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**The Autonomy of the EU Legal Order  
— Fifty Years After *Van Gend***

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# THE AUTONOMY OF THE EU LEGAL ORDER FIFTY YEARS AFTER VAN GEND

by

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## I. Introduction

These days we celebrate the 50<sup>th</sup> birthday of the judgement in Van Gend & Loos.<sup>1</sup> This case, in some way, shaped the history of European Integration more than any other policy, leader or judgment. While, after the entry into force of the EEC Treaty, governments hesitated to give effect to what was

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<sup>1</sup> ECJ [case 26/62](http://eur-lex.europa.eu/legal-content/EN/JOIN/?uri=CELEX:61963:01:0001-8) – Van Gend & Loos.

agreed upon, the ECJ took seriously the spirit and intentions of this unprecedented constituent text.

If the EEC-Treaty established – in the words of Walter Hallstein – a “Rechtsgemeinschaft”<sup>2</sup>, it means that the basis of this revolutionary construct, where sovereignty is pooled beyond the nation-state, is the law – and that the judiciary is to play a central role in it. Thus, it was for the ECJ to give full effect to the terms and objectives of the constitutional foundations of the European Community – and the Court rightly did so.

The subject of the present contribution is “the autonomy of the EU legal order” as it results from the jurisprudence of the ECJ since *Van Gend*. Admittedly, the Court had not used this term prior to *Costa/ENEL* one year later.<sup>3</sup> But when it talked in *Van Gend* about a “new legal order of international law”, the seed for developments of great impact was already set. And it has extended the application of the principle to defend the European legal order not only against internal challenges from Member States but also from those created by international agreements of the Union.

Discussing autonomy of the European legal order in the light of the jurisprudence of the ECJ is not only of academic interest. At least under three aspects the concept seems to be of great practical relevance today as well.

The first is the accession of the European Union to the European Convention on Human Rights. Would the autonomy of the EU legal order be at risk if the EU was a party to the Convention with the consequence that judgments of the ECJ are subject to review by the European Court of Human Rights?

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<sup>2</sup> See Walter Hallstein, *Die Europäische Gemeinschaft*, 1st ed. (Düsseldorf, Econ-Verlag, 1973) 31 ff.; cf. ECJ Case 294/83 – *Les Verts*, (1986) ECR I-1339, para. 23: ‘The European Economic Community is a Community based on the rule of law’. For further developments: Ingolf Pernice, *Begründung und Konsolidierung der Europäischen Gemeinschaft als Rechtsgemeinschaft*, in: Manfred Zuleeg (ed.), *Der Beitrag Walter Hallsteins zur Zukunft Europas*, Referate zu Ehren von Walter Hallstein, Baden-Baden (Nomos) 2003, S. 56-70, available as [WHI-Paper 9/01](#).

<sup>3</sup> ECJ case 4/64 – *Costa/ENEL*, 1964 ECR (English special ed.), p. 585. Although it is true only for the German and French, but not the English translation, which speaks of an “independent source of law”, the ideas of autonomy and independence carry a similar meaning, at least as regards the relationship between the legal order of the EU and that of its Member States. For this interpretation see Pierre Pescatore, *Van Gend an Loos*, 3 February 1963 – A View from Within, in: Miguel Poiares Maduro and Loic Azulai (eds.), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, 2010, p. 3, 5: ‘...that the autonomy is already strongly emphasised in the ruling of the Court, where it reads ‘community law, independent of Member State legislation’.

The second question is related to the bilateral investment agreements. Bilateral investment agreements among Member States as well as with third countries contain arbitration-clauses under which final awards are given even regarding questions of European law. Is the autonomy of the European legal order at risk if the ECJ has no opportunity to give a ruling on the interpretation or validity of the EU law at stake?

A possible threat to the autonomy of the European legal order are the proceedings pending before the German Federal Constitutional Court (GFCC) on the powers of the European Central Bank to announce an unlimited purchase of sovereign bonds of Member States under certain conditions on the secondary market (OMT-program).<sup>4</sup>

To understand the meaning and the scope of the concept of autonomy as developed by the ECJ since *Van Gend* (infra II.) will allow some deeper reflection on these practical questions of its application (infra III.).

## II. Meaning and Scope of the concept of Autonomy

The concept of autonomy became a cornerstone of the Union legal order; it contributed substantially to the determination of the relationship of EU law with both national and international law. At the same time it was and still is one of the most controversially discussed issues in EU law.

In short, it seems to brake up the traditional divide between national and international law by adding a new category of law. Since *Van Gend* the established case-law of the ECJ states that the EU legal order is distinct from the international legal order – the reference to international law in *Van Gend* has never been used again – and that EU law is distinct from national law, too.<sup>5</sup> It must

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<sup>4</sup> GFCC, case 2 BvR 1390/12; 2 BvR 1421/12; 2 BvR 1438/12; 2 BvR 1439/12; 2 BvR 1440/12; 2 BvR 1824/12; 2 BvE 6/12.

<sup>5</sup> In case 26/62 – *Van Gend & Loos*, the ECJ qualifies Community law as a "new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage...". Already the earlier finding in ECJ Case 13/61 – *Bosch*, 1962 ECR (English special ed.), p. 45, 49, that the municipal law of a Member State and "Community law constitute two separate and distinct legal orders". This clearly excludes that it could be considered to be part of either national law or classical international law, and underlines its special character. For a thorough analysis see: René Barents, *The Autonomy of*

even be given primacy over national law by all institutions exercising public authority within the Union. As such it governs the relationship of Union law to the law of the Member States. The modalities have to be clarified (infra 1.) before the concept of “external” autonomy is explained as developed by the Court with regard to international agreements of the EU (infra 2.).

### ***1. Autonomies of the European and the national legal orders.***

Autonomy and primacy of EU law became intrinsic elements of the concept of European law as law. Its uniform application is more than a mere condition for the functioning of the Union. It is even a condition to guarantee equality before the law, as we find it in Articles 9 TEU and 20 of the Charter on Fundamental Rights.<sup>6</sup> According to the ECJ the principle of equality calls for an autonomous interpretation of EU law.<sup>7</sup> Why should one feel bound, if others in the same situation are not? This equality would not exist without autonomy and primacy of EU law.

Van Gend, thus, has paved the way for EU law as a new kind of legal order, for the direct effect of the standstill-clause for custom duties among Member States in Article 12 of the 1957 EEC Treaty implied that, in a given case, the individual may directly invoke this norm before the national judge which, as a further consequence, may set aside conflicting provisions of national law. All the Member States and their courts are recognising this concept in principle. And the Treaties of Maastricht up to Lisbon are building upon it. It is the “rule of law” that allowed the Union to develop as successfully as it did. The trust in the rule of law instead of the rule of man, unlimited power and force, this trust was and continues to be essential for the success of the European Union.

Nevertheless, national constitutional courts and, in particular, the GFCC are reluctant to fully accept the autonomy-thesis and primacy of Union law. The respect of fundamental rights, the safeguard of the limits of powers conferred to the Union and the protection of the Member States’ constitutional identity

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Community Law, 2004, p. 167 et seq., 169. The principle of autonomy was first named explicitly ECJ case 4/64 – Costa/ENEL, 1964 ECR (English special ed.), p. 585.

<sup>6</sup> See Ingolf Pernice, *Theorie und Praxis des Europäischen Verfassungsverbundes*, in Christian Callies (ed.), *Verfassungswandel im europäischen Staaten- und Verfassungsverbund*. Göttinger Gespräche zum deutschen und europäischen Verfassungsrecht, 2007, S. 61-92; WHI-Paper 8/2008, p. 21.

