexts, its practical implications are still far from clear. They may even warrant another Editorial in this Review.

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[9] See for instance CETA art.8.31.2 and its examination in 1/17 at [131] and contrast it with Opinion 2/13 at [236]–[245]. This leap of faith is apparent in other parts of the Opinion too, for instance in the context of the examination of compatibility with the principle of equal treatment under art.20 of the Charter: Opinion 1/17 at [185].
[10] As well as public order, and the protection of human, animal or plant life or health.
[11] CETA art.28.3.2, 8.9.1, 8.9.2., Point 3 of Annex 8-A to CETA, as well as Point 1(d) and 2 of the Joint Interpretative Instrument.
[12] CETA art.8.10.2. See also Opinion 1/17 at [148].

Articles

Towards a Single Standard of Professional Secrecy for Financial Sector Supervisory Authorities: A Reform Proposal
René Smits* and *Nikolai Badenhoop
Recent case law on the scope of professional secrecy for the supervisory authorities of the financial sector and on the measure of openness of their files highlights the lack of co-ordination among the silos of supervision and the absence of clear and uniform professional secrecy rules across the financial sector. The introduction of the Single Supervisory Mechanism (SSM) makes this situation more acute: notwithstanding a centralised system of banking supervision, different approaches may exist in respect of access to files, even when based on EU legislation. This contribution addresses the accountability of supervisory authorities and, notably the European Central Bank (ECB), from the perspective of access to supervisory files, as a prelude to possible follow-up proceedings for failing supervision. Recent judgments in the Altmann*,* Baumeister*,* Buccioni *and* UBS Europe *cases slowly move the case law on supervisory secrecy towards more openness, long after* Hillegom v Hillenius *(1984). The judgments make us wonder whether the absence of legislative co-ordination and questionable drafting is being remedied by the judiciary. The variety of legislative provisions and relevant recent case law form the backdrop of our proposal to adopt a Regulation on professional secrecy for supervisory authorities in the financial sector, which would institute a single standard directly applicable across Member States and supervisory authorities.*

Enhanced Free Movement: Opportunities and Limits for EU Member States Entering into Bilateral Agreements
Karsten Engsig Sørensen
When two Member States enter into an agreement to enhance free movement of goods, persons, companies, services or capital, this may cause distortion of the functioning of the internal market. Consequently, the Member States must observe EU law when they adopt such an agreement. This article analyses how the free movement rights may affect such agreements, and it concludes that Member States should be careful not to adopt restrictions to free movement under an agreement. Furthermore, they should be careful not to unjustly exclude goods, persons and companies from Member States that are not party to the agreement from benefiting from the agreement. The most important question is, however, whether the Member States must observe the requirement for most favoured nation treatment when adopting such an agreement. After analysing the existing case law—including the non-conclusive recent judgement in Achmea*—it is concluded that Member States are likely to avoid intra-EU agreements being scrutinised under this principle.*

The Future of EU Executive Rule-making
Wolfgang Weiß
The European Commission presented, in its White Paper on the Future of Europe, scenarios on the future of the EU in 2025, which prompt the question as to their meaning for the future of EU administrative law. This article explores the implications of the scenarios for the future of EU executive rulemaking and its constitutional consequences. As some scenarios imply a more powerful political role of the Commission, and almost all expand the scope and usage of executive rulemaking, the executive power gains induce the need for more distinct constitutional guidelines for executive rulemaking and for strengthened parliamentary control, to preserve the institutional power balance between legislative and executive rulemaking. The analysis develops proposals insofar and demands respect for constitutional barriers already enshrined in EU primary law but not sufficiently addressed yet in institutional practice.

International Law in the European Banking Union: The Case of non-Euro Periphery
Adrian Dumitrescu-Pasecinic
This article illustrates the interrelation between the EU law and international law in the institutional set-up of the close co-operation arrangement in the Single Supervisory Mechanism, the first arm of the European Banking Union. Based on the legal status of the unilateral acts of states in public international law, the article sheds light on the legal character of the unilateral undertaking of the non-euro Member State to abide by European Central Bank acts. The article challenges the official opinions on the lack of a transfer of sovereignty

from national to Union level and alleges the illegality of the close co-operation mechanism, given the legal restraints inferred from the case law of the Court of Justice of the European Union.

