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Essays in Honour of Prof Dr Kaj Hobér
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A. Introduction

In 2012 an article entitled “Navigating EU Law and the Law of International Arbitration” was published by Professor George Bermann, in which he made a number of observations regarding the intersections between EU law and the law of international arbitration.\(^1\) He noted that both EU law and the law of international arbitration were legal regimes that had thrived based on their own fundamental principles and that they had for a long time co-existed as separate and distinct. However, in the fields of both commercial and investment treaty arbitration he observed that, what he called “something of an age of innocence”, was over. Consequently, the two regimes find themselves increasingly in greater contact and therefore also at greater risk of tension or even conflict.\(^2\) Professor Bermann argued that such conflict requires “careful and considered navigation” and that identified conflicts in


\(^2\) Ibid.
the intersection between EU law and international commercial arbitration could be resolved by “accommodation strategies”\textsuperscript{3}.

These issues remain highly topical and recent events actualise again the potential tension between the two regimes. In the wake of a recent seminar at which these issues were debated, Professor Kaj Hobér encouraged me to continue publishing in the field.\textsuperscript{4} As a result of his kind encouragement, the purpose of my contribution to his \textit{liber amicorum} is to revisit a specific intersection between EU law and the law of international commercial arbitration in light of developments both in Sweden and at the EU level. The Swedish Supreme Court rendered a ruling in 2015 in the so called \textit{Systembolaget} case\textsuperscript{5} that raises central questions how Member State courts act in the context of an intersection between commercial arbitration and EU law when dealing with a challenge to an arbitral award. I will analyse this case from the perspective of the accommodation strategies identified by Professor Bermann. However, subsequent case law from the Court of Justice of the European Union (CJEU) may also impact on the assessment of the accommodation strategies and more broadly on the duties of national courts under EU law in such situations.

This contribution focuses on and analyses one specific intersection, namely a review of EU law as \textit{ordre public} in the context of international commercial arbitration. In order to do this review, the background of \textit{ordre public} in this context and issues that arise in practice for domestic courts will first be outlined. Thereafter, the background to the accommodation strategies identified by Professor Bermann and the debate surrounding them will be outlined before a presentation of the \textit{Systembolaget} case. An analysis of what we can learn from the case taking a Swedish perspective will follow. Finally, the broader EU law perspective will be discussed as follows. First, whether recent case law on the duties of national courts to make references for a preliminary ruling by the CJEU affects the accommodation strategies. Secondly, whether the principle of mutual trust may have any impact on the analysis. As already noted the context of the analysis is commercial arbitration. This contribution will refrain from dealing with the intersections between EU law and arbitration in the investment treaty field. However, to the extent that case law from CJEU regarding investment treaty arbitration

\textsuperscript{3} Ibid 397–398.

\textsuperscript{4} I have previously dealt with one aspect of the intersections in ‘Gazprom OAO v Lietuvos Republika: A Victory for Arbitration?’ (2016) 41 (4) \textit{European Law Review} 578.

\textsuperscript{5} Case T 5767-13 \textit{Systembolaget Aktiebolag v The Absolut Company Aktiebolag}, reported in NJA 2015 s 438.
may also have an impact on commercial arbitration and in particular for the issues at hand they will naturally be taken into account.

B. EU Ordre public and Commercial Arbitration

1. Setting the Scene

(a) The Starting Point: Eco Swiss

The first case from the CJEU that raised the issue of ordre public under EU law in the context of international commercial arbitration was the Eco Swiss case.⁶ Although the basic facts of the case are by now well-known, it is important to recount also the particular details for the analysis in this contribution. The case concerned a licensing agreement for the right of Eco Swiss and Bulova to manufacture and sale of watches. The license agreement included a clause that amounted to an exclusive selling arrangement, whereby Eco Swiss was entitled to sell the watches in all EU Member States except Italy, and Bulova was only entitled to sell the watches in Italy. When the licensor, Benetton, terminated the license agreement, the licensees initiated arbitration in the Netherlands under the arbitration clause in the license agreement and were successful in pleading breach of contract. Subsequently Benetton applied to have the relevant partial arbitration award annulled in the Dutch courts. On appeal the Dutch Supreme Court, Hoge Raad, made a reference for a preliminary ruling to the CJEU.

In its questions to the CJEU the Dutch Supreme Court referred to the Van Schijndel case that concerns the requirements that EU law sets for domestic

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procedural law when substantive EU-law rights are at stake in court actions before the domestic courts of the Member States. Since 1976 the CJEU has held that domestic procedural rules for EU related cases may not be less favourable than those governing similar domestic actions (the principle of equivalence). In addition, the domestic procedural rules cannot render it virtually impossible or excessively difficult to exercise the substantive rights conferred by EU law (the principle of effectiveness). The Van Schijndel case concerned amongst other provisions in the Netherlands Code of Civil Procedure providing that even though courts can raise points of law of their own motion if necessary, courts cannot go beyond the ambit of the dispute defined by the parties or rely on facts or circumstances other than those on which the parties rely. The CJEU held that in cases concerning civil rights and obligations that parties could freely enter into, the national court was obliged to raise EU points of law, including EU competition law, when domestic law allows it to do so in the absence of the party having relied upon the relevant point of law. However, EU law does not require national courts to go beyond a passive role assigned to them under domestic law that prohibits the courts from going beyond the ambit of dispute as defined by the parties.

