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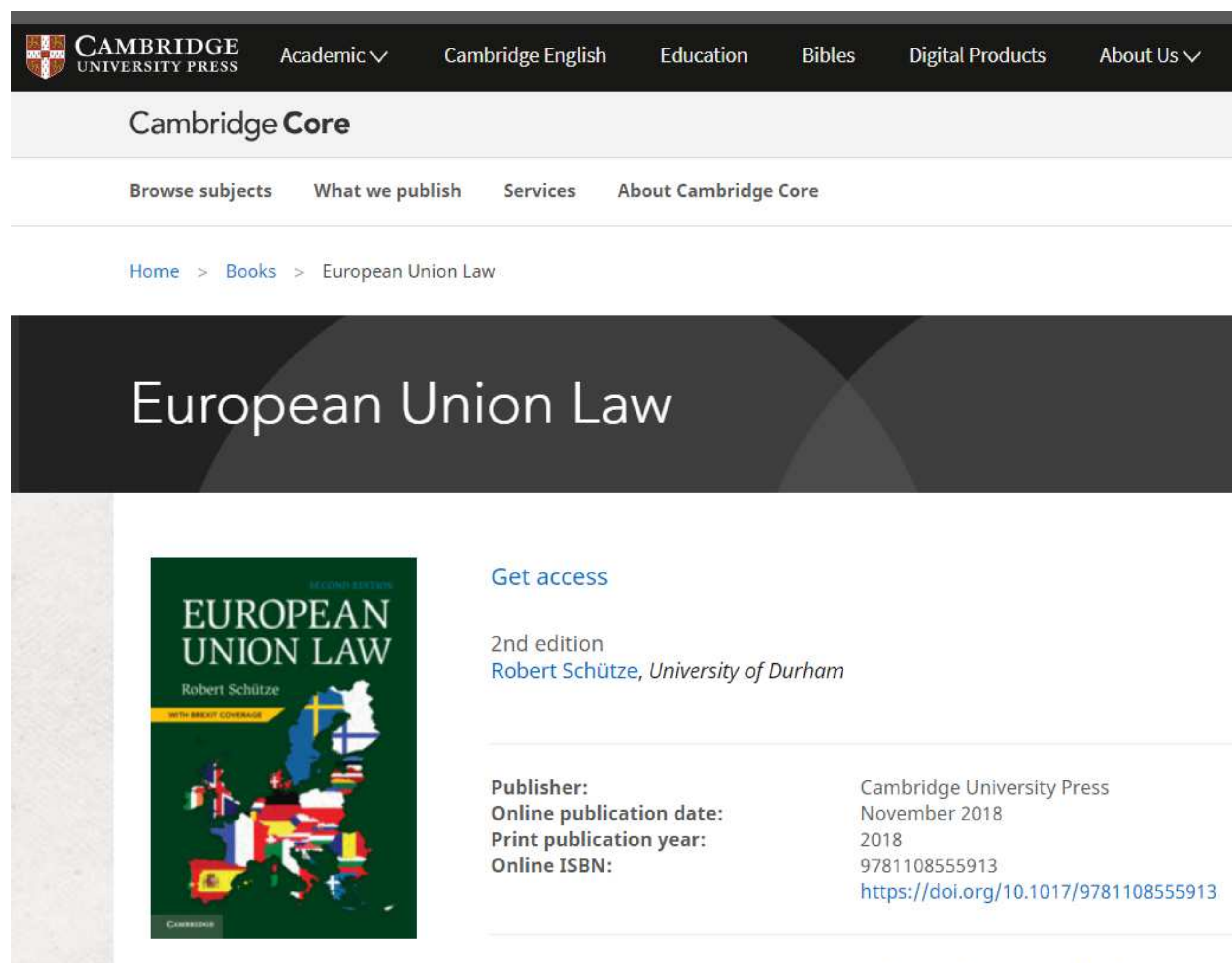

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European Law I

Nature – Direct Effect

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Introduction

Classic international law holds that each State can choose the relationship between its domestic law and international law. Two – constitutional – theories thereby exist: monism and dualism. Monist States make international law part of their domestic legal order. International law will here directly apply *as if* it were domestic law.[1] By contrast, dualist States consider international law separate from domestic law. International law is viewed as the law *between* States; national law is the law *within* a State. While international treaties are thus binding – externally – 'on' States, they cannot be binding 'in' States. International law needs to be 'transposed' or 'incorporated' into domestic law and may, at most, have *indirect* effects through the medium of national law. The dualist theory is based on a basic division of labour: international institutions apply international law, while national institutions apply national law. For an illustration of the two theories, see Figure 3.1.

[1] See Art. VI, Clause 2 of the United States Constitution (emphasis added): '[A]ll Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'

Did the European Union leave the choice between monism and dualism to its Member States?[2] For dualist States, all European law would need to be 'incorporated' into national law before it could have domestic effects.[3] Here, there is no direct applicability of European law, as all European norms are mediated through national law and individuals will consequently never come into *direct* contact with European law. Where a Member State violates European law, this breach can only be established and remedied at the European level. The European Treaties indeed contained such an 'international' remedial machinery against recalcitrant Member States in the form of enforcement actions before the Court of Justice.[4] Another Member State or the Commission – but not individuals – could here bring an action to enforce their rights.

Did this not signal that the European Treaties were international treaties that tolerated the dualist approach? Not necessarily, for the Treaties also contained strong signals against the 'ordinary' international law reading. Not only was the Union entitled to adopt legal acts that were to be 'directly applicable *in* all Member States';[5] from the very beginning, the Treaties also contained a judicial

Figure 3.1 Monism and Dualism in National Law

[2] Under international law, the choice between monism and dualism is a 'national' choice. Thus, even where a State chooses the monist approach (like the United States), monism in this sense only means that international norms are *constitutionally* recognised as an autonomous legal source of *domestic* law. Dualism, by contrast, means that international norms will not automatically, that is: through a constitutional incorporation, become part of the national legal order. Each international treaty demands a separate legislative act 'incorporating' the international norm into domestic law. The difference between monism and dualism thus boils down to whether international law is incorporated via the constitution, as in the United States; or whether international treaties need to be validated by a special parliamentary command, as in the United Kingdom. The idea that monism means that States have no choice but to apply international law is not accepted in international law.

[3] For this dualist technique, see (amended) European Communities Act 1972 as well as the European Union Act 2011 – both discussed in the next chapter.

[4] On this point, see Chapter 10, section 3(a).