<sup>7</sup> ECJ case C-204/09 – Flachglas Torgau, para. 37.

are put forward as instances for an ultimate control of the application of EU law at the national level, so challenging the autonomy of the European legal order. They, indeed, refer to the concept of autonomy on grounds of their national law and constitutions, if not of national sovereignty, to oppose the EU legal order's claim of autonomy.<sup>8</sup>

Is it therefore correct to talk about “competing autonomies”, as René Barents does?<sup>9</sup> The question does not remain theoretical. Until recently, national courts were just warning in order to push the ECJ in matters like fundamental rights or to remind the Union of the limits of its powers, but they did not refuse the application of Union law in any case. This gentle period seems to be over since the Czech Constitutional Court, in the Slovak pensions case, held inapplicable a judgement of the ECJ in the Czech Republic.<sup>10</sup> Because of its circumstantial particularities, this incidence might be a mere “historical curiosity”, as a commentator said.<sup>11</sup> But in fact it continually challenges the autonomy and the primacy of Union law, for which some theoretical adventures of the GFCC may have prepared the ground.

The autonomy of the EU legal order, thus, became an issue of practical relevance. What is its future? My proposal is not to accept the concept of “com-

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<sup>8</sup> See the case law of the German Federal Constitutional Court as the pioneer of this approach: [case 2 BvL 52/71](#) of 29.5.1974, BVerfGE 37, 271, 278-285 (Solange I, English translation in 12 CMLRev. (1975), 275, 307), confirmed in case [2 BvR 197/83](#) of 22.10.1986, BVerfGE 73, 339, 375 et seq. Here, the GFCC reversed its “Solange”-doctrine when it found that the ECJ had developed meanwhile sufficient safeguards for the protection of fundamental rights at the European level (ibid., paras. 104-132) the conceptual approach of “Solange I” has not been given up. For cases of general and evident violations of the essential substance of fundamental rights see case [2 BvR 2134](#), 2159, Dec. of 12.10.1993, BVerfGE 89, 155, 174 et seq. – Maastricht, para. 70; case [2 BvL 1/97](#) of 7.6.2000, BVerfGE 102, 147, 162 et seq. – Bananen, para. 56-62; for Union acts *ultra vires* changing the structure of competences of the Union see case [2 BvR 2134](#), 2159, Dec. of 12.10.1993, BVerfGE 89, 155, 188 – Maastricht, para. 106; see also GFCC [case 2 BvR 2661/06](#) of 6.7.2010, BVerfGE 126, 286 – Honeywell, para. 61, restricting this control to cases of evident and sufficiently qualified violations modifying the structure of competences („Kompetenzgefuge“); and for measures affecting the constitutional identity of Germany see case [2 BvE 2/08](#) of 30.6.2009 BVerfGE 123, 267 – Lissabon, paras. 218 et seq., 226, 239-241.

<sup>9</sup> René Barents, *The Autonomy of Community Law*, 2004, p. 18, 176, further development of the argument ibid., p. 268 et seq., 299 et seq.

<sup>10</sup> CCC case [Pl. ÚS 5/12](#), of 31.1.2012 – Slovak Pensions. For comments see: Robert Zbiral, 'Czech Constitutional Court, judgment of 31 January 2012, Pl. ÚS 5/12. – A Legal revolution or negligible episode? Court of Justice decision proclaimed *ultra vires*', 49 CMLRev. (2012), pp. 1475–1491; Jan Komárek, *Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires*; Judgment of 31 January 2012, Pl. ÚS 5/12, *Slovak Pensions XVII*, 8 EuConst (2012), p. 323-337.

<sup>11</sup> Robert Zbiral, *Nuclear War between the Court of Justice and Czech Constitutional Court (hopefully) averted*, in: [Verfassungsblog](#). On matters constitutional, Wednesday 9 Jan 2013, available at: <http://www.verfassungsblog.de/de/czech-constitutional-court-war-averted/#UflfuVOzDhp>.

peting autonomies”. Both legal orders are not independent from each other. Autonomy in the composed legal system<sup>12</sup> should be understood as “embedded autonomy”. It is based upon the co-responsibility of European and national courts for what constitutes “the law” in each particular case.

The following five theses supplemented by some further considerations may explain what this means:

*a. Autonomy and constitutional pluralism*

Autonomy of the EU legal order does not imply hierarchy but rather a pluralist concept of legal orders applicable to the same people.

First of all, the pluralist approach<sup>13</sup> is a matter of realism: From the perspective of each legal order the claim of autonomy seems to be perfectly legitimate for the courts established by them respectively. Consequently, the EU legal order can neither be conceived as being derived from 28 different national legal orders, nor do national constitutions allow to be subject to a supremacy of Union law in a hierarchical sense without any reservation.<sup>14</sup> As both legal orders supplement each other, are legitimised by and applicable to the same people, acknowledgement of some sort of legal pluralism is necessary.<sup>15</sup>

*b. Ensuring legal certainty in a pluralist system*

Legal certainty requires to ensure that if two legal orders co-exist only one legal solution is applicable in concreto to solve cases of conflict.

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<sup>12</sup> For the theoretical background see Ingolf Pernice, Multilevel Constitutionalism in the European Union, *European Law Review* 27 (2002), S. 511-529, WHI-Paper 5/2002; id., Theorie und Praxis des Europäischen Verfassungsverbundes, in: Christian Calliess (Hrsg.), *Verfassungswandel im europäischen Staaten- und Verfassungsverbund*. Göttinger Gespräche zum deutschen und europäischen Verfassungsrecht, 2007, S. 61-92, WHI-Paper 8/2008

<sup>13</sup> For the concept of constitutional pluralism see first: Neil MacCormick, *Beyond the Sovereign State*, 56 *Modern Law Review* (1993), p. 1 et seq.; id., *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, 1999. An insight into the many faces of constitutional pluralism can be found at Matej Avbelj and Jan Komárek, Introduction, in: id. (eds.), *Constitutional Pluralism in the European Union and Beyond*, 2012, p. 1, 4-7. See also Neil Walker, *The Idea of Constitutional Pluralism*, *Modern Law Review* 65 (2002) No. 3, p. 317, 336 et seq. with further reference to other works on legal pluralism.

<sup>14</sup> McCormick, *Questioning Sovereignty* (note 13), p. 104.

<sup>15</sup> Ibid., p. 105. For the reconciliation of constitutionalism and constitutional pluralism see Franz Mayer/ Mattias Wendel, *Multilevel-Constitutionalism and Constitutional Pluralism. Querelle Allemande ou Querelle d'Allemand?* in: Avbelj/ Komárek (note 13) pp. 105.

The rule of law demands for a single legal solution in every individual case. If this cannot be guaranteed, there is no rule of law and therefore no law at all.<sup>16</sup> Any meta-rule assumed to do this, however, would imply a monist approach with some sort of hierarchy, at least for the meta-rule having authority over the conflicting legal orders. It would, thus, exclude the claim of autonomy for each of them. The establishment of a constitutional council having jurisdiction at least on the key question of competences,<sup>17</sup> therefore, would not be a solution, while concepts like contrapunctual law,<sup>18</sup> the principle of best fit<sup>19</sup> or of procedural priority<sup>20</sup> either face a similar criticism<sup>21</sup> or lack an explanation for why an autonomous legal order should engage into such methods. Though these approaches indicate a path for practically ensuring what the rule of law and, thus, legal certainty require, a theoretical framework is needed for providing these methods with a normative basis without abandoning pluralism.