(b) The Ruling on Ordre Public

In Eco Swiss the CJEU first dealt with the issue of ordre public and EU competition law and started off by noting that where questions of EU law are raised in an arbitration, the ordinary courts of the Member States may have to examine these issues in the context of reviewing the arbitral award either in setting aside or enforcement proceedings. The CJEU did not at this point address the review itself, merely noting that the review may be more or less extensive. However, later on the CJEU acknowledged that it is in the interest of efficient arbitration proceedings that the review of arbitration awards

9 Van Schijndel (n 7) 11.
10 Van Schijndel (n 7) 15 and 20-22. For an analysis of the importance of the case in this context see Torbjörn Andersson, ‘Svensk skiljedomsrätt och EG:s konkurrensrätt – reflektioner i anledning av EG-domstolens avgörande i Eco Swiss målet’ (1999/2000) Juridisk Tidskrift 444-446.
11 Eco Swiss (n 6) 32.
should be limited in scope such that annulment or refusal of enforcement of an award should be possible only in exceptional circumstances.\textsuperscript{12}

Thereafter, the CJEU noted that the national courts should nevertheless be able to ascertain in such setting aside or enforcement proceedings whether or not it is necessary to make a reference for a preliminary ruling under Article 234 TFEU in order to obtain an interpretation of relevant the provisions of EU law.\textsuperscript{13} Further, the CJEU confirmed based on its prior case law that commercial arbitral tribunals cannot make references for preliminary rulings to the CJEU.\textsuperscript{14} Thus, the guarantee of review of EU law and its observance has been called “back-loaded” in the commercial arbitration context.\textsuperscript{15}

The CJEU then turned to the issue of ordre public and held that Article 101 TFEU constitutes a fundamental provision of EU law and that it is essential for the tasks entrusted to the EU, in particular for the functioning of the internal market. In addition, any agreements in breach of the provision are under EU law automatically null and void. Therefore, the CJEU found that a breach of Article 101 TFEU may be regarded as a matter of ordre public under the New York Convention. In addition, when domestic rules of procedure require national courts to grant annulment of an arbitral award based on domestic ordre public, the national court must also grant annulment if it finds that the arbitral award breaches Article 101 TFEU.\textsuperscript{16}

Finally, the CJEU ended its analysis of the ordre public question by further emphasizing that because of the fact that commercial arbitration tribunals are not able to make references for preliminary ruling and because it is manifestly important that EU law be interpreted uniformly, EU law requires, in circumstances like the ones at hand, that the domestic courts can review the application of EU competition law when examining an arbitral award. In addition, EU law requires that national courts in this context are able to refer a question for preliminary ruling to the CJEU if necessary. According to the CJEU this distinguishes the case from \textit{Van Schijndel}.\textsuperscript{17}

Thereafter, the CJEU turned to the second issue that arose due to the domestic three-month procedural time limit for seeking annulment. Assess-

\textsuperscript{12} \textit{Eco Swiss} (n 6) 35.
\textsuperscript{13} \textit{Eco Swiss} (n 6) 33, in addition a reference for preliminary may be necessary to ascertain the validity of a provision of EU law, which national courts are not empowered to do.
\textsuperscript{14} \textit{Eco Swiss} (n 6) 34, reference is made to the Case 102/81 “Nordsee” Deutsche Hochseefischerei GmbH mot Reederei Mond Hochseefischerei Nordstern AG & Co KG v Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co KG EU:C:1982:107, [1982] ECR 1095.
\textsuperscript{16} \textit{Eco Swiss} (n 6) 35–37.
\textsuperscript{17} Ibid 40.
ing the rule in light of the principle of effectiveness, the CJEU held that the period is not excessively short and does not render it excessively difficult or virtually impossible to exercise the rights conferred by EU law. In addition, the CJEU held that the domestic procedural rules such as the one in question, that render an award res judicata after the expiry of the time limit, are justified to uphold legal certainty. Hence, EU law did not require the domestic court to refrain from applying its rules of procedure, even if this would mean that the agreement in breach of EU competition could not be examined in any setting aside proceedings. It is, thus, relevant to note that despite the CJEU holding that a certain provision of EU competition law constituted ordre public, the end result in practice in the Eco Swiss case was that the national court was entitled to dismiss the setting aside application for being filed too late.

(c) The Salient Issues
The Eco Swiss case answered certain questions. However, certain other issues in relation to the intersection between commercial arbitration and EU law were not addressed. Firstly, it left unanswered the question of whether other provisions of substantive EU law could constitute ordre public and, if so, which provisions might they be? The CJEU has subsequently clarified that certain provisions of EU consumer law constitute ordre public. However, the CJEU has not given any general guidance on the question taking into account the full body of the acquis communautaire and it remains so far to be determined on a case-by-case basis which provisions of substantive EU law that constitute ordre public. The question has naturally been the subject of doctrinal discourse over the years and has also arisen in domestic case law. However, the issues of the substantive remit of EU ordre public will not be further addressed here.

A second issue that has been debated in the doctrine since Eco Swiss is the interpretation by the CJEU of the criteria regarding which bodies qualify as a “court” or “tribunal” that can submit references for a preliminary ruling under Article 267 TFEU. The classic exclusion of commercial arbitral tribunals from the category of bodies that can make a reference for

18 Ibid 45.
19 Ibid 46.
Navigating EU Law and the Law of Arbitration

a preliminary ruling since the Nordsee case in 1982 has been considered ripe for change. More recent case law on the relevant criteria nuanced the analysis and raised a hope that arbitral tribunals hearing investment treaty claims could be considered to fall within the criteria. However, the most recent and much debated Achmea case seems to have closed that window of hope. In addition, the cases further support the fact that commercial arbitral tribunals remain outside the category of bodies that can submit a reference for a preliminary ruling because their jurisdiction emanates from an arbitration clause that the parties have freely entered into in the course of contractual negotiations. The full panoply of debate regarding the pros and cons for such a state of affairs will, however, not be dealt with here.