[5] Art. 288(2) TFEU.

mechanism that envisaged the direct application of European law by the national courts.[6] But regardless of the intention of the founding Member States, the European Court discarded any dualist reading of Union law in the most important case of European law: *Van Gend en Loos*.[7] The Court here cut the umbilical cord with classic international law by insisting that the European legal order was a 'new legal order'. In the famous words of the Court:

> The objective of the E[U] Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the [Union], implies that this Treaty is *more than an agreement which merely creates mutual obligations between the contracting States*. This view is confirmed by the preamble to the Treaty which refers not only to the governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nations of the States brought together in the [Union] are called upon to cooperate in the functioning of this [Union] through the intermediary of the European Parliament and the Economic and Social Committee.
>
> In addition the task assigned to the Court of Justice under Article [267 TFEU], the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the States have acknowledged that [European] law has an authority which can be invoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the [Union] constitutes 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*, [European] law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.[8]

All judicial arguments here marshalled to justify a monistic reading of European law are debatable.[9] But with a stroke of the pen, the Court confirmed the independence of the European legal order from classic international law. Unlike ordinary international law, the European Treaties were more than agreements creating mutual obligations between States. European law was to be enforced in national courts – despite the parallel existence of an international enforcement machinery.[10] Individuals were subjects of European law and individual rights and obligations could consequently derive *directly* from European law.

[6] *Ibid*., Art. 267. On the provision, see Chapter 10, section 4.

[7] Case 26/62, *Van Gend en Loos* v. *Netherlands Inland Revenue Administration* [1963] ECR (English Special Edition) 1.

[8] *Ibid*., 12 (emphasis added).

[9] For a critical overview, see T. Arnull, *The European Union and Its Court of Justice* (Oxford University Press, 2006), 168ff.

[10] Case 26/62, *Van Gend en Loos*, 13. On the 'centralised' (international) enforcement methods within the EU legal order generally, see Chapter 10.

Importantly, *all* European law is directly applicable law,[11] and the European Union would therefore be able to *itself* determine the effect and nature of all European law within the national legal orders. The direct applicability of European law indeed allowed the Union *centrally* to develop two foundational doctrines of the European legal order: the doctrine of direct effect and the doctrine of supremacy. The present chapter deals with the doctrine of direct effect; Chapter 4 deals with the doctrine of supremacy.

What is the doctrine of direct effect? It is vital to understand that the Court's decision in favour of a monistic relationship between the European and the national legal orders did not mean that all European law would be directly effective, that is: enforceable by national courts or the national executive (see Figure 3.2). To be enforceable, a norm must be 'justiciable', that is: it must be capable of being applied by a public authority in a specific case.[12] But not all legal norms

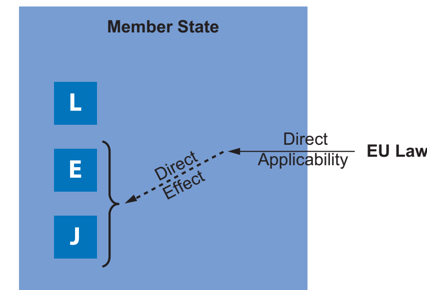

Figure 3.2 Direct Effect

[11] The direct applicability of the European Treaties is, at first sight, harder to justify, as many legal orders seem to 'transpose' them into national law. However, from a European constitutional perspective, the national ratification of a new draft (!) EU Treaty is not transposing EU primary law into national law. Indeed, after *Van Gend en Loos*, a fundamental distinction must be made between the individual national decision to ratify the (amendment to the) EU Treaties, and their coming into effect once all (!) the Member States have ratified them. For it is, importantly, solely the *collective* decision of all the Member States to agree to Treaty (amendments) that establishes the validity of the EU Treaties. Not the individual (national) ratification act but the collectivity of the Member States ratifying the Treaties underpins the validity of EU primary law; and, once that primary law exists, it is directly applicable in all the national legal orders. With the Lisbon Treaty, the distinction between the validity of EU primary law and national ratification has indeed gained further strength by means of the introduction of the simplified revision procedures set out in Art. 48(7) TEU. According to the latter, the European Union may – admittedly, for a very small part of primary law – change its Treaties if backed up by the *tacit* consent of national *parliaments*. This route allows for constitutional change through parliamentary *inaction*. And the validity and direct applicability of primary Union law is here clearly independent of any national ratification or transposition.

[12] On the application of the doctrine of direct effect to the national executive branch, see Conclusion below.

have this quality. For example, where a European norm requires Member States to establish a public fund to guarantee unpaid wages for insolvent private companies, yet leaves a wide margin of discretion to the Member States on how to achieve that end, this norm is not intended to have direct effects in a specific situation. While it binds the national *legislator*, the norm is not self-*executing*. The concept of direct applicability is thus wider than the concept of direct effect. Whereas the former refers to the *internal* effect of a European norm within national legal orders, the latter refers to the *individual* effect of a norm in specific cases.[13] Direct effect requires direct applicability, but not the other way around. However, the direct applicability of a norm only makes its direct effect *possible*.

After all these terminological preliminaries, when will European law have direct effect? And are there different types of direct effect? This chapter explores the doctrine of direct effect across the various sources of European law. It will start with the direct effect of the European Treaties in section 1. The European Treaties, as primarily law, also envisage the adoption of European secondary law. This secondary law may take various forms. These forms are defined in Article 288 TFEU,[14] which defines the Union's legal instruments and states:

> [1] To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.
> [2] A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
> [3] A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
> [4] A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.
> [5] Recommendations and opinions shall have no binding force.

The provision acknowledges three binding legal instruments – regulations, directives and decisions – and two non-binding instruments.[15] Why was there a need for three distinct binding instruments? The answer seems to lie in their specific – direct and indirect – effects in the national legal orders. While regulations and decisions were considered Union acts that directly establish legal norms (section 2), directives appeared to be designed as indirect forms of legislation (section 3).

Sadly, Article 288 TFEU is incomplete, for it only mentions the Union's *internal* instruments. A fourth binding instrument indeed needs to be 'read into' the list: international agreements. Union agreements are not only binding upon the institutions of the Union, but also '*on* its Member States'.[16] Did this mean that international agreements were an indirect form of external legislation, or could they be binding 'in' the Member States? Section 4 will analyse the doctrine of direct effects for international agreements.[17]

The extent to which the Union uses these various legal instruments can be seen in Table 3.1. It shows that – from a comparative point of view – regulations and decisions are the clearly dominating instruments of the Union. Directives, by contrast, represent a tiny fraction of the legal output of the Union today – an output that is even overshadowed by the number of international agreements yearly concluded by the Union with third States.