*c. Interdependence and interplay of European and national law*

Any autonomous body exists in an environment, which with it is interacting in order to survive. This is particularly true for the European system of autonomous but closely interrelated legal orders.

The EU legal order is interdependent and interwoven with the national legal orders both, functionally and in substance. The autonomous legal orders do not exist separately from each other. As the Polish Constitutional Court rightly stresses, “the existence of the relative autonomy of both, national and Com-

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<sup>16</sup> The critique of constitutional pluralism by J Baquero Cruz, *The Legacy of the Maastricht-Urteil and the pluralist Movement*, 14 *European Law Journal* (2008), p. 389, 416 et seq., seems to focus on this problem; similarly: P. Eleftheriades, *Pluralism and Integrity* 23 *Ratio Juris* (2010), p. 365, 377 et seq. 387, 388.

<sup>17</sup> J.H.H. Weiler, *The Autonomy of the Community Legal Order – Through the Looking Glass*, 37 *Harvard International Law Journal* (1996)p. 447; id., *The Constitution of Europe*, 1999, p. 322, 353 et seq.

<sup>18</sup> See Miguel Poires Maduro, *Contrapunctual Law: Europe’s Constitutional Pluralism in Action*, in: Neil Walker (ed.), *Sovereignty in Transition*, 2003., p. 501, 523 et seq.; id., *Der Kontrapunkt im Dienste eines europäischen Verfassungpluralismus*, 42 *EuR* (2007) 3, 22 et seq.

<sup>19</sup> Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11 *ELJ* (2005), p. 262, 286 et seq.; see also id., *The Moral Point of Constitutional Pluralism: Defining the domain of legitimate institutional disobedience and conscientious objection*, in: Julie Dickson and Pavlos Eleftheriades, *The Philosophical Foundations of European Union Law* (2012), p. 216-246.

<sup>20</sup> Anne Peters, *Elemente einer Theorie der Verfassung Europas*, Duncker&Humblot, Berlin 2001, p. 215-220, 255, 284-295.

<sup>21</sup> For clarification that the idea of contrapunctual law is non-hierarchical see Miguel Poires Maduro, *Three Claims of Constitutional Pluralism*, in Avbelj and Komárek, *Constitutional Pluralism* (note 13), p. 83.



munity, legal orders in no way signifies an absence of interaction between them.”<sup>22</sup>. The Union could not function without the democratic systems and processes at the national level both, for making European elections meaningful, and for ensuring democratic legitimacy and accountability of the national governments represented in the Council as well as of the members of the ECJ and other institutions. The Union also needs functioning administrations and judicial systems at the national level, based upon the rule of law, for the implementation of Union law generally left to the national authorities.

Consequently, the system is based upon mutual openness and respect, as well as a continuous dialogue regarding the substance of the law and the policies of the Union. Mattias Wendel calls this permeability.<sup>23</sup> That is what the integration clauses of the national constitutions as well as EU Treaties’ provisions provide for.<sup>24</sup> Due to the reference to “the law” in Article 19 (1) TEU and to the general principles of law in Article 6 (3) TEU, legal concepts and fundamental principles of national legal orders are integrated in the EU’s legal order. More generally, the reference to common values in Article 2 TEU, to national identities and cooperation in Article 4 (2) and (3) TEU and also the sanction-mechanism under Article 7 TEU witness that the fundamental principles are binding national and Union law together, not only as facts but with normative value at both levels.

Each legal order in the European Union, thus, is not independent from its respective legal environment. EU law, autonomous as it is, takes account of, and is construed with regard to, national legal concepts and traditions. National law, in turn, is supplemented by EU law and even “europeanised” insofar as legal concepts and institutions migrate from Member States to the Union and back to the national legal orders. In some way we see the “principle of best practices” as a driving force for innovation and also some convergence of the legal orders involved. One example is the principle of proportionality; it seems to have made its way from the German legal system to the EU and, through

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<sup>22</sup> Polish Constitutional Tribunal Judgment of 11 May 2005, K 18/04, principal reasons (EN summary), para. 12.

<sup>23</sup> Mattias Wendel, *Permeabilität im europäischen Verfassungsrecht*, 2011, p. 5 et seq.

<sup>24</sup> For a thorough comparative analysis of the national integration clauses of 27 Member States see *ibid.*, p. 145-370.

Union law back to the national law of the others.<sup>25</sup> Another example are the principles of access to information and transparency: They came from the Scandinavian traditions, found acceptance in European environmental law applied by the European institutions and are progressively applied also in the national legal orders Union-wide.<sup>26</sup>

*d. “Embedded autonomy” and multilevel constitutionalism*

Autonomy of the EU legal order has to be understood as an “embedded autonomy”; this qualification corresponds to an understanding of the EU and each of the national legal orders as forming one composed constitutional system, which is established by the citizens of the Union according to the principles of multilevel constitutionalism.<sup>27</sup>

The American and the Chinese legal orders are autonomous to each other. There is no legal constraint for them to interact. In contrast, the EU and the national legal orders are constituted by, and they affect in each instance, the same individuals, be it as national or as Union citizens: They are made to interact for their citizens’ benefit. The term “responsive legal pluralism”, introduced by Lars Viellechner in the broader context of the global system,<sup>28</sup> may best describe the idea: Each national legal order is embedded in a greater legal environment established by the citizens of the Union, and vice versa. This implies mutual respect for the EU and the national legal orders as required by Article 4 (3) TEU. The regard to be given to the other legal orders respectively is for each legal order an element of its autonomous self-conception as a complementary component in one composed constitutional system.

The Union’s constitutional setting is a compound, embracing and based upon the constitutions of its Member States. The European Treaties add to them a

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<sup>25</sup> See Pache, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung der Gerichte der Europäischen Gemeinschaften*, NVwZ 1999, p. 1033 et seq.; see also Jürgen Schwarze, *Europäisches Verwaltungsrecht, Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, 2nd ed. (Nomos, Baden-Baden 2005), p. 664 et seq., especially as regards the Italian constitutional law, *ibid.*, p. 675 et seq. and the Irish constitutional law *ibid.*, p. 681 et seq.

<sup>26</sup> With an overview: Ingolf Pernice, *Verfassungs- und europarechtliche Aspekte der Transparenz staatlichen Handelns*, in: Alexander Dix/Gregor Franßen/Michael Kloepfer/Peter Schaar/Friedrich Schoch (eds.), *Informationsfreiheit und Informationsrecht. Jahrbuch 2012* (lexxion, Berlin 2013), forthcoming.

<sup>27</sup> See *supra* notes 12 and 15.

<sup>28</sup> Lars Viellechner, *Responsiver Pluralismus. Zur Entwicklung eines transnationalen Kollisionsrechts*, in: 51 *Der Staat* (2012), p. 559.

supplementary level of action by establishing powers to make policies possible for objectives, which are beyond the reach of national sovereignty.<sup>29</sup> Autonomy of the EU legal order in this compound is an important tool to ensure the functioning of the system; this function, in turn, is what qualifies it as “embedded autonomy”. For the application and interpretation of European law always needs to take into account the constitutional context.

*e. Common responsibility of courts and the judicial dialogue*

From the perspective of the citizens European and national institutions bear a common responsibility for the effective functioning of the Union and are bound to avoid constitutional conflicts or settle them through the existing system of judicial dialogue.