A third issue relates to the fact that domestic procedural rules and practices fulfill the requirements of the principles of equivalence and effectiveness when the matter concerns substantive EU law rights as noted above. In Eco Swiss, a procedural time limit for bringing an annulment case was held to fulfil these requirements. However, naturally there may be other procedural rules and practices in domestic annulment proceedings that can be relevant and that will need to be assessed. In this context, a potential tension between the arbitration regime and the EU law regime can be perceived. The finality of arbitral awards entails in general that the grounds for annulment are limited but also that their interpretation and application is a narrow one. In addition, it has traditionally been held that the review in annulment cases should not be a de novo review of the substance of the ruling made

24 Case C-284/16 Slowakische Republik v Achmea BV EU:C:2018:158.
25 Ascendi (n 23) 27–28 and Paschalidis (n 23) 677.
26 See inter alia Basedow (n 21), referring amongst other to a parallel growth of international arbitration and EU private law which entails that EU law is increasingly applied without guidance from the CJEU.
27 See the consumer law arbitration cases Mostaza Claro (n 19) and C-40/08 Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira EU:C:2009:615 [2009] ECR I-09579 dealing with national procedural rules related to ex officio review and res judicata.
by an arbitral tribunal. It has therefore been argued that it would “erode a fine balance” to go any further and that it would harm the foundations of arbitration while not benefiting EU competition law. Nevertheless, the uniform interpretation of EU law requires according to the CJEU in *Eco Swiss* that the domestic courts are able to review the application of EU law by arbitral tribunals in annulment cases. Therefore, the remit of that review and the procedural practices related to the review of EU law in domestic annulment proceedings is a significant issue. In particular, the CJEU noted in *Eco Swiss* it is important for the domestic courts to be able to submit a reference for a preliminary ruling when necessary. These are the issues that will be further analysed in this contribution.

2. Accommodation Strategies

(a) A Minimalist or a Maximalist Approach?

Professor Bermann called the main accommodation strategy that he identified as “reconciliation through norm-mitigation”. As a prime example of the strategy he referred to the *Cytec* case from the Paris Court of Appeal, *Cour d’Appel*. In that case another provision of EU competition law, the prohibition of abuse of dominant position under Article 102 TFEU, was raised at the enforcement stage in the French courts to resist enforcement of an arbitration award rendered in Belgium. The French court accepted that the ruling in *Eco Swiss* meant that a breach of this central provision of EU competition law could as such constitute an infringement of international *ordre public*. However, the French court noted that at the enforcement stage it can only exercise a limited review with respect to the award’s compliance with international *ordre public*. In addition, it held that the party resisting enforcement had not been able to demonstrate a “flagrant, real and concrete” violation of *ordre public*. The result was that the French court found the award enforceable. The broader implication of the ruling is that domestic courts may set up limitations for the review of *ordre public* to resolve a normative tension between EU-law requirements with respect

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28 Prehal and Shelkoplyas (n 21) 607.
29 Bermann (n 1) 426.
to *ordre public* and the importance of finality of arbitral awards. A similar approach has also been taken by courts in other Member States and reflects what in the doctrine has been called the minimalist approach.\(^{32}\)

In the longstanding doctrinal debate on the standard of review of arbitral awards related to competition law at the stage of enforcement or in setting aside proceedings, the proponents of the minimalist approach advocate deference to the arbitral award. In addition to the principles of finality and neutrality in international arbitration, they also argue *inter alia* that there is no assurance that a court will be better placed to assess the application of, or compliance with, competition law.\(^{33}\) They further note that arbitrators regularly apply competition law and that an in-depth review of competition law by the courts is not necessary to ensure the effective enforcement of competition law. Thus, they posit that it is only relevant to identify seriously erroneous decisions that are *prima facie* apparent from a perusal of the award. This would in turn mean that only awards that *manifestly* violate competition law should fall under *ordre public*.\(^{34}\) The strict minimalist approach further entails that the award itself and its effect be the focus of the review, not the reasoning of the arbitrators or their factual findings.\(^{35}\)

Further it has been suggested that there can only be limited cases in which a more extensive review should take place, such as when the competition law issues have not been raised or pleaded in the arbitration. However, even in these cases it has been held that a mere allegation of a breach of *ordre public* cannot suffice to provoke a more thorough review and that there must be a high degree of likelihood that the potential breach will constitute a serious, effective and concrete breach.\(^{36}\) It is clear that a substantive test for *ordre public* becomes easily linked to, or intertwined with, the procedural issue of the remit of the review. In addition, it is clear that the level of review can vary in its intensity also in a minimalist context.

It has also been argued that the *Eco Swiss* case does not require national courts to undertake a greater level of review in relation to EU competition law than with respect to other *ordre public* allegations under domestic law.\(^{37}\) The opposing view has been that a literal reading of the *Eco Swiss* rul-


\(^{33}\) Ibid 5–7.

\(^{34}\) Ibid 7–9.


\(^{36}\) Radicati di Brozolo (n 32) 15–17.

\(^{37}\) Pierre Heitzmann and Jacob Grierson, ‘SNF v Cytec Industrie; National Courts within the
ing supports the idea of a full substantive review of the award with respect to *ordre public*. However, it appears to be more correct to state that the CJEU did not specifically rule on the remit of review and actually left the issue open. As noted above, the CJEU merely noted that the review may be more or less extensive. Thereafter, the CJEU acknowledged that it is in the interest of efficient arbitration proceedings that the review of arbitration awards be limited. However, the CJEU further emphasized that national courts should be able to ascertain whether or not it is necessary to make a reference for a preliminary ruling. It is notable that the proponents of the minimalist approach often simply refrain from mentioning this final issue and aspect of the CJEU’s ruling. If it is mentioned it is argued that due to the limited review, the only question that can be relevant to put to the CJEU is whether or not certain values can be regarded as fundamental and thus constitute *ordre public*.