Table 3.1 EU Legislative Output: Legal Instruments (2015–17)

	2015	2016	2017
Regulations	1,282	1,216	1,117
Directives	38	41	32
Decisions	800	801	795
International treaties	41	66	74

1. Primary Union Law: The Effect of the Treaties

The European Treaties are framework treaties. They establish the objectives of the European Union, and endow it with the powers to achieve these objectives.

[13] In this sense direct applicability is a 'federal' question as it relates to the effect of a 'foreign' norm in a domestic legal system, whereas direct effect is a 'separation-of-powers' question as it relates to the issue whether a norm is addressed to the legislature or the executive and judiciary.

[14] The institutional practice of Union decision-making has created a number of 'atypical' acts. For a discussion of atypical acts, see J. Klabbers, 'Informal Instruments before the European Court of Justice' (1994) 31 *CML Rev.* 997. But see also now: Art. 296 TFEU – third indent: 'When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.'

[15] Logic would dictate that non-binding acts are not binding. Yet, the European Court has accepted the possibility of their having some 'indirect' legal effect. In Case 322/88, *Grimaldi* v. *Fonds des maladies professionelles* [1989] ECR 4407, para. 18, the Court held that recommendations 'cannot be regarded as having no legal effect' as they 'supplement binding [European] provisions'. 'Non-binding' Union acts may, therefore, have legal 'side effects'. For an interesting overview, see L. Senden, *Soft Law in European Community Law: Its Relationship to Legislation* (Hart, 2004).

[16] Art. 216(2) TFEU.

[17] What this section will however not do is to explore the legal effects of decisions adopted by international organisations or bodies created by international agreements signed by the Union. The most prominent example here are so-called EEA decisions, that is: decisions adopted by the joint committee established by the EEA Agreement between the European Union and the EFTA States. For a brief analysis of the EEA arrangements, see (online) Chapter 18B, section 4(b/bb).

Many of the European policies in Part III of the TFEU thus simply set out the competences and procedures for future Union secondary law. The Treaties, as primary European law, only offer the constitutional bones. But could this constitutional 'skeleton' itself have direct effect? Would there be Treaty provisions that were sufficiently precise to give rise to rights that national courts could apply in specific situations?

The European Court affirmatively answered this question in *Van Gend en Loos*.[18] The case concerned a central objective of the European Union: the internal market. According to that central plank of the Treaties, the Union was to create a customs union between the Member States. Within a customs union, goods can move freely without any pecuniary charges levied when crossing borders. The Treaties had chosen to establish the customs union gradually; and to this effect ex-Article 12 EEC contained a standstill obligation:

> Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.[19]

The Netherlands appeared to have violated this provision, and, believing this to be the case, Van Gend & Loos – a Dutch importing company – brought proceedings in a Dutch court against the National Inland Revenue. The Dutch court had doubts about the admissibility and the substance of the case and referred a number of preliminary questions to the European Court of Justice.

Could a private party enforce an *international* treaty in a *national* court? And, if so, was this a question of national or European law? In the course of the proceedings before the European Court, the Dutch government heavily disputed that an individual could enforce a Treaty provision against its own government in a national court. Any alleged infringements had to be submitted to the European Court by the Commission or a Member State under the 'international' infringement procedures set out in Articles 258 and 259 TFEU.[20] The Belgian government, having intervened in the case, equally claimed that the question of what effect an international treaty had within the national legal order 'falls exclusively within the jurisdiction of the Netherlands court'.[21] Conversely, the Commission countered that 'the effects of the provisions of the Treaty on the national law of Member States cannot be determined by the actual national law of each of them but by the Treaty itself'.[22] And since ex-Article 12 EEC was 'clear and complete',

[18] Case 26/62, *Van Gend en Loos*.
[19] The provision has been repealed. Strictly speaking, it is therefore not correct to identify Art. 30 TEU as the successor provision, for the latter is based on ex-Arts. 13 and 16 EEC. The normative content of ex-Art. 12 EEC solely concerned the introduction of *new* customs duties; and therefore did not cover the abolition of existing tariff restrictions.
[20] Case 26/62, *Van Gend en Loos*, 6. On enforcement actions by the Commission, see Chapter 10, section 3(a).
[21] Case 26/62, *Van Gend en Loos*, 6. [22] *Ibid*.

it was 'a rule of law capable of being effectively applied by the national court'.[23] The fact that the European provision was addressed to the Member States did 'not of itself take away from individuals who have an interest in it the right to require it to be applied in the national courts'.[24]

Two views thus competed before the Court. According to the dualist 'international' view, legal rights of private parties could 'not derive from the [Treaties] or the legal measures taken by the institutions, but [solely] from legal measures enacted by Member States'.[25] According to the monist 'constitutional' view, by contrast, European law was capable of directly creating individual rights. The Court famously favoured the second view. It followed from the 'spirit' of the Treaties that European law was no 'ordinary' international law. It would in itself be directly applicable in the national legal orders.

But when would a provision have direct effect, and thus entitle private parties to seek its application by a national court? Having briefly presented the general scheme of the Treaty in relation to customs duties,[26] the Court concentrated on the wording of ex-Article 12 EEC and found as follows:

> The wording of [ex-]Article 12 [EEC] contains a *clear and unconditional prohibition* which is not a positive but a *negative obligation*. This obligation, moreover, is *not qualified by any reservation on the part of the States, which would make its implementation conditional upon a positive legislative measure enacted under national law*. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects. The implementation of [ex-]Article 12 [EEC] does not require any legislative intervention on the part of the States. The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation.[27]

While somewhat repetitive, the test for direct effect is here clearly presented: wherever the Treaties contain a 'prohibition' that was 'clear' and 'unconditional', that prohibition would have direct effect. To be an unconditional prohibition thereby required two things. First, the European provision had to be an *automatic* prohibition, that is: it should not depend on subsequent positive legislation by the European Union. And, second, the prohibition should ideally be *absolute*, that is: 'not qualified by any reservation on the part of the States'.

This was a – very – strict test. But ex-Article 12 EEC was indeed 'ideally adapted' to satisfy this triple test. It was a clear prohibition and unconditional in the double sense outlined above. However, if the Court had insisted on a strict

[23] *Ibid*. [24] *Ibid*.
[25] This was the view of the German government (*ibid*., 8).
[26] The Court considered ex-Art. 12 EEC as an 'essential provision' in the general scheme of the Treaty as it relates to customs duties (*ibid*., 12).
[27] *Ibid*., 13 (emphasis added).

application of all three criteria, very few provisions within the Treaties would have had direct effect. Yet the Court subsequently loosened the test considerably (section (a)). And, as we shall see in section (b) below, it clarified that the Treaties could be vertically and horizontally directly effective.

a. Direct Effect: From Strict to Lenient Test

The direct effect test set out in *Van Gend en Loos* was informed by three criteria. First, a provision had to be clear. Second, it had to be unconditional in the sense of being an automatic prohibition. And, third, this prohibition would need to be absolute, that is: not allow for reservations. In its subsequent jurisprudence, the Court expanded the concept of direct effect on all three fronts.