If both, national constitutions and the constitution of the European Union are, ultimately, as explained by the underlying concept of multilevel constitutionalism,<sup>30</sup> established by, and a matter of, the citizens, there is no room, in the composed constitution of the EU, for competition among courts claiming autonomy. Instead, Articles 4 (3) TEU and 267 TFEU make clear, that cooperation in the spirit of mutual respect and assistance is required as a normative condition making the system a compound on the basis of “embedded autonomies”: There is no final arbiter, as Barents stresses,<sup>31</sup> but there is a common responsibility vis-à-vis the citizen. Taking the citizens seriously in the EU means taking seriously this specific responsibility for all actors involved.

Issues of fundamental rights, competence and national identity would, therefore, be brought to the ECJ by the national courts to give it the opportunity to take and argue its position, considering carefully the constitutional concerns of

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<sup>29</sup> Ingolf Pernice, *Multilevel Constitutionalism in Action*, 15 *Columbia Law Journal* (2009) 3, p. 349, 374 et seq. WHI-Paper 02/09.

<sup>30</sup> *Supra* notes 12 and 29; for further developments towards a “multilevel constitutionalism *senso lato*” see: Neil Walker, *Multilevel Constitutionalism: Looking Beyond the German Debate*, in *LSE’s Europe in Question’ Discussion Paper Series No. 08/2009*, also in: Kaarlo Tuori and Suivi Sankari (eds.), *The Many Constitutions of Europe* (2010) p. 143. Critical: René Barents, *The Fallacy of European Multilevel Constitutionalism*, in: Matej Avbelj and Jan Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond*, 2012, p. 153; see also: Matthias Jestaedt, *Der Europäische Verfassungsverbund – Verfassungstheoretischer Charme und rechtstheoretische Insuffizienz einer Unschärferelation*, in: Christian Calliess (ed.), *Verfassungswandel im europäischen Staaten- und Verfassungsverbund. Göttinger Gespräche zum deutschen und europäischen Verfassungsrecht*, 2007, p. 93.

<sup>31</sup> Barents, *Autonomy* (note 9) p. 300.

the case as explained by the national court. National authorities and courts may then not be inclined to accept and follow the ruling given by the ECJ, like in the case of the Czech Constitutional Court. It would be for the Commission, at this stage, to consider opening an infringement procedure, if it finds politically worth it to do so. Finally, after intense exchange of arguments, the ECJ might be given another opportunity to take a position etc. If all participants in the dialogue remain aware of their common responsibility for the citizens of the Union, loyal to ensure that the system produces an acceptable final decision in the given case, from the drafting of the legal act up to the point, eventually, of an infringement procedure, only a few cases will arrive at this stage, and there is no reason to fear a real threat to legal certainty within the Union. The remaining risk of a Union act not finding recognition in a Member State is the more negligible the more the institutions in charge become aware of their respective responsibilities.

This risk is far from threatening the autonomy of the EU legal order to a considerable degree. That national courts participate in the task of ensuring that “the law” is observed and, in flagrant instances, may even revolt as last resort, compels the European judges to be careful in considering their concerns. If this is the price for a pluralist system accepting the autonomy of the EU and the national legal orders in a composed constitutional system, where judges struggle for the better law in the interest of the individual, it is not high compared to the problems of acceptance of any hierarchical approach in this new kind of legal compound, which is different from federal – and even more so – from centralised states.

## ***2. Autonomy of the EU Legal Order and International Law***

In Opinion 1/91 – *EEA I* the Court not only stressed the constitutional character of the EEC-Treaty to distinguish it categorically from international law and, thus, reject the internationalist approach, but it also referred to it with a view to defend the autonomy of the EU legal order. It was the special EEA-Court to be created by the EEA-Agreement, the function of which would have been, the Court says, “to rule on the respective competences of the Community and the

Member States as regards the matters governed by the provisions of the agreement“. It argues that this arrangement is not in compliance with the Treaty,

„since it is likely adversely to affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order, respect for which must be assured exclusively by the Court of Justice pursuant to Article 164 of the EEC Treaty“.<sup>32</sup>

Autonomy is employed here for protecting the integrity of the legal system established by the Treaties against intrusion from provisions of international agreements.

As can be seen also from the judgment in the subsequent case C-459/03 – *Mox plant*,<sup>33</sup> the autonomy argument is used in defence primarily of the function of the ECJ against intrusion from courts established under international agreements. After an amendment of the *EEA* Treaty for protecting the exclusive authority of the Court to interpret Community law and for ensuring that the binding nature of its case law is not affected the Court accepted in Opinion 2/91 – *EEA II*, that having included an “essential safeguard indispensable for the autonomy of the Community legal order“ the *EEA*-Agreement was in conformity with the Treaty.<sup>34</sup>

In a more general way the Court was anxious to exclude that provisions and institutional arrangements in an international agreement of the Community with third states ensuring a uniform interpretation of rules of Community law, “affect the autonomy of the Community legal order”, in its Opinion 1/00 – *ECAA*. The Court summarized the conditions to be met as follows:

„the agreement must make it possible to anticipate and prevent any such undermining of the objective enshrined in Article 220 EC that Community law should be interpreted uniformly and of the Court's function of reviewing the legality of the acts of the Community institutions (see, to that effect, Opinion 1/91, paragraphs 41 to 46)...

12 Preservation of the autonomy of the Community legal order requires therefore, first, that the essential character of the powers of the Community and its in-

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<sup>32</sup> Ibid., para. 2.

<sup>33</sup> ECJ [case C-459/03](#) – *Mox plant*, 2006 ECR I-4635 paras. 123-157.

<sup>34</sup> ECJ [Opinion 2/92](#) – *EEA II*, 1992 ECR I-2821, summary.

stitutions as conceived in the Treaty remain unaltered (Opinion 1/91, paragraphs 61 to 65, and 1/92, paragraphs 32 and 41).

13 Second, it requires that the procedures for ensuring uniform interpretation of the rules of the ECAA Agreement and for resolving disputes will not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement (Opinions 1/91 and 1/92)<sup>35</sup>.

None of the provisions of the Agreement on the European Common Aviation Area, however, was found to either affect the Commissions' powers in the field of competition law, or to call into question the „Court's exclusive task of reviewing the legality of acts of the Community institutions, whether the latter are acting under the Treaty or under another international instrument, conferred on it by inter alia Articles 230 EC and 234 EC“<sup>36</sup>. Also regarding the „mechanisms in the proposed agreement for ensuring the uniform interpretation of the rules of the ECAA Agreement and the resolution of disputes“ the Court found that they have no binding effect for the Community and its institutions in a manner to „affect the autonomy of the Community legal order“<sup>37</sup>.

A more recent case where the Court defended the autonomy of the EU legal order against threats resulting from the creation of a new court by international law was Opinion 1/09: Here, the Court declared the draft agreement on the European and Community Patents Court to be incompatible with the Treaties.<sup>38</sup> The Court reiterated the key sections of opinion 1/00, summarising that an international agreement may affect the Court's own powers

“provided that the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the European Union legal order”.

The Court took the view that this condition was not fulfilled by the draft agreement, given that the latter provided an exclusive jurisdiction to interpret and apply European Union law in the field of Community patent law and would, according to the Court,

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<sup>35</sup> ECR [Opinion 1/00](#) – ECAA, 2002 ECR I-3493, para. 11-13.

<sup>36</sup> *Ibid.*, paras. 23-26.