On the other hand, proponents of a more maximalist approach that advocate a more extensive substantive review of the arbitral award in order to assess compliance with EU *ordre public* often emphasize the obligations of domestic courts under EU law. It has been argued that the minimalist approach can even been seen as undermining the ruling in Eco Swiss. In addition, it has been noted that many courts in Member States actually apply a maximalist approach. It has further been noted that in practice an assessment, which is supposed to secure compatibility with EU competition law, cannot in many cases be conducted solely by reviewing the award itself. Other factors including the reasoning of the arbitrators or their factual findings, may need to be analysed. In addition, the opinion of the Advocate General in *Eco Swiss* is referred to because he stressed the effective judicial supervision over arbitral proceedings by domestic courts. Thus, under a

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40 *Eco Swiss* (n 6) 32. See further Andersson (n 10) 457–460 for a discussion on Swedish law in the wake of *Eco Swiss*.
41 *Eco Swiss* (n 6) 35.
42 Shelkoplyas (n 35) 388.
43 Blanke (n 38) 75–78.
44 Andersson (n 10) 459.
45 Blanke (n 38) 68–71. See also *inter alia* de Groot (n 39) 217–221, Mourre and Radicati di Brozolo (n 30) 180–181 and Shelkoplyas (n 35) 371.
46 de Groot (n 39) 224.
maximalist approach the questions that may be relevant to refer to the CJEU for a preliminary ruling can also relate to the findings in the award and the underlying case.\textsuperscript{47} Some of the maximalist proponents also suggest that there is a balance to be found between the two approaches, although they have still been criticized for suggesting a review which is too extensive.\textsuperscript{48}

Finally, it is worth emphasizing that there is a mixed picture with respect to the standard of review used among the courts in the various Member States and within the same domestic jurisdiction. In addition, one commentator notes that it is confusing when courts in their abstract reasoning first express support for one approach, but then proceed to conduct a level of review that \textit{de facto} appears closer to the other approach.\textsuperscript{49} The same commentator reflects that the standard of review of \textit{ordre public} by courts in practice actually appears to be affected by a number of \textit{ad hoc} factors including political and economic factors. Thus, the circumstances of the particular case may actually be more relevant than the principal issue of the standard of review to be employed. Thus, although there are clearly opposing camps in legal doctrine that propose certain levels of review \textit{in abstracto}, in practice the reality seems to be more nuanced. It is in this context that Swedish case law will now be reviewed in the following sections.

\textbf{(b) The First Swedish Cases}

In a Swedish context, prior to the \textit{Systembolaget} case, there are only a few rulings at the appellate level that address the issue. The Svea Court of Appeal has in a setting aside action confirmed that breach of EU competition law can constitute \textit{ordre public}.\textsuperscript{50} However, in the same case it also noted that if there is no prior ruling from a court or other official body that confirms that a certain behavior is in breach of competition law it will likely only be possible to make a finding of \textit{ordre public} in manifest cases. Furthermore, the Svea Court of Appeal went on to note that Swedish law takes a restrictive positon on the possibilities to challenge an arbitral award, and that the CJEU has expressed the same position in \textit{Eco Swiss}.\textsuperscript{51} So far the Swedish court seems to support a strict reading of \textit{Eco Swiss} and a limited and restrictive review of a potential breach of \textit{ordre public} similar to the Cytec case, albeit worded in a slightly different manner.
However, in its ruling, it remains slightly unclear what standard of review that the Svea Court of Appeal has actually applied. In the relevant case it was alleged that the ruling on damages in the arbitral award constituted illegal state aid under both Latvian law and the pre-accession association agreement between Latvia and the EU. Without explicitly confirming that illegal state aid would substantively fall under *ordre public* based on an analogous application of *Eco Swiss*, the Svea Court of Appeal reviewed the circumstances of the case including the facts and evidence adduced before it based on the criteria for state aid set out by the CJEU in *Altmark*. Thereafter, it held that since the *Altmark* criteria were not fulfilled, the circumstances of the case did not support the allegation that the award was in breach of *ordre public*.52

In another Swedish case from the Court of Appeal of Western Sweden, it was alleged that an award breached mandatory EU law, more specifically internal market rules for telecommunications terminal equipment and satellite earth station equipment (including *inter alia* a directive and a Council decision), and therefore constituted *ordre public*.53 The ruling of the Swedish court is brief. It first clarifies that if arbitrators ignore the application of a mandatory rule, such a breach may in some contexts constitute *ordre public*. However, immediately thereafter the Court states that *ordre public* is applied in a restrictive manner in Sweden. Only highly offensive cases can constitute a breach of *ordre public* and the breach must relate to a particularly important or fundamental rule. Thereafter, the Court of Appeal notes that a breach of EU law may breach *ordre public* based on *Eco Swiss*. However, in the case at hand, the Court of Appeal found that relevant EU law provisions could not create direct effect and obligations between private parties. In addition, the Court held that it has not been shown that the rules in question are of such a fundamental importance that a breach of these rules would constitute *ordre public*.54 The Court of Appeal did not opine on the nature of the review or scrutiny of the award that it conducted, but merely reflected on the overall restrictive approach to *ordre public* in a more substantive context.

However, in both these rulings the Swedish courts of appeal arguably appear to find means of easily assessing and dealing with the *ordre public* allegations that leads to a confined and limited review of the relevant arbitration awards. As such the cases could be considered to support a mini-

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52 Ibid.
53 Case T 4366-02 *Dirland Télécom S A v Viking Telekom AB*.
54 Ibid.
malist approach. On the other hand, in both cases the assessment of *ordre public* related to an application of EU law by the domestic courts that goes beyond merely reading the awards themselves. In fact, the assessment of EU law appears to be rather independently conducted by the Swedish courts.\(^{55}\) However, neither of these cases reached the Supreme Court. Thus, it is pertinent to next turn to the findings of the Supreme Court in the *Systembolaget* case that provided much welcome clarifications on the issues under discussion.