First, how clear would a prohibition have to be to be directly effective? Within the Treaties' title on the free movement of goods, we find the following famous prohibition: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.'[28] Was this a clear prohibition? While the notion of 'quantitative restrictions' might have been – relatively – clear, what about 'measures having equivalent effect'? The Commission had realised the open-ended nature of the concept and offered some early semantic help.[29] And yet, despite all the uncertainty involved, the Court found that the provision had direct effect.[30]

The same lenient interpretation of what 'clear' meant was soon applied to even wider provisions. In *Defrenne*,[31] the Court analysed the following prohibition: '[e]ach Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'.[32] Was this a clear prohibition of discrimination? Confusingly, the Court found that the provision might and might not have direct effect. With regard to indirect discrimination, the Court considered the prohibition indeterminate, since it required 'the elaboration of criteria whose implementation necessitates the taking of appropriate measures at [European] and national level'.[33] Yet in respect of direct discrimination, the prohibition was directly effective.[34]

[28] Art. 34 TFEU.

[29] Directive 70/50/EEC on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty [1970] OJ English Special Edition 17.

[30] Case 74/76, *Iannelli & Volpi SpA* v. *Ditta Paolo Meroni* [1977] ECR 557, para. 13: 'The prohibition of quantitative restrictions and measures having equivalent effect laid down in Article [34] of the [FEU] Treaty is mandatory and explicit and its implementation does not require any subsequent intervention of the Member States or [Union] institutions. The prohibition therefore has direct effect and creates individual rights which national courts must protect[.]'

[31] Case 43/75, *Defrenne* v. *Sabena* [1976] ECR 455, para. 19.

[32] Art. 157(1) TFEU. [33] Case 43/75, *Defrenne* v. *Sabena*, para. 19.

[34] *Ibid*., para. 24. However, the Court subsequently held the prohibition of indirect pay discrimination to be also directly effective, see Case 262/88, *Barber* v. *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, para. 37: '[Article 157(1)] applies directly to all forms of discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question.' This generous reading was subsequently extended to the yet wider prohibition of 'any discrimination on grounds of nationality'; see Case C-85/96, *Martínez Sala* v. *Freistaat Bayern* [1998] ECR I-2691, para. 63.

What about the second part of the direct effect test? When was a prohibition automatic? Would this be the case where the Treaties expressly acknowledged the need for positive legislative action by the Union to achieve a Union objective? For example, the Treaty chapter on the right of establishment contains not just a prohibition addressed to the Member States in Article 49 TFEU,[35] the subsequent Article 50 states:

> In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.

Would this not mean that the freedom of establishment was conditional on legislative action? In *Reyners*,[36] the Court rejected this argument. Despite the fact that the general scheme within the chapter on freedom of establishment contained a set of provisions that sought to achieve free movement through positive Union legislation,[37] the Court declared the European right of establishment in Article 49 TFEU to be directly effective. And the Court had no qualms about giving direct effect to the general prohibition on 'any discrimination on grounds of nationality'– despite the fact that Article 18 TFEU expressly called on the Union legislator to adopt rules 'designed to prohibit such discrimination'.[38]

Finally, what about the third requirement? Could *relative* prohibitions, even if clear, ever be directly effective? The prohibition on quantitative restrictions on imports, discussed above, is subject to a number of legitimate exceptions according to which it 'shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security'.[39] Was this then a prohibition that was 'not qualified by any

[35] Art. 49(1) TFEU states: 'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.'

[36] Case 2/74, *Reyners* v. *Belgian State* [1974] ECR 631. For an excellent discussion of this question, see P. Craig, 'Once Upon a Time in the West: Direct Effect and the Federalisation of EEC Law' (1992) 12 *Oxford Journal of Legal Studies* 453 at 463–70.

[37] Case 2/74, *Reyners*, para. 32.

[38] Case 85/96, *Martínez Sala* v. *Freistaat Bayern*. [39] Art. 36 TFEU.

reservation on the part of the States'? The Court found that this was indeed the case. For although these derogations would 'attach particular importance to the interests of Member States, it must be observed that they deal with exceptional cases which are clearly defined and which do not lend themselves to any wide interpretation'.[40] And since the application of these exceptions was 'subject to judicial control', a Member State's right to invoke them did not prevent the general prohibition 'from conferring on individuals rights which are enforceable by them and which the national courts must protect'.[41]

What, then, is the test for the direct effect of Treaty provisions in light of these – relaxing – developments? The simple test is this: a provision has direct effect when it is capable of being applied by a national court. Importantly, direct effect does *not* depend on a European norm granting a subjective right;[42] but on the contrary, the subjective right is a result of a directly effective norm.[43] Direct effect simply means that a norm can be 'invoked' in and applied by a court. And this is the case when the Court of Justice says it is! Today, almost all Treaty *prohibitions* have direct effect – even the most general ones. In *Mangold*,[44] the Court thus held that an – unwritten and vague – *general* principle of European law could have direct effect.

Should we embrace this development? We should, for the direct effect of a legal rule 'must be considered as being the normal condition of any rule of law'. The very questioning of the direct effect of European law was an 'infant disease' of the young European legal order.[45] And this infant disease has today – largely – been cured but for one area: the Common Foreign and Security Policy.

b. Dimensions: Vertical and Horizontal Direct Effect

Where a Treaty provision is directly effective, an individual can invoke European law in a national court (or administration). This will normally be as against the State. This situation is called 'vertical' effect, since the State is 'above' its subjects. But while a private party is in subordinate position vis-à-vis public authorities, it is in a coordinate position vis-à-vis other private parties. The legal effect of a norm between private parties is thus called 'horizontal' effect. And while there

[40] Case 13/68, *Salgoil* v. *Italian Ministry of Foreign Trade* [1968] ECR 453 at 463.

[41] Case 41/74, *van Duyn* v. *Home Office* [1974] ECR 1337, para. 7.