Analysis and Reflections

Conceptualisation and Application of the Principle of Autonomy of EU Law: The CJEU's Judgment in *Achmea* Put in Perspective
Steffen Hindelang
It seemed that Court of Justice of the European Union wanted to make it short and sweet: it took the Grand Chamber in its Achmea *judgment fewer than 15 pages to conclude that investor-state dispute settlement in an intra-EU context is incompatible with EU law. The judgment is noteworthy in terms of both the conceptualisation as well as of the application of the principle of autonomy of EU law. In terms of conceptualisation of the principle, what we witness in* Achmea*, read in conjunction with another decision, could be a first subtle attempt to enrich the principle with notions of the rule of law. In terms of application, the Court further strengthens legal equality, its judicial monopoly, and—perhaps even more importantly—the role of the Member States' courts, understood as "traditional permanent State courts", in the judicial dialogue.*

Ownership Structures and Beneficial Ownership: Registering and Investigating the Unknown
Ondřej Vondráček* and *David Ondráčka
The article analyses the key issues in the implementation of the new corporate ownership and beneficial ownership disclosure obligation introduced by the fourth EU Anti-money Laundering Directive. It discusses some of the immediate and potential issues arising from the interlinked problems of effectiveness and efficiency of identification and evidencing of corporate ownership structures and beneficial owners, and comes up with a possible comprehensive solution for these issues which consists in developing a practical guidance on disclosure of corporate and beneficial ownership structures. This guidance—in the Practical Guide on disclosure and evidencing of corporate and control structures and beneficial owner(s) for the process of verification of disclosed ownership structures and beneficial owners, and in the Handbook for disclosure of beneficial ownership and beneficial owners for the process of investigation of unknown ownership structures and beneficial owners—would elaborate in detail the provisions of the guidance on transparency of beneficial ownership issued by the Financial Action Task Force.

Structural Consequences of Cross-border Company Seat Transfers within the EU in the Latest Court of Justice Case Law: *Polbud*
Julie Benedetti* and *Arnaud Van Waeyenberge
Owing to the lack of European legislative measures on cross-border transfer of registered offices, Member States currently retain their competence in this field. However, Member States are required to respect the fundamental freedoms of the EU internal market under the purview of the Court of Justice of the European Union (CJEU). The purpose of this article is to comment on the latest stage of this jurisprudential evolution through an analysis of the Polbud *judgment. This case clarifies the regulatory context surrounding the transfer of a registered office within the internal market since it liberalises companies' cross-border mobility by accepting that the benefit of freedom of establishment does not require the pursuit of a genuine economic activity or the relocation of the real head office of the company. Finally, the practical and political consequences of the ruling complete the analysis.*

Book Reviews

Forthcoming in European Law Review

What Effect on Trade? A Balancing Act in Circumscribing the Notion of State Aid
Gjermund Mathisen
"Effect on trade" is seeing a renaissance in decisional practice in the field of state aid. The Commission is refining its approach to assessing whether potential aid measures affect trade between Member States such as to engage art.107 TFEU. The present contribution analyses the systemic implications of this shift, and argues that the refined approach re-balances the application of the "liable to affect trade" test as developed in case law. This test, and thus the outer limit of the notion of state aid, is analysed in light of related rules, especially de minimis rules in state aid law, and competition law rules on effect on trade. In this light, the Commission's reasoning in relevant cases is assessed as robust, whereas the general approach is seen as coming with some challenges, especially for use at the national level. However, the approach is promising enough that it deserves the support of the Courts in Luxembourg, the first signs of which are now showing.

RO v Minister for Justice and Equality: Brexit Means Nothing Has Changed … Yet
Christina Saenz Perez
This case note analyses the judgment delivered by the ECJ in RO v Minister for Justice and Equality (C-327/18), which examines the possibility of executing European arrest warrants (EAW) issued by the UK after giving notice of its withdrawal according to art.50 TEU. In this case, the Court prioritises the functioning of the EAW despite the uncertainty surrounding the fundamental rights and legal framework governing the relationship of this country with the EU after Brexit. It clarifies issues such as whether mutual trust continues to apply to a Member State after the triggering of art.50 TEU and the implications of the loss of access to the ECJ for current EAWs. However, it also leaves many questions unanswered, such as what happens if the UK unilaterally modifies the rights assisting those surrendered prior to Brexit or what happens to EAWs which have not been executed before Brexit.

Beyond Procedural Protection: Information Technology, Privacy and the Workplace
David Mangan
There has been an unproductive artificiality in the current understanding of information technology in employment law which focuses more on procedural hurdles than deliberating upon the substance of the rights in question. This procedural approach has increasingly shown signs of obsolescence as contemporary innovations in information technology contest the more traditional boundaries relied upon in law. This article uses the decision in Bărbulescu v Romania *as a tool for uncovering the legal considerations regarding the intermingling of information technology, the workplace and employees' private lives.*