C. **Systembolaget**

1. **The Supreme Court distinguishes between domestic and EU law matters**

   (a) **The Facts of the Case**

   In *Systembolaget*, the company that has alcohol distribution monopoly in Sweden, had partially terminated a delivery agreement due to the fact that members of the staff of its supplier had been sentenced for bribing Systembolaget employees, which was considered a breach of contract by Systembolaget. The partial termination was based on the seriousness of the breach of contract and in accordance with a “sanctions model” used by Systembolaget also for other suppliers. The supplier, V&S, claimed that the termination was ungrounded and that to apply the sanctions model constituted an abuse of a dominant position (breach of competition law) because V&S had together with other suppliers been forced to accept unfair contract terms. The arbitral tribunal held that Systembolaget on the basis of civil law was entitled to partially terminate the agreement. However, it also found that Systembolaget had in its actions towards its supplier abused its position as a so-called super-dominant and was therefore liable to pay damages to V&S.\(^{56}\)

   Systembolaget sought to have the award annulled on various grounds, including relying on breaches of competition law, and requested that the

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\(^{55}\) Readers will note that both Swedish courts chose to apply the ruling in *Eco Swiss* by analogy to other EU law provisions than competition law provisions, thus ostensibly broadening the substantive scope of EU *ordre public*. However, as noted above in section B(1)(c) the substantive scope of EU law will not be dealt with further here. Another question that arises from the cases is why both courts chose not to make a reference for a preliminary ruling to the CJEU and whether the courts could be construed as potentially having an obligation to do so. There is no room to deal with these questions in this contribution, see however Emilia Skog, ‘Skiljedom och EG-rätt’ (2001/2002) *Juridisk Tidskrift* 205–207.

\(^{56}\) *Systembolaget* (n 5) 1–2.
Court make a request for a preliminary ruling to the CJEU. The Svea Court of Appeal dismissed both the application for annulment and the request for seeking a preliminary ruling. Thereafter, the matter came before the Swedish Supreme Court that took the opportunity to elaborate upon on the general position under Swedish law concerning competition law and invalidity of awards before ruling on the case at hand. In addition, the Supreme Court opined on the obligation to seek a preliminary ruling from the CJEU.

(b) The Findings with respect to Ordre Public

The Supreme Court first states that it follows from the preparatory works to the Swedish Arbitration Act that if an arbitral award orders or upholds a behavior that breaches competition law it may be annulled on the basis of being in breach of ordre public. This, in turn, entails that the issue of invalidity depends on whether the arbitral tribunal has been correct in its assessment. That being said, the Supreme Court also notes that in the interest of finality of arbitral awards it follows from the Swedish Arbitration Act that any breach of ordre public must be manifest and the grounds for annulment must in general be applied in a restrictive manner.

With reference to what is stated in the preparatory works to the Swedish Arbitration Act, the Supreme Court further notes that a factor that can point to an award being null and void is if there is a prior ruling from a court or other official body that confirms that a certain behavior is in breach of competition law. In other cases it will likely only be possible to make a finding of breach of ordre public in manifest cases. In the first type of case, where there is a prior decision, the award should in principle always be annulled. In the latter type of case, the Supreme Court states that the assessment of the veracity of the ruling of an arbitral tribunal with reference to competition law, should focus on whether the tribunal has reached a legally acceptable analysis (as opposed to whether the court itself would make the same finding). Thus, a relevant court must make a certain substantive assessment of the application of mandatory competition by the arbitral tribunal, but it should as a main rule focus on the legal findings of the arbitral tribunal and take as a starting point the arbitral tribunal’s evidentiary findings.

57 For the purpose of this contribution, the relevant grounds for annulment raised in the case related to Section 33(1)(2) of the Swedish Arbitration Act: “An award is invalid: […] 2. if the award, or the manner in which the award arose, is clearly incompatible with the basic principles of the Swedish legal system”.
59 Systembolaget (n 5) 15–17.
The Supreme Court then goes on to state that the above applies only in domestic cases. When mandatory EU competition law is at stake, additional considerations must be taken into account. Thereafter, the Supreme Court holds that in case the relevant issues of EU competition law are clear and settled, an arbitral award that prescribes or maintains a behavior that breaches competition law shall in principle be annulled. However, in other cases, there may be some uncertainty. The Supreme Court notes that to apply the same assessment as in domestic cases, i.e., to annul the award only if the arbitral tribunal has not made a reasonably motivated analysis or is not within the boundaries of what can be a possible correct assessment, might not be acceptable from an EU-law perspective. To uphold a practice that in essence entails that only manifest breaches of competition law are annulled would not necessarily be in compliance with the principle of effectiveness according to the Supreme Court.\textsuperscript{60} Thus, the Supreme Court outlines what can be said to be a more maximalist approach.

\textbf{(c) The Findings with respect to a Reference for a Preliminary Ruling}

The Supreme Court notes that one means of clarifying the situation would be to make a reference for a preliminary ruling to the CJEU. The Supreme Court then proceeds to outline the relevant \textit{CILFIT} criteria of the CJEU related to when domestic courts have an obligation to do so. Thereafter, the Supreme Court states that in applying the \textit{CILFIT} criteria it is not clear that it must make a reference for a preliminary ruling when it is uncertain if an arbitral award is in breach of mandatory EU competition law. Nevertheless, in cases where it is apparent under EU law that the arbitral award is not in breach of EU competition law, there is no such duty.\textsuperscript{61}

\textbf{(d) The Assessment of \textit{Ordre Public}}

Article 102 TFEU on abuse of dominant position is closely connected to Article 101. The CJEU has emphasized that both these articles are fundamental within the EU legal order and necessary to uphold the internal market. Therefore, the Supreme Court finds that it must be presumed that also breaches of Article 102 must fall under the principles laid out in \textit{Eco Swiss}.\textsuperscript{62}


\textsuperscript{61} \textit{Systembolaget} (n 5) 23–25.