[42] For the opposite view, see K. Lenaerts and T. Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 *EL Rev.* 287 at 310: direct effect 'is the technique which allows individuals to enforce a subjective right which is only available in the internal legal order in an instrument that comes from outside that order, against another (state or private) actor'.

[43] M. Ruffert, 'Rights and Remedies in European Community Law: A Comparative View' (1997) 34 *CML Rev.* 307 at 315.

[44] For a long discussion of this case, see section 3(b/bb).

[45] P. Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 8 *EL Rev.* 155.

has never been any doubt that Treaty provisions can be invoked in a vertical situation, there has been some discussion about their horizontal direct effects.

Should it make a difference whether European law is invoked in administrative proceedings against the Inland Revenue or in a civil dispute between two private parties? Should the Treaties be allowed to impose obligations on individuals? The Court in *Van Gend en Loos* had accepted this theoretical possibility.[46] And, indeed, the horizontal direct effect of Treaty provisions has never been in doubt for the Court.[47] A good illustration of the horizontal direct effect of Treaty provisions can be found in *Familiapress* v. *Bauer*.[48] The case concerned the interpretation of Article 34 TFEU prohibiting unjustified restriction on the free movement of goods. It arose in a *civil* dispute before the Vienna Commercial Court between Familiapress and a German competitor. The latter was accused of violating the Austrian Law on Unfair Competition by publishing prize crossword puzzles – a sales technique that was deemed unfair under Austrian law. Bauer defended itself in the national court by invoking Article 34 TFEU – claiming that the directly effective European right to free movement prevailed over the Austrian law. And the Court of Justice indeed found that a national law that constituted an unjustified restriction of trade would have to be disapplied in the civil proceedings.

The question whether a Treaty prohibition has horizontal direct effect must, however, be distinguished from the question of whether it also outlaws private party actions. For example, imagine that the rule prohibiting prize crossword puzzles had not been adopted by the Austrian legislature but by the Austrian Press Association – a private body regulating Austrian newspapers. Would this 'private' rule equally breach Article 34 TFEU? The latter is not simply a question of the *effect* of a provision, but rather of its personal scope.[49]

Many Treaty prohibitions are – expressly or implicitly – addressed to the State.[50] However, the Treaties equally contain provisions that are directly addressed to private parties.[51] The question whether a Treaty prohibition covers public as well as private actions is controversial. Should the 'equal pay for equal work' principle or the free movement rules – both *expressly* addressed to the Member

[46] Case 26/62, *Van Gend en Loos*, 12: '[European] law therefore not only imposes obligations on individuals …'.

[47] Indeed, the direct effect of Art. 34 TFEU was expressly announced in a 'horizontal' case between two private parties; see Case 74/76, *Iannelli & Volpi* v. *Paolo Meroni*.

[48] Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH* v. *Bauer Verlag* [1997] ECR I-3689.

[49] This point will be further discussed in the specific context of the free movement of goods, see Chapter 13, section 1(a).

[50] For example, Art. 157 TFEU states (emphasis added) that '[e]ach *Member State* shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'; and Art. 34 TFEU prohibits restrictions on the free movement of goods 'between Member States'.

[51] Art. 101 TFEU prohibits 'all agreements between undertakings' that restrict competition within the internal market, and is thus addressed to private parties.

States – also *implicitly* apply to private associations and their actions? If so, the application of the Treaty will not just impose *indirect* obligations on individuals (when they lose their right to rely on a national law that violates European law); they will be *directly* prohibited from engaging in an activity. The Court has – in principle – confirmed that Treaty provisions, albeit addressed to the Member States, might cover private actions.[52] Thus in *Defrenne*, the Court found that the prohibition on pay discrimination between men and women could equally apply to private employers.[53] And, while the exact conditions remain uncertain,[54] the Court has confirmed and reconfirmed the inclusion of private actions within the free movement provisions.[55]

To distinguish the logical relations between the various constitutional concepts of direct applicability, direct effect – both vertical (VDE) and horizontal (HDE) – and private party actions, Figure 3.3 may be useful.

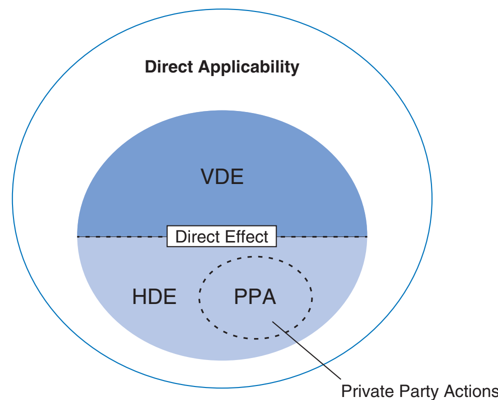

Figure 3.3 Direct Applicability, Direct Effect and Private Party Actions

[52] Case 36/74, *Walrave et al.* v. *Association Union cycliste international et al.* [1974] ECR 1405, para. 19: 'to limit the prohibitions in question to acts of a public authority would risk creating inequality in their application'.

[53] Case 43/75, *Defrenne*, para. 39: 'In fact, since Article [157 TFEU] is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.'

[54] The Court generally limits this application to 'private' rules that aim to regulate 'in a collective manner' (*ibid.*, para. 17). For somewhat more recent case law on the application of the free movement rules to private parties, see Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL* v. *Jean-Marc Bosman* [1995] ECR I-4921.

[55] This has been confirmed for all four freedoms, with the possible exception of the provisions on goods. On the application of the free movement provisions in this context, see Chapter 13, section 1(a). For the same question in the context of EU fundamental rights, see Chapter 12, section 4(d).

2. Direct Union Law: Regulations and Decisions

When the European Union was created, the Treaties envisaged two instruments that were a priori directly applicable: regulations and decisions. A regulation would be an act of direct and general application in all Member States. It was designed as the legislative act of the Union. By contrast, a decision was originally seen as the executive instrument of the Union. It would directly apply to those to whom it was addressed.[56] Both instruments were predestined to have direct effects in the sense of allowing individuals to directly invoke them before national courts. Nonetheless, their precise effects have remained – partially – controversial. Would all provisions within a regulation be directly effective? And could decisions be generally applicable? Let us look at these questions in turn.

a. Regulations: The 'Legislative' Instrument

Article 288 defines a 'regulation' as follows:

> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.[57]

This definition demands four things. First, regulations must be *generally* applicable. Second, they must be *entirely* binding. Third, they must be *directly* applicable, and that – fourth – in *all* Member States. This section starts by investigating characteristics one and four. It subsequently analyses the relationship between direct applicability and the question of direct effect.[58]

aa. General Application in All Member States

Regulations were designed to be an instrument of (material) legislation.[59] Their 'general application' was originally meant to distinguish them from the 'specific application' of decisions.