<sup>37</sup> *Ibid.*, paras. 27-46.

<sup>38</sup> ECJ, opinion 1/09 – European and Community Patents Court, paras. 65-89.

“deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law.”<sup>39</sup>

Autonomy, thus, requires institutional or functional devices for protecting “the essential character of the powers of the Community and its institutions“, but it also regards the substance of the EU legal order. This was the subject of the famous joint cases C-402/05 P and C-415/05 P – *Kadi and al Barakaat*, where the Court equates autonomy with the “allocation of powers fixed by the Treaties”.<sup>40</sup> It refers to the binding character of the fundamental rights, which, according to its settled case law, “form an integral part of the general principles of law whose observance the Court ensures“. The conclusion is

„that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty“.<sup>41</sup>

Though obligations under international law are binding for the EU and may even be given precedence over secondary law<sup>42</sup>, the Court makes clear that the autonomy and the constitutional principles of the EU legal system exclude any immunity of acts of the Union giving effect to Resolutions of the UN Security Council from judicial review under EU law order with regard to the constitutional principles of the Union as now laid down in Article 2 TEU, for “such review is a constitutional guarantee forming part of the very foundations of the Community“.<sup>43</sup> The explanation given in paragraphs 316 and 317 of the judgment again refer to the autonomy:

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<sup>39</sup> Ibid., para 89.

<sup>40</sup> ECJ joint cases [C-402/05 P and C-415/05 P](#) – *Kadi*, 2008 ECR I-6351, paras. 282, with reference to its former case law stating “that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system“.

<sup>41</sup> Ibid., paras. 283-285.

<sup>42</sup> See ECJ case C-308/06 – [Intertanco](#), paras. 42-44, 51.

<sup>43</sup> Ibid., para. 290.

„316 ...the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.

317 The question of the Court’s jurisdiction arises in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights.“

While the EU recognises the “primacy” of the relevant Resolution in international law, this does not imply primacy under Union law: It is a “primacy at the level of international law“, a principle regarding the obligations under the Charter of the United Nations.<sup>44</sup> That the EU is bound by Resolutions of the UN Security Council seems to be generally accepted, though the EU is not party to the UN Charter.<sup>45</sup> But the autonomy-claim made by the ECJ not only distinguishes the EU legal order from international law – like it did earlier regarding national law, but also stresses the independent responsibilities of the EU institutions and, in particular of the ECJ, for ensuring the respect of „the law“ as required under Article 19 (1) TEU.

In some way, thus, the autonomy of the EU legal order is also an embedded one with regard to international law; the so far final decision in the Kadi-story, however, leaves the impression that the spirit of cooperation suggested by the Advocate General Bot<sup>46</sup> did not discourage the Court to undertake a thorough review of the procedures applied to the applicant and, finally, to maintain the General Courts’ decision to annul the regulation implementing the decisions of the UN Security Council’s Sanction Committee.<sup>47</sup>

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<sup>44</sup> Ibid., paras. 288, 300.

<sup>45</sup> Article 21 (1) TEU, however, refers among the principles to be respected by the Union to „the principles of the United Nations Charter and international law“; similarly: Article 3 (5) TEU and Declaration no. 13 to the Treaty of Lisbon.

<sup>46</sup> Advocate General Yves Bot in joined cases C-584/10 P, C-593/10 P and C-595/10 P – Commission/Kadi, paras. 44 et seq., 65-110, suggesting “to develop cooperation between the Union and the United Nations in the area in question” (ibid., para. 76).

<sup>47</sup> ECJ, joined cases [C-584/10 P](#), [C-593/10 P](#) and [C-595/10 P](#) – Kadi II, judgment of 18 July 2013, not yet reported.



### III. Practical Issues of Autonomy

The autonomy of the EU's legal order is presently at stake in at least three instances to be discussed hereafter: The accession of the EU to the ECHR (infra 1.), the application of arbitration clauses in bilateral investment treaties (infra 2.) and the case pending before GFCC regarding the OMT-program of the ECB (infra 3.).

#### *1. Accession of the EU to the ECHR*

Article 6 (2) TEU provides for the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The draft agreement on the accession was finalized on 5 April 2013, an opinion of the ECJ on it is announced.<sup>48</sup> To be a contracting party to the Convention means for the EU that upon complaint by an individual or a state party to the Convention the European Court of Human Rights (ECtHR) would have the power to review the compatibility of any legal act of the Union with the human rights guaranteed in the Convention (Article 34 ECHR). Given the jurisprudence of the ECJ regarding the autonomy of the EU legal order vis-à-vis international Treaties<sup>49</sup> the question is whether this amounts to be a challenge to the autonomy of the EU legal order.<sup>50</sup> Though the obligation to accede the ECHR in Article 6 (2) TEU could be understood to modify the principle of autonomy insofar as the autonomy is limited and may not be put forward against judgments of the ECtHR at all, Article 2 of Protocol no. 8 to the Lisbon Treaty stating that the accession agreement "shall not affect the competences of the Union or the powers of its institutions" seems to preserve the current status of the EU and its law to the greatest possible extent.

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<sup>48</sup> See Council of Europe, Milestone reached in negotiations on accession of EU to the European Convention on Human Rights, Press release – [DC041\(2013\)](#).

<sup>49</sup> See supra II.2.

<sup>50</sup> For an analysis see Lock, Walking on a Tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order, CML Rev. 2011, 1025–1054. Sceptic also: also Noreen O'Meara, A More Secure Europe of rights? The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR, 12 German Law Journal (2011), p. 1813, 1827.

This provision can indeed be understood as a “reference to the preservation of the autonomy of EU law.”<sup>51</sup>

According to the jurisprudence of the ECJ referred to above, in general, agreements are not acceptable if they are “likely adversely to affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order, respect for which must be assured exclusively by the Court of Justice pursuant to Article 164 of the EEC Treaty (sc. Article 19 (1) TEU”.<sup>52</sup> Provision must therefore be made for ensuring that the objective enshrined in Article 19 TEU (Community law is to be interpreted uniformly), that the Court’s function of reviewing the legality of the acts of the Community institutions is not questioned and that the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered.<sup>53</sup> In particular, Procedures for ensuring uniform interpretation of the rules of an international agreement and for resolving disputes shall not have the effect of binding the Union and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Union law referred to in that agreement.<sup>54</sup>

An international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 19 (1) TEU. That exclusive jurisdiction of the Court is confirmed by Article 344 TFEU and applies to agreements concluded within the competences of the Union.<sup>55</sup>

The powers of a court established by an international treaty to which the EU is a contracting party may not in any way restrict the powers of national courts and the ECJ to determine, in a dialogue under Article 267 TFEU the interpretation and application of provisions of European law.<sup>56</sup>

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<sup>51</sup> Lock (note 50), p. 1033. This understanding can be based upon ECJ joint [cases C-402/05 P and C-415/05 P](#) – Kadi, 2008 ECR I-6351, paras. 282, with reference to its former case law, stating “that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system”.

<sup>52</sup> ECJ [opinion 1/91](#) – EEA, 1991 ECR I-6079, summary para. 2.

<sup>53</sup> ECJ [opinion 1/91](#) – EEA, 1991 ECR I-6079, paras 41-46; ECR [Opinion 1/00](#) – ECAA, 2002 ECR I-3493, para. 11-12.

<sup>54</sup> ECR [Opinion 1/00](#) – ECAA, 2002 ECR I-3493, para. 13.