\textsuperscript{62} Ibid 18–19.
Finally, the Supreme Court moves to its substantive assessment of the two grounds on which Systembolaget argued that the award breached competition law. The first ground was that the damages imposed by the arbitral tribunal constituted an over-application of competition law. According to the second ground, the award hindered Systembolaget from fulfilling its duties of market neutrality with respect to other suppliers under Article 37 TFEU.

The Supreme Court’s substantive assessment is in this part very short. The assessment does not focus on the award itself, the underlying reasoning of the arbitral tribunal or an analysis of the conditions for the finding of abuse of dominant position and for the damages imposed. There is at least no explicit analysis of these issues in the ruling.

The Supreme Court focuses instead on whether the two grounds adduced by Systembolaget are of such a nature that they could render the award to breach EU competition law and ordre public. With respect to both grounds the Supreme Court finds that it is apparent that there is no reason to annul the award. Although the ruling is very short in this respect, the application of EU law by the Supreme Court concerns the effect of the award and appears to be rather independently conducted. The Supreme Court also holds that because the EU law position is clear in respect of both grounds, there is no need to make a reference for a preliminary ruling to the CJEU.63

2. The principal findings of the Supreme Court have been confirmed also for enforcement cases

In the aftermath of the Systembolaget case the Swedish Supreme Court has had the opportunity to rule also on the assessment of ordre public within the context of enforcement of arbitral awards under the Swedish Arbitration Act.64 In the Norwegian Award case65 the Court confirms that what it had found in the Systembolaget case with respect to how the assessment of ordre public is to be made in annulment cases applies equally to enforcement cases.66 The Supreme Court with direct reference to Systembolaget, reiterates that the restrictive review that in general applies to the assessment of ordre

63 Ibid 28–32.
64 The relevant provision being Section 55(1)(2) of the Swedish Arbitration Act: “Recognition and enforcement of a foreign award shall also be refused if a court finds: [...] 2. that it would be clearly incompatible with the basic principles of the Swedish legal system to recognize and enforce the award”.
65 Case Ö 5384-17 Jonny Olausson with trade name JO Produkter v Smart Board Production AB, reported in NJA 2018 s 323.
66 Ibid 13. This perspective had already been discussed in the doctrine after Eco Swiss also with respect to the duties of the execution authorities, see Andersson (n 10) 462.
**public** is not to be be used in cases that involve as assessment whether an award is compatible with mandatory competition law.\(^{67}\) In addition, the Supreme Court, once again with direct reference to \textit{Systembolaget}, states that when EU competition law is at stake, particular considerations apply to the remit of the assessment of \textit{ordre public}.\(^{68}\) However, the \textit{Norwegian Award} case differed from the Systembolaget in that competition law had not been raised in the actual arbitration and therefore had not been dealt with by the arbitral tribunal. In \textit{Norwegian Award}, the Supreme Court therefore further clarified that the review of mandatory competition law is different and becomes wholly independent. In addition, the Supreme Court held that the \textit{ordre public} assessment must be more concrete and in-depth in cases relating to competition law than what is customary in other cases. Thus, the Supreme Court stated that the review must as a starting point be the same as when a court in general applies mandatory competition law.\(^{69}\) With respect to the assessment of \textit{ordre public} conducted by the Svea Court of Appeal as the first instance in the \textit{Norwegian Award} case, the Supreme Court noted that the assessment made was not sufficient. The Svea Court of Appeal had conducted a summary review of whether the award \textit{manifestly} breached \textit{ordre public}. The Supreme Court clearly refuted this approach and held that the manifest-criterion cannot be applied in cases concerning \textit{ordre public} and mandatory competition law. Therefore, the Supreme Court concluded that it had been incumbent upon the Court of Appeal to conduct a more extensive review and, if necessary, use its powers of case management to assist such a review.\(^{70}\)

**D. “Synthesis” from a Swedish horizon**

1. **The approach by the Supreme Court seems to be in line with \textit{Genentech}**

Proponents of the minimalist approach have conceded that CJEU may not be willing to accept the restrictive national review of arbitral awards in the context of EU \textit{ordre public} and may come to declare it incompatible with the requirements of EU law.\(^{71}\) Proponents of the maximalist approach, on the other hand, have suggested that such a ruling would be important to

\(^{67}\) \textit{Norwegian Award} (n 65) 14.

\(^{68}\) Ibid 14.

\(^{69}\) Ibid 22 and 26.

\(^{70}\) Ibid 27.

\(^{71}\) Shelkoplyas (n 35) 391 and Bermann (n 1) 426–427.
clarify the position under EU law. However, at present there is no such ruling and, thus, the position remains open for debate. Nevertheless, the Swedish Supreme Court in *Systembolaget* indicated that based on its understanding of EU law, the minimalist approach may not always be acceptable. In the case at hand, the Supreme Court however does not need to deal with the issue because of its finding that it was “apparent” that there was no breach of EU law.

Nevertheless, in its detailed description of the substantive scope of *ordre public*, i.e. the statutory requirement that it be *manifest*, and what this entails for the remit of the review or assessment of *ordre public* by a court under domestic law as compared with the requirements under EU law, the Supreme Court shows a clear awareness of the “minimalist versus maximalist” debate. In addition, the Supreme Court shows that although the Swedish legislator appears to have envisaged that a minimalist approach applies in domestic cases, this may not always be acceptable under EU law due to the requirements stemming from the principle of effectiveness. Thus, the Supreme Court gives guidance to the lower courts in Sweden, in practice the appeal courts that deal with annulment and enforcement cases, that there may in specific future cases be a need to make a broader assessment of *ordre public*, a maximalist approach, and that it may in those instances be warranted to seek clarification from the CJEU. This position is confirmed and arguably even strengthened in the *Norwegian Award case*, because the Supreme Court clearly states that the manifest-criterion cannot be applied when mandatory competition law is raised in support of an *ordre public* argument.

