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Editorial

Foreign Investment Policy and EU Law: a Time of Reckoning?

Bilateral investment treaties; Competence; Dispute resolution; EU law; External relations; Foreign investment; Member States

The fundamental challenges facing the EU at the moment (Brexit, refugees, the state of the Eurozone) have been attracting the lion's share of attention by academics, practitioners, and policy-makers. And yet, one would be wrong to assume that all is calm in the other, more mundane, areas of EU activity. A case in point is foreign investment policy.

Since the entry into force of the Lisbon Treaty, this field has gradually become an important strand of the EU's external relations. It became part, for the first time, of the EU's Common Commercial Policy (CCP) under art.207 TFEU. As such, it now falls within the scope of the Union's exclusive competence. As the EU was not in a position to articulate fully its investment policy as soon as it assumed the competence to do so, pragmatic arrangements were adopted which would enable the Member States to maintain their investment treaties with third countries provided that they complied with a set of EU procedural and substantive conditions.¹

For some time, the tensions between the EU and the Member States about the scope and nature of the former's powers and their implications for the latter's policy have been managed without a major crisis. Recent developments, however, have brought to the fore a number of questions with considerable intensity. The first question is about the scope and nature of the Union's external competence in the field. What is the scope of foreign direct investment pursuant to art.207 TFEU? For the areas not covered by the CCP, does the EU enjoy an exclusive implied competence pursuant to the TFEU provisions on capital movement (art.64(2) TFEU)? At the time of writing, these questions are examined by the European Court of Justice in the context of the conclusion of the EU-Singapore Free Trade Agreement. In its request for an Opinion in accordance with art.218(11) TFEU,² the Commission has put forward an extremely broad reading of the Union's investment competence.

The second question is about the maintenance of bilateral investment treaties (BITs) between Member States (intra-EU BITs). The Commission's long-standing argument that they are inconsistent with EU law has been ignored by most of the Member States (except for Italy and Ireland which have terminated their intra-EU BITs). In June 2015, the Commission initiated proceedings against Austria, the Netherlands, Romania, Slovakia and Sweden. It has also requested information from the remaining 21 Member States.

The third question, following from the above, is about the investor-State dispute settlement rules laid down in intra-EU BITs, their impact on national legal orders and their interactions with EU law. This question has been raised in the context of the *Micula* dispute. This was about compensation granted to investors by an arbitral tribunal award pursuant to the BIT between Romania and Sweden. The investors sought to enforce the award before the Bucharest Tribunal which, bizarrely, did not consider it necessary to refer to the Court of Justice, even though the Commission had already opened the formal investigation procedure against Romania as to whether the partial implementation of the Award that had taken place was consistent with state aids rules. The Commission decided subsequently that the payment of the compensation awarded by the Arbitral Tribunal would be illegal under EU law as it

¹ See Regulation 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2013] OJ L 351/40. See also Regulation 912/2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party [2014] OJ L257/121.

² Opinion 2/15 (re: EU-Singapore Free Trade Agreement) (pending).

would constitute State aid pursuant to art.107(1) TFEU.³ It also held that Romania should recover any compensation it had already paid to the Micula brothers in implementation of the award. This Decision has been challenged by the investors before the General Court of the European Union.⁴ They allege, amongst others, that the Commission's decision violates art.351 TFEU and general principles of law and amounts to an incorrect application of the state aid rules.

The issue of the compatibility of the dispute settlement mechanism laid down in intra-EU BITs with EU law has also been raised in a reference by the German Federal Court of Justice (*Bundesgerichtshof*) in the context of the BIT between Czechoslovakia and the Netherlands.⁵ The *Bundesgerichtshof* has raised questions regarding the scope of the exclusive jurisdiction of the Court of Justice under art.344 TFEU, the preliminary reference procedure, and the non-discrimination principle.