In *Zuckerfabrik Watenstedt GmbH* v. *Council*,[60] the European Court defined 'general' applicability as 'applicable to objectively determined situations and involves legal consequences for categories of persons viewed in a general and abstract manner'; yet conceded that a regulation would not lose its general nature 'because it may be possible to ascertain with a greater or lesser degree of accuracy

[56] The original Art. 189 EEC stated: 'A decision shall be binding in its entirety upon those to whom it is addressed.'

[57] Art. 288(2) TFEU.

[58] We shall analyse the 'second' element in Chapter 4, section 4(a/aa) when dealing with a regulation's pre-emptive capacity.

[59] Joined Cases 16–17/62, *Confédération Nationale des Producteurs de Fruits et de Légumes* v. *Council* [1962] ECR 471, para. 2. On the material concept of legislation, see Chapter 7, Introduction.

[60] Case 6/68, *Zuckerfabrik Watenstedt GmbH* v. *Council* [1968] ECR 409.

the number or even the identity of the persons to which it applies at any given time as long as there is no doubt that the measure is applicable as a result of an objective situation of law or of fact which it specifies'.[61] The crucial characteristic of a regulation – a characteristic that would give it a 'legislative' character – is thus the 'openness' of the group of persons to whom it applies. Where the group of persons is 'fixed in time' the act would not constitute a regulation but a bundle of individual decisions.[62]

Would all provisions within a regulation have to satisfy the general applicability test? The European Court has clarified that this is not the case. Not all provisions of a regulation must be general in character. Some provisions may indeed constitute individual decisions 'without prejudice to the question whether that measure considered in its entirety can be correctly called a regulation'.[63] This laxer threshold has also been applied to the geographical scope of regulations. Article 288 TFEU tells us that they must be applicable in all the Member States. However, the European Court sees a regulation's geographical applicability from an abstract perspective: while normatively valid in all Member States, its concrete application can be confined to a limited number of States.[64]

bb. Direct Application and Direct Effect

By making regulations directly applicable, the Treaties recognised from the very beginning a monistic connection between that Union act and the national legal orders. Regulations would be automatically binding *within* the Member States – a characteristic that distinguished them from ordinary international law. Regulations were thus 'a *direct source of rights and duties* for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under [European] law'.[65] In 1958, this was extraordinary: the Union had been given the power to directly legislate for all individuals in the Member States.[66]

Would the direct application of regulations imply their direct effect? Direct applicability and direct effect are, as we saw above,[67] distinct concepts. The former refers to the *normative* validity of regulations within the national legal order. Direct applicability indeed simply means that no 'validating' national act is needed for European law to have effects within the domestic legal orders: 'The direct application of a Regulation means that its entry into force and its application in favour of those subject to it are independent of any measure of reception

[61] *Ibid.*, at 415.
[62] Joined Cases 41–4/70, *International Fruit Company and others* v. *Commission* [1971] ECR 411, esp. para. 17.
[63] Joined Cases 16–17/62, *Confédération Nationale des Producteurs de Fruits et Légumes*, para. 2.
[64] Case 64/69, *Compagnie Française commerciale et financière* v. *Commission* [1970] ECR 221.
[65] Case 106/77, *Amministrazione delle Finanze dello Stato* v. *Simmenthal SpA* [1978] ECR 629, paras. 14–15 (emphasis added).
[66] J.-V. Louis, *Les Règlements de la Communauté Économique Européenne* (Presses universitaires de Bruxelles, 1969), 16.
[67] See Introduction to this chapter.

into national law.'[68] Direct effect, on the other hand, refers to the ability of a norm to execute itself. Direct applicability thus only makes direct effect *possible*, but the former will not automatically imply the latter. The direct application of regulations thus 'leave[s] open the question whether a particular provision of a regulation has direct effect or not'.[69] In the words of an early commentator:

> Many provisions of regulations are liable to have direct effects and can be enforced by the courts. Other provisions, although they have become part of the domestic legal order as a result of the regulation's direct applicability, are binding for the national authorities only, without granting private persons the right to complain in the courts that the authorities have failed to fulfil these binding [Union] obligations. This is by no means an unrealistic conclusion. In every member State there consists quite a bit of law which is not enforceable in the courts, because these rules were not meant to give the private individual enforceable rights or because they are too vague or too incomplete to admit of judicial application.[70]

Direct effect is thus narrower than direct applicability. Not all provisions of a regulation will have to have direct effect. This has been expressly recognised by the Court.[71] In *Azienda Agricola Monte Arcosa*, the Court thus stated:

> [A]lthough, by virtue of the very nature of regulations and of their function in the system of sources of [European] law, the provisions of those regulations generally have immediate effect in the national legal systems without its being necessary for the national authorities to adopt measures of application, some of their provisions may none the less necessitate, for their implementation, the adoption of measures of application by the Member States … In the light of the discretion enjoyed by the Member States in respect of the implementation of those provisions, it cannot be held that individuals may derive rights from those provisions in the absence of measures of application adopted by the Member States.[72]

Legislative discretion left to the national level will thus prevent provisions within regulations from having direct effect, 'where the legislature of a Member State has not adopted the provisions necessary for their implementation in the

[68] Case 34/73, *Fratelli Variola SpA* v. *Amministrazione delle Finanze dello Stato* [1973] ECR 981, para. 10.
[69] P. Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities* (Sijthoff, 1974), 164.
[70] G. Winter, 'Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law' (1972) *CML Rev.* 425 at 436.
[71] See Case 230/78, *SpA Eridania-Zuccherifici nazionali and SpA Societa Italiana per l'Industria degli Zuccheri* v. *Minister of Agriculture and Forestry, Minister for Industry, Trade and Craft Trades and SpA Zuccherifici Meridionali* [1979] ECR 2749; Case 137/80, *Commission* v. *Belgium* [1981] ECR 653; Case 72/85, *Commission* v. *The Netherlands* [1986] ECR 1219.
[72] Case C-403/98, *Azienda Agricola Monte Arcosa Srl* [2001] ECR I-103, paras. 26, 28.

national legal system'.[73] Regulations often explicitly call for the adoption of implementing measures.[74] But even if there is no express provision, Member States are under a general duty to implement non-directly effective provisions within regulations.[75] Yet non-directly effective provisions might still have indirect effects. These indirect effects have been extensively discussed in the context of directives, and will be treated there. Suffice to say here that the European Court applies the constitutional doctrines developed in the context of directives – such as the principle of consistent interpretation – also to provisions within regulations.[76]

b. Decisions: The Executive Instrument

Article 288 defines a Union 'decision' as follows:

> A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.[77]

The best way to make sense of this definition is to contrast it with that for regulations. Like a regulation, a decision shall be binding in its entirety. And like a regulation it will be directly applicable. However, unlike a regulation, a decision was originally not designed to be generally applicable;[78] yet, with time, European constitutional practice developed a non-addressed decision. This development

[73] *Ibid.*, para. 29.