Certain commentators have argued that the ruling in *Systembolaget* should be taken as sign of a “Scandinavian model” under which only manifest breaches of *ordre public* will lead to annulment and only a superficial review of the award suffices as so-called ‘second look’ by the courts. The same commentators have argued that this should suffice under EU law. I consider that such a reading of the ruling of the Swedish Supreme Court is overly simplified and that it appears to reveal a strong preference for the minimalist approach. However, irrespective of preference, the requirements

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72 Blanke (n 38) 78.
73 Skog (n 55) also demonstrates that the Swedish legislator is also aware that EU law or case law from the CJEU may come to impose requirements on Swedish law in this respect.
74 Jacob B Sørensen and Kristian Torp, ‘The Second Look in European Union Competition Law: A Scandinavian Perspective’ (2017) 34 (1) *Journal of International Arbitration* 47–48, 52–54. The authors refer to the *Systembolaget* case and a Danish case; I have not analysed the latter.
under EU law cannot be ignored. In addition, as will be explained below, a fuller perspective of current EU law needs to be taken into account, which commentators blindly favouring the minimalist approach only appear to ignore.\textsuperscript{75}

First, it should be noted that although there is no ruling yet from the CJEU that specifically addresses the issue of the remit of review of \textit{ordre public}, the issue has already been argued in the \textit{Genentech} case before the CJEU.\textsuperscript{76} The case was referred to the CJEU by a French court and one of the parties argued that the matter was not admissible. More specifically, it was argued since the domestic court could not review an arbitral award as to its substance, the answer to the substantive EU law question(s) set forth in the reference for a preliminary ruling would not be useful for the national court.

In its judgment in \textit{Genentech}, the CJEU repeated its traditional position that it is for the national court to take responsibility for the need for a preliminary ruling and for the relevance of the question which it submits in its reference. In addition, the CJEU will answer the question unless it is obvious that the question bears no relation to the facts or is hypothetical.\textsuperscript{77} On this basis, the CJEU found the substantive questions admissible and proceeded to address them.

In \textit{Genentech}, the CJEU had no opportunity to address the issue of the remit of the review of \textit{ordre public}. However, Advocate General Wathelet did address the issue in his Opinion. Although the Opinion is not binding, it is an expression of the status of EU law of a member of the CJEU. In his Opinion, the Advocate General first found that the French rule that requires that a breach of \textit{ordre public} must be material is not permissible under EU law. He held that there is simply no basis under EU law, within the context of \textit{ordre public}, to treat a breach of EU competition law differently depending on the materiality of the breach.\textsuperscript{78} Secondly, the Advocate General stated that the assessment of EU competition law in the arbitral award cannot be limited by a rule in domestic law making the assessment dependent on whether or not the issue was raised in the underlying arbitration. In addition, the assessment cannot be limited by a domestic rule that prevents


\textsuperscript{76} Case C-567/14 \textit{Genentech Inc v Hoechst GmBh and Sanofi-Aventis Deutschland GmbH} EU:C:2016:526, 26. See also Paschalidis (n 15) for a review of the case.

\textsuperscript{77} Ibid 26–25.

\textsuperscript{78} Opinion in Case C-567/14 EU:C:2016:177, 64–67.
the substance of the award from being reconsidered. The Opinion of the Advocate General also raises the question whether the consistent practice of the French courts could entail a breach of EU law, resulting in potential State liability.

Thus, the more nuanced position taken by the Swedish Supreme Court before the Opinion in *Genentech* was rendered, distinguishing cases of EU *ordre public* from domestic cases, appears to be warranted. In addition, the position of the Supreme Court in the *Norwegian Award* case strengthens the view that under Swedish law a more extensive review of public policy is merited. Finally, the Opinion of the Advocate General shows that both the substantive scope of *ordre public* and the remit of the assessment of *ordre public* based on a minimalist approach, may be too restrictive for the purpose of EU *ordre public*.

2. **Mutual trust distinguishes courts from arbitration tribunals**

Many commentators arguing that a minimalist is acceptable under EU law refer to the old *Renault* case from the CJEU. This case concerned recognition and enforcement of judgments cross-border in the EU and the application of the *ordre public* exception in the former Brussels Convention. In particular, the case addressed the issue whether an alleged error of EU competition law in the judgment of one Member State court could constitute grounds for refusing enforcement in another Member State court based on *ordre public*. It is explicitly stated in the Convention and its current emanation as the Brussels I-bis Regulation, that the court of enforcement cannot review the judgment on its merits. This is an expression of the trust between the courts in the Member States that underlies the system of cross-border enforcement in the EU.

The CJEU held in the *Renault* case that an error of law could not constitute *ordre public* and that the appropriate legal remedies against a potential erroneous judgment should be raised in the courts of the original Member State that could, when necessary, make a request for a preliminary rul-

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79 Ibid 70–72.
80 Blanke (n 38) 76. For an action for infringement under Article 258 in which it was also held that a Member State was in breach of its obligations under EU law due to actions of its courts, see Case C-416/17 European Commission v French Republic EU:C:2018:811.
81 Case C-38/98 Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento EU:C:2000:225 [2000] ECR-I 2973. Commentators referring to the case include Inter alia Bermann (n 1), Shelkoplyas (n 35) and Sørenson and Torp (n 74).
82 Article 52.
ing. However, the commentators arguing for a minimalist approach tend to refrain from noting that from an EU-law perspective, an analogy can potentially not be fully made between Member State judgments and arbitral awards.