The above developments raise complex questions that are central not just to the evolving investment policy of the Union but, more broadly, to the interaction between EU and international law. Their significance is illustrated by their emergence in a variety of procedural settings and in an ever wider canvass, involving national and transnational courts, arbitral tribunals, where the Commission routinely points out the supremacy of EU law, as well as courts in third states (the *Micula* saga has given rise to enforcement proceedings before national courts in Romania, United Kingdom, Belgium, France, and Luxembourg, as well as the United States).⁶

Two factors underline the significance of these developments. The first is the increasingly prominent position of the principle of autonomy of the EU's legal order in the Court's case-law.⁷ The ambiguous concept, ill-defined outer limits, and unclear implications of this principle raise questions about the management of the co-existence between EU and international investment law. The second factor is the politically charged environment within which such questions are raised. After all, investment arbitration is viewed with scepticism, if not outright hostility, by the wider public, as illustrated only too clearly by the reactions to the Comprehensive Economic and Trade Agreement between the EU and Canada and the ongoing negotiation of the Transatlantic Trade and Investment Partnership. The EU foreign investment policy landscape is, therefore, gradually shifting and the repercussions would be felt beyond the EU legal order, as they would have an impact on the work of EU, international, and national lawyers alike.

³ Commission Decision 2015/1470 on State aid SA. (2014/C) (ex 2014/NN) implemented by Romania—Arbitral award *Micula v Romania* of 11 December 2013 [2015] OJ L 232/43.

⁴ Cases T-694/15 and T-704/15 (pending).

⁵ Case C-284/16 (pending).

⁶ The District Court of the Southern District of New York recognised the award in a judgment which is under appeal by Romania. In the proceedings before the US Court of Appeals for the Second Circuit, the European Commission has submitted an amicus curiae brief in which it argues that the judgment under appeal was "jurisprudentially imprudent", as it ignored the principle of international comity (see <http://www.italaw.com/sites/default/files/case-documents/italaw7096.pdf> at 18 [Accessed 23 September 2016]).

⁷ See, for instance, Opinion 1/09 EU:C:2011:123 and Opinion 2/13 EU:C:2014:2454.

Articles

Building Intra-Judicial Dialogue: The Relationship between the ECJ and Cypriot National Courts

Constantinos Lycourgos

The intra-judicial dialogue established with national courts through the preliminary reference procedure has always been central to the ECJ's role of securing a uniform interpretation and implementation of EU law within the Union. This article provides an illustration, through the case of Cyprus, of how a new Member State has gradually adapted, both as regards its procedural rules and the practice of its courts, to the particularities of this original system. This national example also allows some general remarks regarding the relationship between the ECJ and national courts and what could be good practices on behalf of national judges.

The Doctor, the Patient and EU Law: The Impact of Free Movement Law on Quality Standards in the Healthcare Sector

Barend van Leeuwen

This article analyses the impact of the free movement provisions on quality of healthcare in the EU. The application of the free movement provisions in the healthcare sector has restricted the freedom of Member States to set their own medical standards. International scientific evidence has to be taken into account. This impact reaches beyond the provision of cross-border healthcare. As a result, patients who are unable to travel abroad also benefit from higher medical standards. Individual challenges to national legislation under the free movement provisions are more successful in improving medical standards than adopting uniform European standards. Without a genuine internal market for healthcare services, European minimum standards do not contribute to improving the quality of healthcare in the EU.

Who is a "Spouse" under the Citizens' Rights Directive? The Prospect of Mutual Recognition of Same-Sex Marriages in the EU

Chloë Bell and Nika Bačić Selanec

*The Supreme Court of the US held in *Obergefell v Hodges* that the Fourteenth Amendment of the US Constitution required every State to legalise same-sex marriage and to recognise same-sex marriages lawfully conducted in other States. This article poses the same question in the European context: if a case concerning same-sex marriage were to present itself, what conclusion could the Court of Justice of the EU reach that was both appropriate and legitimate under EU law and, more specifically, the Citizens' Rights Directive? By contrast to the US Supreme Court, the Court of Justice of the EU does not have the competence to require Member States to legalise same-sex marriage in their national laws. However, this article will argue that the Court of Justice is fully competent to require that all Member States recognize same-sex marriages for the purposes of EU equality and free movement law where that marriage involves an EU citizen and was legally conducted in one of the EU Member States. Mutual recognition of same-sex spouses as "spouses" under the Citizens Rights Directive is crucial, not only to ensure the effective enjoyment by Union citizens of their right to free movement, but also to prevent discrimination on the basis of sexual orientation and to ensure respect for their family life.*

Is there a Future for an Efficiency Defence in EU Merger Control?