<sup>55</sup> ECR, case [C-459/03](#) – MOX-Plant, 2006 ECR I-4635, paras. 123 et seq.

<sup>56</sup> ECJ, [opinion 1/09](#) – European and Community Patents Court, paras. 65-89.

International law may not affect the jurisdiction the Court has to review the validity of Community measures in the light of fundamental rights.<sup>57</sup>

The mere fact that the EU will be bound, as a contracting party, to the human rights guaranteed in the ECHR is not in conflict with any of these principles. Nor can the power of the ECtHR to review measures taken by the European Union and to judge upon their compliance with these human rights be understood as undermining the powers of the institutions of the Union. Article 6 (3) TEU clearly states that the fundamental rights as guaranteed by the ECHR constitute general principles of the Union's law, thus, they are binding upon the institutions in any event. This is confirmed by Articles 52 (3) and 53 of the Charter of Fundamental Rights (ChFR) regarding the interpretation and the level of protection provided by the ECHR.

Even if fundamental rights are understood as “negative norms of competence”, so limiting or even denying powers the institutions are generally conferred to, with regard to the sphere of individual rights and freedoms,<sup>58</sup> the accession to the Convention by the European Union would not add any new restrictions or limits to those imposed to the institutions already by the Treaties and the Charter. It remains within the power of the ECJ to ensure that the allocation of powers set out in the Treaties is respected and that European law is applied uniformly throughout the Union. Its exclusive task to decide on the validity of European law is not affected, as are its prerogatives and the national courts powers under Article 267 TFEU. Indeed, as can be seen from the wording of Article 46 ECHR, the ECtHR will have no right to declare EU-law invalid.<sup>59</sup>

The ECHR, like any other international agreement within the competences of the Union to which the EU is a contracting party, are binding upon the EU and its Member States (Article 216 (2) TFEU) and its provisions become an inte-

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<sup>57</sup> ECJ joint [cases C-402/05 P and C-415/05 P](#) – Kadi, 2008 ECR I-6351, paras. 283-285, 316 and 317. See also ECR [Opinion 1/00](#) – ECAA, 2002 ECR I-3493, paras. 23-26.

<sup>58</sup> For the construction of fundamental rights as *negative Kompetenznormen*, see Konrad Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20th ed. (CF Müller, Heidelberg 1999) 128; see also Franz Mayer, Die drei Dimensionen der Europäischen Kompetenzdebatte, 61 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 577, 583-84 (2001) (with more references); Ingolf Pernice, Europäische Grundrechte-Charta und Abgrenzung der Kompetenzen, 12 Europäische Zeitschrift für Wirtschaftsrecht 673 (2001).

<sup>59</sup> See also Lock (note 50), p. 1036 .

gral part of European law.<sup>60</sup> It would be the prerogative, thus, of the ECJ to give it the appropriate interpretation and application in any case of dispute among parties within the EU. This exclusive jurisdiction is confirmed as regards Member States by Article 344 TFEU, as the ECJ stated in case 259/03, MOX plant.<sup>61</sup> According to this provision Member States undertake not to submit a dispute concerning the interpretation and application of the Treaties to any method of settlement other than those provided for therein. As the jurisdiction of the ECtHR, however, is subsidiary and any other domestic remedy must be exhausted before an application is admissible (Article 35 ECHR), the autonomy of the EU legal order is not in question. Even for inter-state cases between EU Member States the principles established by the judgment in MOX plant should apply to the effect that the ECJ has jurisdiction as a “domestic” court before the case may be referred to the ECHR. Its competence does not affect that of the ECJ, it must be regarded as a supplementary instrument, as Article 6 (2) TEU suggests, for the protection of human rights in Europe. The same is true in case if the ruling of MOX plant was applied similarly to individual applications to the ECtHR.

A question seems to arise, however, regarding the binding nature of rulings of the ECtHR under Article 46 ECHR with regard to provisions of the Convention similar to those guaranteed by Union law. What the jurisprudence of the ECJ seems to expressly exclude (*supra*, lit. a.), appears to be in contradiction to this fundamental provision of the ECHR. The solution, however, can be found in Article 52 (3) ChFR and in Article 6 (2) TEU. The former provides for the binding effect of the meaning, in such cases, of the rights under the ECHR. The latter – in conjunction with Article 216 (2) TFEU – exactly aims at giving the ECHR and, with it, the judgements of the ECtHR the binding effect necessary to make the accession to the Convention meaningful. The practice of “parallel interpretation” envisaged in the Joint Communication of Justices Costa and Skouris of 17 January 2011<sup>62</sup> may be an instrument to ensure the coherence needed.<sup>63</sup> Furthermore, the co-respondent mechanism will be an important tool

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<sup>60</sup> ECJ, case [181/73](#) – Haegeman, 1973 ECR 449, para. 5.

<sup>61</sup> ECR, case [C-459/03](#) – MOX-Plant, 2006 ECR I-4635, paras. 123 et seq.

<sup>62</sup> Joint Communication of Justices Costa and Skouris, 17 January 2011, available at: [http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh\\_cjue\\_english.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf).

<sup>63</sup> See also O’Meara (note 50), 1819.

for ensuring coherence,<sup>64</sup> as well as the prior involvement procedure, giving the ECJ an opportunity to assess the compatibility with the human rights at issue of the provision of EU law at stake (Article 3 (6) of the Draft Accession Agreement).<sup>65</sup>

Another issue could be seen in the fact that the ECtHR must necessarily understand the legal act of the EU under review, and therefore give it an interpretation, for assessing its compliance with the human rights of the Convention. Whatever this interpretation may be, however, it is not binding for the European institutions. Only the judgment of the ECtHR and the interpretation of the relevant human right under the Convention are binding under Article 46 ECHR. Where the Court states a violation of a human right by a legal act of the EU, the obligation of the EU would be limited to remedy this violation by, either, abolishing this act or by giving it an interpretation which is in compliance with the human right in question.

## ***2. Arbitration Clauses in Bilateral Investment Agreements***

In recent times, investor-state arbitration clauses in so-called bilateral investment treaties of the Member States with other Member states (so-called intra-EU BITs)<sup>66</sup> and between Member States and third countries (third-country BITs)<sup>67</sup> are broadly discussed in terms of their compatibility with EU law. In

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<sup>64</sup> The wording of the co-respondent mechanism (Article 6 (2) and (3) of the draft accession agreement) has been framed in a rather abstract way (“calls into question the compatibility ...”) and combined with a test of plausibility according to which the ECtHR limits itself to assessing whether it is plausible that the conditions in Article 6 (2) or (3) are met (Article 6 (5) of the draft accession agreement). This arrangement is to prevent that the ECtHR can decide implicitly on the internal distribution of competencies between the EU and its Member States and thus interferes with the autonomy of the EU’s legal order.

<sup>65</sup> Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, Annex 1 to the Final Report to the CDDH, 5 April 2013, available at: [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting\\_reports/47\\_1%282013%29008rev2\\_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf).

<sup>66</sup> For a the discussion see: Claus Dieter Classen, *Der EuGH und die Schiedsgerichtsbarkeit in Investitionsschutzabkommen*, *Europarecht* (2012) 611; Steffen Hindelang, *Circumventing Primacy of EU Law and the CJEU’s Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration*, 39 *Legal Issues of Economic Integration* (2012) 179 et seq.; focussing more the intra-EU-BIT’s: *Konstanze v. Papp*, *Clash of “autonomous legal orders”: Can EU Member State courts bridge the jurisdictional divide between investment tribunals and the ECJ? A plea for direct referral from investment tribunals to the ECJ*, 2013 *Common Market Law Review*, 1039-1081, with some references also to new EU-agreements *ibid.*, para. 9, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2267045](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2267045).