The principle of mutual trust between EU courts has notably been developed in a long line of case law from the CJEU concerning recognition of judgments within the EU area of freedom, security and justice, stemming from the mutual jurisdiction scheme in the Brussels I-bis Regulation. Thus, the principle of mutual trust applies in a specific context. In addition, the CJEU has clarified that the principle does not necessarily apply to arbitral awards and to courts dealing with commercial arbitral awards in enforcement cases. This supports the finding already visible in Eco Swiss that the CJEU distinguishes between the role of commercial arbitral tribunals and Member State courts with respect to the supervision of the application of EU law. The role of the domestic courts at the annulment or enforcement stage is from this perspective to ensure that fundamental provisions of EU law are respected and that, if necessary, a reference is made for a preliminary ruling.

Both the Opinion of the Advocate General in Genentech and the recent Achmea ruling point in the same direction. In particular, in Achmea the CJEU reiterated that the review of commercial arbitral awards by domestic courts can be limited, but only provided that fundamental provisions of EU law can be examined in the context of that review and be the subject of a reference for preliminary ruling. The qualification that the CJEU makes in this statement is of central importance. In addition, the general tenet in the Achmea ruling, albeit stated in relation to intra-EU investment treaty arbitration, is that in the fields of law covered by EU law, Member States cannot remove disputes entirely from the system of remedies available in national courts. Thus, the role of the Member State courts in providing effective remedies for EU law rights is of particular importance.

83 Renault (n 81) 32–33.
85 See Case C-536/13 “Gazprom” OAO v Lietuvos Respublika EU:C:2015:316 35–39, confirmed in Opinion (n 78) 69.
86 Opinion (n 78) 70 and Achmea (n 24) 54.
87 Achmea (n 24) 54.
88 Achmea (n 24) 55, with reference to Article 19 TEU and Case C-64/16 Associação Sindical dos Juízes Portugueses v Tribunal de Contas EU:C:2018:117. See also the Opinion of Advocate General Tanchev in Case C-619/19 European Commission v Republic of Poland EU:C:2019:325, 59.
3. The possibility to make a reference for a preliminary ruling is a distinguishing feature

The possibility for the CJEU to provide guidance in the application of EU law via the preliminary reference procedure is an important element in the *Eco Swiss* ruling. The arguments of the proponents of the minimalist approach that the CJEU’s guidance can only serve to confirm which provisions of EU law fall within the scope of *ordre public*, but not the substantive application of EU law in the relevant case, finds no basis in EU law. In addition, such a position is negated by the *Genentech* case in which the CJEU provided guidance to the domestic court on the substantive application of EU law that was relevant to assess whether the award complied with fundamental provisions of EU law. In this context, the correctness of a statement of the Swedish Supreme Court in *Systembolaget* can be questioned.

The Supreme Court states that in applying the *CILFIT* criteria, it is not clear that it must make a reference for a preliminary ruling when it is uncertain if an arbitral award is in breach of mandatory EU competition law. I would argue that if the position under EU law is unclear also with respect to the duty to make a reference for preliminary ruling under Article 267 TFEU, there is duty for a court of final instance to refer a question to the CJEU (if the question is of relevance for the ruling in the case). In addition, I would argue that the different – minimalist and maximalist – approaches proposed in the doctrine and applied by Member State courts with respect to EU *ordre public* and arbitral awards demonstrates that there may indeed be both a need and a duty to make a reference for a preliminary ruling to the CJEU. The CJEU held in the *Ferreira* case that when there is conflicting case law at a national level and the same issue has also given rise to difficulties of interpretation in various Member States, a national court of last instance must comply with its obligation to make a reference to the CJEU. In such circumstances, the application of EU law can arguably not be “clear” under the *CILFIT* criteria. Thus, in a particular case, it may indeed be necessary to make a reference for a preliminary ruling both with respect to the scope of *ordre public* and the remit of the assessment of *ordre public*. The fact that the Supreme Court found that there was no need to do so under the particular circumstances of the case in *Systembolaget* does not mean that it will be possible to make the same finding in all cases.

89 (n 61).
90 See also Case C-160/14 *João Filipe Ferreira da Silva e Brito and Others v Estado português* EU:C:2015:565, 44.
In this respect, a further aspect of the Systembolaget case, which arose also in the Norwegian Award case, will need to be addressed as a concluding reflection, namely, the issues of how to assess the damages awarded by an arbitral tribunal as a consequence of an allegedly incorrect application of mandatory competition law. The position under Swedish law is that although the competition rules are mandatory, the civil law rights and remedies that are available as a result of a breach of competition law are not mandatory. It follows that the parties are free to settle and dispose freely of the damages as they wish inter partes. Thus, the Supreme Court found in both cases that the grounds raised for invalidity related to the damages awarded could for this reason not constitute ordre public. It has been questioned in this context whether the damages can be separated so clearly from the alleged violation of competition law itself. In addition, the dissenting Supreme Court Justices in the Norwegian Award case noted that such a distinction was not made in Eco Swiss. They further found it clear that the effective application of EU law would considerably be reduced if courts would not be obliged to assess not only the mandatory competition law provisions but also the related damages assessment. Whatever the correct substantive answer, one ponders whether this is an issue that is “clear” under EU law or whether a reference for a preliminary ruling indeed might be warranted.

91 Systembolaget (n 5) 28 and Norwegian Award (n 65) 33–36.
92 This is not a new issue and has already arisen in other countries, see Heitzmann and Grierson (n 37) 47–48, and the French court in Cytec apparently took a similar position to the Swedish Supreme Court.
93 Henriksson (n 60) 694.