[74] Art. 2(5) of Regulation 797/85 and Art. 5(5) of Regulation 2328/91 – at issue in *Azienda Agricola Monte Arcosa Srl* – indeed stated: 'Member States shall, for the purposes of this Regulation, define what is meant by the expression "farmer practising farming as his main occupation".' For an analysis of this practice, see R. Král, 'National Normative Implementation of EC Regulations: An Exceptional or Rather Common Matter?' (2008) 33 *EL Rev.* 243.

[75] For an implicit duty to adopt national implementing measures, see Case C-177/95, *Ebony Maritime et al.* v. *Prefetto della Provincia di Brindisi et al.* [1997] ECR I-1111, para. 35: '[T]he Court has consistently held that where a [Union] regulation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article [4(3) TEU] requires the Member States to take all measures necessary to guarantee the application and effectiveness of [European] law.'

[76] Case C-60/02, *Criminal proceedings against X* [2004] ECR I-651, paras. 61–3, esp. para. 62 (emphasis added): 'Even though in the case at issue in the main proceedings the [Union] rule in question is a regulation, which by its very nature does not require any national implementing measures, and not a directive, Article 11 of Regulation No 3295/94 empowers Member States to adopt penalties for infringements of Article 2 of that regulation, thereby making it possible to *transpose to the present case the Court's reasoning in respect of directives*.'

[77] Art. 288(4) TFEU.

[78] The old Art. 189 EEC stated: 'A decision shall be binding in its entirety upon those to whom it is addressed.'

is now recognised in Article 288(4) TFEU that allows for two types of decisions: decisions specifically applicable to those to whom it is addressed, and decisions that are generally applicable because they are not addressed to anybody specifically.

aa. Specifically Addressed Decisions

Decisions that mention an addressee shall only be binding on that person. Depending on whether the addressee(s) are private individuals or Member States, European law thereby distinguishes between individual decisions and State-addressed decisions.

Individual decisions are similar to national administrative acts. They are designed to execute a Union norm by applying it to an individual situation. A good illustration can be found in the context of competition law, where the Commission is empowered to prohibit anticompetitive agreements that negatively affect the internal market.[79] A decision that is addressed to a private party will only be binding on the addressee. However, this will not necessarily mean that it has no *horizontal* effects on other parties. Indeed, the European legal order expressly recognises that decisions addressed to one person may be of 'direct and individual concern' to another.[80] In such a situation this 'third person' is entitled to challenge the legality of that decision.[81]

State-addressed decisions constitute the second group of decisions specifically applicable to the addressee(s).[82] We find again a good illustration of this Union act in the context of competition law. Here the Union is empowered to prohibit State aid to undertakings that threaten to distort competition within the internal market.[83] What is the effect of a State-addressed decision in the national legal orders? Binding on the Member State(s) addressed, may it give direct rights to individuals? In *Grad* v. *Finanzamt Traunstein*,[84] the Court answered this question positively. The German government had claimed that State-addressed decisions cannot, unlike regulations, create rights for private persons. But the response of the European Court went the other way:

> [A]lthough it is true that by virtue of Article [288], regulations are directly applicable and therefore by virtue of their nature capable of producing direct effects, it does not follow from this that other categories of legal measures mentioned in that Article can

[79] Art. 101 TFEU.

[80] Art. 263[4] TFEU: 'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.'

[81] For this point, see Chapter 10, section 1(c).

[82] On this type of decision, see U. Mager, 'Die staatengerichtete Entscheidung als supranationale Handlungsform' (2001) 36 *Europarecht* 661.

[83] Art. 107 TFEU.

[84] Case 9/70, *Grad* v. *Finanzamt Traunstein* [1970] ECR 825.

> never produce similar effects. In particular, the provision according to which decisions are binding in their entirety on those to whom they are addressed enables the question to be put whether the obligation created by the Decision can only be invoked by the [Union] institutions against the addressee or whether such a right may possibly be exercised by all those who have an interest in the fulfilment of this obligation.
> It would be incompatible with the binding effect attributed to decisions by Article [288] to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision. Particularly in cases where, for example, the [Union] authorities by means of a decision have imposed an obligation on a Member State or all the Member States to act in a certain way, the effectiveness (*'l'effect utile'*) of such a measure would be weakened if the nationals of that State could not invoke it in the courts and the national courts could not take it into consideration as part of [European] law. Although the effects of a decision may not be identical with those of a provision contained in a regulation, this difference does not exclude the possibility that the end result, namely the right of the individual to invoke the measures before the courts, may be the same as that of a directly applicable provision of a regulation.[85]

State-addressed decisions could, consequently, create rights for private citizens. They could have direct effect in certain circumstances. What were those circumstances? The Court insisted that the direct effect of a provision depended on 'the nature, background and wording of the provision'.[86] And indeed: the provision in question was a prohibition that was 'unconditional and sufficiently clear and precise to be capable of producing direct effects in the legal relationships between the Member States and those subject to their jurisdiction'.[87] This test came close – remarkably close – to the Court's direct effect test for Treaty provisions. But would this also imply – like for Treaty provisions – their horizontal direct effect? State-addressed decisions here seem to follow the legal character of directives,[88] which will be discussed in section 3.

bb. Non-addressed Decisions

While not expressly envisaged by the original Treaties, non-addressed decisions (decisions *sui generis*) had become a widespread constitutional phenomenon within the European Union.[89] The Lisbon Treaty has now 'officialised' them in Article 288 TFEU. But what is the function of these decisions? In the past,

[85] *Ibid.*, para. 5. [86] *Ibid.*, para. 6. [87] *Ibid.*, para. 9.

[88] See Case C-80/06, *Carp* v. *Ecorad* [2007] ECR I-4473, paras. 19ff., esp. para. 21: 'In accordance with Article [288], Decision 1999/93 is binding only upon the Member States, which, under Article 4 of that decision, are the sole addressees. Accordingly, the considerations underpinning the case-law referred to in the preceding paragraph with regard to directives apply *mutatis mutandis* to the question whether Decision 1999/93 may be relied upon as against an individual.'