<sup>67</sup> Steffen Hindelang, *Member State BITs - There's Still (Some) Life in the Old Dog Yet - Incompatibility of Existing Member State BITs with EU Law and Possible Remedies*, in: Karl P. Sauvant (ed.), *Yearbook on International Investment Law & Policy 2010-2011* (Oxford University Press, 2011) 217 et seq., 238.

particular it is questioned whether they are reconcilable with the prerogatives of the ECJ and, thus, the autonomy of the European legal order. In a recent staff working paper the Commission summarizes the concerns as follows:

“Such agreements clearly lead to discrimination between EU investors and are incompatible with EU law. In particular, most Intra-EU BITs provide for the possibility of investor-to-State arbitration procedures of a binding character, which is not subject to review by the CJEU on issues of interpretation of EU law. This form of international arbitration is incompatible with the exclusive competence of EU courts to rule on the rights and obligations of Member States under EU law. In contrast to national courts, arbitral tribunals are not bound to respect the primacy of EU law and, in case of doubt, are neither required nor in a position to refer questions to the CJEU for a preliminary ruling. In any case, such investor-to-State arbitration is very costly and thus not easily accessible to SMEs”.<sup>68</sup>

The conditions and limits posed specifically to the EU with a view to the concept of autonomy of EU law, to subjecting itself to the current model of investor-State arbitration in comprehensive free trade agreements currently negotiated with the USA<sup>69</sup>, Canada, Singapore, and India,<sup>70</sup> however, have received little attention so far.<sup>71</sup> Like in the existing agreements between Member States or of Member States with third countries questions on the treatment of investors, such as regarding the application of European state aid law, by national authorities may arise and be decided under the applicable dispute resolution rules by arbitration tribunals giving awards to be enforced worldwide, without the ECJ having an opportunity to give a ruling on the interpretation of the EU law at stake. The very purpose of these arbitration procedures established by international agreements is exactly to detract disputes from the normal jurisdic-

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<sup>68</sup> Commission Staff Working Document on the free movement of capital in the EU, SWD (2013) 146) final, p. 11, at: [http://ec.europa.eu/internal\\_market/capital/docs/reports/130415\\_market-monitoring-working-document\\_en.pdf](http://ec.europa.eu/internal_market/capital/docs/reports/130415_market-monitoring-working-document_en.pdf).

<sup>69</sup> First published documents: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=943>.

<sup>70</sup> The purported text of the negotiating directives has been made public by a NGO, cf. Seattle to Brussels Network, Text of the Mandates, available at <http://www.s2bnetwork.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html>, last visited 30.7.2013

<sup>71</sup> See however Steffen Hindelang, Der primärrechtliche Rahmen einer EU-Investitionsschutzpolitik: Zulässigkeit und Grenzen von Investor-Staat-Schiedsverfahren aufgrund künftiger EU Abkommen, in: Marc Bungenberg / Christoph Herrmann (eds.), Die Gemeinsame Handelspolitik der Europäischen Union „nach Lissabon“ (Nomos Baden-Baden, 2011) p. 157 et seq, also available as WHI Paper 01/11, [http://www.whi-berlin.eu/tl\\_files/documents/whi-paper0111.pdf](http://www.whi-berlin.eu/tl_files/documents/whi-paper0111.pdf); idem, The Autonomy of the European Legal Order – EU Constitutional Limits to Investor-State Arbitration on the Basis of Future EU Investment-related Agreements, in: Marc Bungenberg und Christoph Herrmann (eds.), Common Commercial Policy after Lisbon, Special Issue to the European Yearbook of International Economic Law, Springer, Heidelberg 2013) p. 187 et seq.

tion of the contracting parties, for national courts are suspected to be biased and not to provide for foreign investors impartial legal protection. In the case of the EU or its Member States such disputes may include, however, the application and interpretation of Union law.<sup>72</sup> If arbitration tribunals do not avoid or forget dealing with them at all, there is a risk that they give provisions of Union law a final and binding interpretation, which is contrary to the jurisprudence of the ECJ. In any case, the ECJ is excluded from exercising the function normally reserved to it under the Treaties. At least indirectly, this would encroach upon the prerogatives of the ECJ as spelled out in the Courts Opinion 1/91 on the EEA, reminding that:

„Under Article 87 of the ECSC Treaty and Article 219 of the EEC Treaty (sc.: Article 344 TFEU), the Member States have undertaken not to submit a dispute concerning the interpretation or application of the treaties to any method of settlement other than those provided for in therein“.<sup>73</sup>

There are reasons to assume that this is to protect the ECJ and, with it, to ensure the uniform application of Union law. The ruling therefore applies to the EU as well as to arrangements among Member States and those with third countries.

While there may be no *formal or explicit* legal mechanisms in investor-State arbitration clauses the agreements referred to with the effect to oblige the ECJ to align its interpretation of EU law to that of a court or tribunal established on the basis of such EU agreement, problems regarding the autonomy of the EU legal order due to the jurisdiction of investor-State arbitral tribunals might arise even under the EU free trade and investment agreements to come. An example given by Steffen Hindelang seems to be telling: Assume that an investment tribunal established on the basis of an EU investment-related agreement rules that the recovery of a State aid granted by a Member State (for the action of which the EU would be accountable vis-à-vis the country where the investor is

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<sup>72</sup> There are good reasons to assume therefore, that intra-EU investment agreements are unacceptable and, in the light of Article 344 TFEU also violating EU law. This is what v. Papp (note 66), para. 6.1, seems to argue. Contrary to what she seems to suggest, the mere fact that in a concrete case the dispute is carried out between a private investor and a state does not exclude the application of Article 344 TFEU, since it would be the agreement between Member States which substitute normal courts including the ECJ by arbitration.

<sup>73</sup> ECJ [opinion 1/91](#) – EEA, 1991 ECR I-6079, summary para. 2, sentence 4.

from<sup>74</sup>) violated material standards contained in the aforesaid agreement and therefore awarded the investor damages to the amount of the state aid or even higher. If that very same state aid, however, was declared contrary to EU law and – the ECJ striking a different balance between legality and legitimate expectations of an investor<sup>75</sup> – the Member State was compelled to recover it from the investor, the question is which law prevails. If the EU were to comply with the award it would place the investor in the same position as before the recovery of the state aid. This would be contrary to the provisions of Articles 107 and 108 TFEU. Compliance with the award of the investment tribunal, thus, would amount to a selective non-application of EU State aid law with the consequence that competition on the EU Internal Market could severely be distorted.<sup>76</sup> As it is difficult to accept that these are “exceptional circumstances” justifying a derogation to be given by the Council under Article 108 (2) subpara. 3 TFEU, namely with a view to said distortions, not only the prerogatives of the ECJ but also the uniform application of substantive Union law and, thus, the autonomy of the EU legal order seems to be at stake. While no legal mechanism binding the ECJ to the interpretation of a court or tribunal established by an international agreement on a factual level may be established, the EU might, finally, have no choice other than to adapt its interpretation of EU law to the ruling of the aforesaid court or tribunal if it does not want to face several more investment arbitrations and a “patchwork rug” of factual disapplication of EU State aid law.<sup>77</sup>

The situation in such circumstances seems to be somewhat more complicated than discussed by Classen, who concludes on the compatibility of arbitrations clauses in investment agreements for their very concept is to find a fair alterna-

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<sup>74</sup> Member States are not party to this agreement. The act of the Member State would be attributable to the EU. Cf. on the question of attribution Hoffmeister, *Litigating against the European Union and Its Member States – Who Responds under the ILC’s Draft Articles on International Responsibility of International Organisations?*, EJIL 21 (2010), p. 723; Paasivirta/Kuijper, *Does one Size fit all?: The European Community and the Responsibility of International Organisations*, NYIL XXXVI (2005), p. 169

<sup>75</sup> See e.g. ECJ, case C-24/95, *Alcan*, (1997) ECR, I-1591, especially guiding principle 2.