Petri Kuoppamäki and Sami Torstila

Since 2004, EU merger control guidelines state the Commission will consider efficiencies as a part of its evaluation. In this article, we show evidence that, despite the guidelines, current EU regulatory practice contains no effective efficiency defence. We investigate empirically all EU merger control decisions from 1991 to 2014, with an emphasis on art.8 decisions since 2004. Parties have raised efficiency arguments only 21 times since 2004 in art.8 decisions. In fact, the Commission appears slightly more likely than the parties to raise efficiency arguments. Efficiency defence cases represent only 3 per cent of all cases, but 31 per cent of art.8 cases. In critical cases, however, efficiency arguments appear to never have been decisive in the Commission's practice. We discuss the reasons for this rarity. The parties may currently feel that raising efficiency issues signals weakness in the rest of their argument. We raise the possibility of requesting mandatory disclosure of a limited set of efficiency arguments in order

to get started on regulatory evaluation of merger efficiencies, and we discuss the advantages and disadvantages of such an approach.

Analysis and Reflections

Outsourcing EU Law While Differentiating European Integration: The Unitary Patent's Identity in the Two "Spanish Rulings" of 5 May 2015

Emanuela Pistoia

The judgments on the actions respectively brought by Spain against EU Regulation 1257/2012 and EU Regulation 1260/2012 give a green light to an unprecedented legislative technique of the EU Institutions, which is labelled here as "empty shell" (taking inspiration from the language of the applicant State in one of the rulings) or "outsourcing EU law". Specifically EU Regulation 1257/2012 is the "empty shell" filled with content taken from domestic legislation and some international agreements. This article focuses on one specific aspect of such an "empty shell": the "outsourcing" of the material rules for determining the scope of the right of an EPUE's proprietor to prevent any third party from committing acts affecting the intellectual property covered by the said EPUE, including the applicable limitations. Furthermore, the two judgments are a follow-up to the previous Court of Justice's ruling on the legality of the Council authorisation to start an enhanced co-operation in the area of unitary patent protection (Joint Cases C-274/11 and C-295/11).

Extended Confiscation of Criminal Assets: Limits and Pitfalls of Minimum Harmonisation in the EU

Michele Simonato

Confiscation laws are the mainstay of policies aimed at depriving criminals of their gain. One of the most debated aspects concerns the extension of the scope of confiscation beyond the direct proceeds of a specific crime for which a person has been convicted. The European scenario on "extended" confiscation, however, is characterised by an apparent disharmony that endangers co-operation between national authorities. In 2014, the EU adopted a Directive with the goal of introducing a common model of extended confiscation in all Member States. This article explores whether the new provisions on extended confiscation are adequate to achieve this objective, and highlights the pitfalls in the implementation of such provisions, particularly as regards respect for fundamental rights. For this purpose, the Directive will be analysed in light of both the case law of the European Court of Human Rights and the concept of minimum harmonisation, revealing inherent limitations.

Of Vexed Questions and Vexatious Litigation: A Comment on Eventech

Francesco de Cecco

The ruling in Eventech concerns the question whether State aid is entailed if a regulatory framework allows certain undertakings (but not others) free access to public infrastructure. Should the answer to this question take account of the regulatory context and purpose or does the commitment to an "objective", "effects-based" definition of State aid eschew these considerations? There is (arguably) a place for regulatory context and regulatory purpose in the interpretation of the scope of art.107(1) TFEU, both with regard to the issue of the use of public resources and with regard to the selective nature of the public measure. As long as this interpretation requires that the regulatory framework governing access to public infrastructure is applied in a consistent and objectively verifiable fashion, this approach does not contradict the objective nature of the definition of State aid. However, Eventech throws scant light on these issues.

In, Out or In-between? The UK as a Contracting Party to the Agreement on the European Economic Area

Dóra Sif Tynes and Elisabeth Lian Haugsdal

The article examines the legal status of the UK as a contracting party to the Agreement on the European Economic Area (EEA Agreement) pre- and post-Brexit. To understand the legal nature of the EEA Agreement it is necessary to consider the historical context in which it was concluded. Furthermore, the institutional set-up of the Agreement, centred on the so-called two-pillar system, sets this Agreement apart from other association agreements concluded by the EU. Thus the decision-making procedures and the provisions related to the application and interpretation of the agreement rely on this two-pillar structure: the EU and EFTA and the

respective institutions. The article then examines the nature of mixed agreements under EU law and how it applies to the EEA Agreement in the light of the division of competence between the EU and its Member States. The authors conclude that it is not de facto possible for the UK to remain a contracting party to the EEA Agreement without adhering to one of the two pillars, as it is the only way to have access to decision-making and to ensure the effective application and enforcement of EEA law.

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