<sup>76</sup> This could even prompt attempts to make sure that State aid to be granted by Member States, but which for whatever reason cannot be paid out due to EU law restrictions, could be implemented via the back-door of investment arbitration.

<sup>77</sup> See Hindelang, *Autonomy* (note 71), p. 187 et seq.



tive to – and therefore exception from – the prerogatives of national jurisdictions of states party to such agreements for a legitimate purpose.<sup>78</sup>

Not only the function of the ECJ is in question, but also the coherence and uniformity of the application of Union law. To include into investment agreements of the EU an obligation of the arbitration tribunal in charge to refer questions of Union law to the ECJ under Article 267 TFEU would not only require a broad interpretation of the term “court or tribunal of a Member State” in this provision,<sup>79</sup> but also be difficult to reconcile with the very concept and purpose of such arbitration clauses.<sup>80</sup> With a view to the principle of autonomy of the EU legal order, however, such clauses and an opening of the EU law regarding Article 267 TFEU seem to be a condition for compliance of investment agreements with the Treaties.

### ***3. The ECB-Program on OMT and the German Federal Constitutional Court***

Fifty years after Van Gend one of the greatest threats to the autonomy of the European legal order might still be pending in Karlsruhe:<sup>81</sup> Scrutinizing the ECB’s announcement of potentially unlimited future Outright Monetary Transactions (OMT) at the secondary market could well represent a violation of the autonomy of the EU legal order and the duties of Germany under Article 4 (3) TEU. To be sure: A formal decision has been taken by the ECB only on some technical features of the program,<sup>82</sup> but no purchase has been effectuated so far; so the first question would be that of the very subject of the application. As it is directed against a simple announcement, the application should be dis-

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<sup>78</sup> Claassen (note 66), p. 622-628.

<sup>79</sup> Such interpretation does not seem excluded, as the tribunal is established by states or the EU and may be constructed so that the jurisdiction is permanent and compulsory, established by law and independent, deciding according to law, with a procedure inter partes and that the awards are enforceable and states might be called to intervene. For the conditions to be met see ECJ, case [102/81](#) 1982 ECR 1095 – Nordsee, paras. 10-12, case [109/88](#), 1989 ECR 3199 - Danfoss, paras. 7-9; case [C-126/97](#), 1999 ECR I-3055 - Eco Swiss para. 34; case [C-125/04](#), 2005 ECR I-923, paras. 13, 16; case 196/09, 2011 ECR I-5105 – Miles, para. 42 (complaints board of European Schools established by the Member States by an international agreement:). For the discussion, with an open view see v. Papp (note 66), para. 8.1.

<sup>80</sup> See also Classen (note 66), p. 622; the point is also recognized by v. Papp (note 66), para. 9.

<sup>81</sup> For the background see Helmut Siekmann/ Volker Wieland, The European Central Banks' Outright Monetary Transactions and the Federal Constitutional Court of Germany, Institute for Monetary and Financial Stability, Goethe-University Frankfurt, Paper Series No. 71 (2013), available at: [http://safe-frankfurt.de/uploads/media/Siekmann\\_Wieland\\_The\\_ECBs\\_OMT\\_and\\_the\\_FCC\\_of\\_Germany.pdf](http://safe-frankfurt.de/uploads/media/Siekmann_Wieland_The_ECBs_OMT_and_the_FCC_of_Germany.pdf).

<sup>82</sup> ECB Press release 6 September 2012 - Technical features of Outright Monetary Transactions, available at: [http://www.ecb.int/press/pr/date/2012/html/pr120906\\_1.en.html](http://www.ecb.int/press/pr/date/2012/html/pr120906_1.en.html).

missed from the outset and the case closed. The function of the announcement, furthermore, was to stop speculation of the markets against any limit set to the any purchase of bonds by the ECB. This has worked, and its imminent logic is that because of this effect the Program will not need to be implemented at all. Would the GFCC rise serious doubts about its legality, this would not only infringe the autonomy of the EU legal order but also compromise its “*effet utile*”: the markets would return to the crisis mode of the period preceding the announcement.

The Court has many good reasons to respect the division and the limits of the respective powers of the European and national courts under the Treaty, including the principle of loyal co-operation laid down in Article 4 (3) TEU. Should it consider questioning the power of the ECB to do what it has announced, it would have to open the judicial dialogue by referring the case to the ECJ under Article 267 TEU first. Its doubts and reasons would be considered within the framework of this procedure by the institutions, by the national governments submitting their views to the ECJ, be discussed at a Courts’ hearing, be considered by an Advocate General and, finally, have to be assessed by the Court, probably sitting as a plenary. It would require much effort, in reaction to the outcome of such a process, to argue contrary to what the judgment of the ECJ suggests.<sup>83</sup>

What is more likely, and how the public hearing at the court was perceived by some observers,<sup>84</sup> is that the GFCC finally declares the application inadmissible or, in avoiding a reference to the ECJ limits itself to providing guidance to the German Federal Bank as well as other authorities involved in the processes of decision-making of the ECB in a given case where a decision under the OMT-Program may be considered, with a view to preserving the stability of the Euro and the budgetary prerogatives of the German parliament.

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<sup>83</sup> The ECJ could particularly argue that indirect purchases of bonds are compatible with Article 123 TFEU under the double condition that EU Member States are incited to pursue a sound fiscal policy and that price stability is not jeopardized, see Daniel Thym/ Mattias Wendel, *Préserver le respect du droit dans la crise*, Cahiers de droit européen (CDE) 2012, p. 733, 748 et seq.

<sup>84</sup> See e.g. Max Steinbeis’ comments to the hearing, *Die EZB vor dem Verfassungsgericht*, Teil I, in *Verfassungsblog on matters constitutional*, 11 June 2013, at: <http://www.verfassungsblog.de/de/die-ezb-vor-dem-bundesverfassungsgericht-teil-1/#.Ufk9SFOzDhp>, and, in particular, idem, *Teil II*, available at <http://www.verfassungsblog.de/de/die-ezb-vor-dem-bundesverfassungsgericht-teil-2/#.Ufk4LFOzDhp>.

#### IV. Conclusions

Internal and external autonomy of the European legal order, fifty years after Van Gend, cannot be understood as absolute as it may have been conceptualised in the earlier jurisprudence of the ECJ. Challenges both, from the Member States' constitutions and constitutional courts and from international law must be taken into account. As the EU is consisting of constitutional states and embedded in an increasingly interdependent global system, the autonomy of its legal order must be understood as "embedded autonomy" too. It must be open and accommodate, in order to be sustainable, to normative claims and limitations originating from national constitutions as well as from internationally recognised principles, in a spirit of cooperation and without, however, giving up the fundamental values referred to in Article 2 TEU and its special constitutional setting which it is bound to defend internally as much as in its external relations.