[89] For a historical and systematic analysis, see the groundbreaking work by J. Bast, *Grundbegriffe der Handlungsformen der EU: entwickelt am Beschluss als praxisgenerierter Handlungsform des Unions- und Gemeinschaftsrechts* (Springer, 2006).

the Union had recourse to these decisions – instead of regulations – to have an instrument that was directly applicable but lacked direct effect.

3. Indirect Union Law: Directives

The third binding instrument of the Union is the most mysterious one: the directive. According to Article 288 TFEU, a 'directive' is defined as follows:

> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.[90]

This formulation suggested two things. First, directives appeared to be externally binding *on* States – not *within* States. On the basis of such a 'dualist' reading, directives would have no validity in the national legal orders. They seemed *not* to be directly applicable, and would thus need to be 'incorporated' or 'implemented' through national legislation. This dualist view was underlined by the fact that Member States were only bound as to the result to be achieved – for the obligation of result is common in classic international law.[91] Second, binding solely on the State(s) to which it was addressed, directives appeared to lack *general* application. Their general application could indeed only be achieved indirectly *via* national legislation transforming the European content into national form. Directives have consequently been described as 'indirect legislation'.[92]

But could this indirect Union law have direct effects? In a courageous line of jurisprudence, the Court confirmed that directives could – under certain circumstances – have direct effect and thus entitle individuals to have their European rights applied in national courts. But, if this was possible, would directives not become instruments of direct Union law, like regulations? The negative answer to this question will become clearer in this third section. Suffice to say here that the test for the direct effect of directives is subject to two additional limitations – one temporal, one normative. Direct effect would only arise *after* a Member State had failed properly to 'implement' the directive into national law, and then only in relation to the State authorities themselves. We shall analyse the conditions and limits for the direct effect of directives first, before exploring their potential indirect effects in national law.

[90] Art. 288(3) TFEU.

[91] For this view, see L.-J. Constantinesco, *Das Recht der Europäischen Gemeinschaften* (Nomos, 1977), 614. For a recent look at the various choices with regard to the methods of transposition, see R. Král, 'On the Choice of Methods of Transposition of EU Directives' (2016) 41 *EL Rev.* 220.

[92] Pescatore, 'Doctrine of "Direct Effect"' (n. 45 above) at 177.

a. Direct Effect and Directives: Conditions and Limits

That directives could directly give rise to rights that individuals could claim in national courts was accepted in *Van Duyn* v. *Home Office*.[93]

The case concerned a Dutch secretary, whose entry into the United Kingdom had been denied on the grounds that she was a member of the Church of Scientology. Britain had tried to justify this limitation on the free movement of workers by reference to an express derogation within the Treaties that allowed such restrictions on grounds of public policy and public security.[94] However, in an effort to harmonise national derogations from free movement, the Union had adopted a directive according to which '[m]easures taken on grounds of public policy or of public security shall be based exclusively on the *personal conduct of the individual concerned*'.[95] This outlawed national measures that limited free movement for generic reasons, such as membership of a disliked organisation. Unfortunately, the United Kingdom had not 'implemented' the directive into national law.

Could Van Duyn nonetheless directly invoke the directive against the British authorities? The Court of Justice found that this was indeed possible by emphasising the distinction between direct applicability and direct effect:

> [B]y virtue of the provisions of Article [288] regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow from this that other categories of acts mentioned in that Article can never have similar effects. It would be incompatible with the binding effect attributed to a directive by Article [288] to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the [Union] authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if the individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of [European] law. Article [267], which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the [Union] institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts.[96]

The Court here – rightly – emphasised the distinction between direct applicability and direct effect, yet – wrongly – defined the relationship between these two concepts in order to justify its conclusion. To brush aside the textual

[93] Case 41/74, *Van Duyn* v. *Home Office* [1974] ECR 1337.

[94] Art. 45(1) and (3) TFEU.

[95] Directive 64/221 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ (English Special Edition): Chapter 1963–1964/117, Art. 3(1) (emphasis added).

[96] Case 41/74, *Van Duyn*, para. 12.

argument that regulations are directly applicable while directives are not, it wrongly alluded to the idea that direct effect without direct application was possible.[97] And the direct effect of directives was then justified by three distinct arguments. First, to exclude direct effect would be incompatible with the 'binding effect' of directives. Second, their 'useful effect' would be weakened if individuals could not invoke them in national courts. Third, since the preliminary reference procedure did not exclude directives, the latter must be capable of being invoked in national courts.

What was the constitutional value of these arguments? Argument one is a sleight of hand: the fact that a directive is not binding in *national law* is not 'incompatible' with its binding effect under *international law*. The second argument is strong, but not of a legal nature: to enhance the useful effect of a rule by making it more binding is a political argument. Finally, the third argument only begs the question: while it is true that the preliminary reference procedure generically refers to all 'acts of the institutions', it could be argued that only those acts that are directly effective can be referred. The decision in *Van Duyn* was right, but sadly without reason.

The lack of a convincing *legal* argument to justify the direct effect of directives soon prompted the Court to propose a fourth argument:

> A Member State which has not adopted the implementing measures required by the Directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails.[98]

This fourth reason has become known as the 'estoppel argument' – acknowledging its intellectual debt to English 'equity' law. A Member State that fails to implement its European obligations is 'stopped' from invoking that failure as a defence, and individuals are consequently – and collaterally – entitled to rely on the directive as against the State. Unlike the three original arguments, this fourth argument is *State*-centric. It locates the rationale for the direct effect of directives not in the nature of the instrument itself, but in the behaviour of the State.

This (behavioural) rationale would result in two important limitations on the direct effect of directives. For even if provisions within a directive were 'unconditional and sufficiently precise' 'those provisions may [only] be *relied upon by*

[97] In the words of J. Steiner: 'How can a law be enforceable by individuals within a Member-State if it is not regarded as incorporated in that State?' ('Direct Applicability in EEC: A Chameleon Concept' (1982) 98 *Law Quarterly Review* 229–48 at 234). The direct effect of a directive presupposes its direct application. And, indeed, ever since *Van Gend en Loos*, all directives must be regarded as directly applicable (see S. Prechal, *Directives in EC Law* (Oxford University Press, 2005), 92 and 229). For the same conclusion, see also C. Timmermans, 'Community Directives Revisited' (1997) 17 YEL 1–28 at 11–12.

[98] Case 148/78, *Ratti* [1979] ECR 1629, para. 22.

an individual against the State where that State fails to implement the Directive in national law *by the end of the period prescribed or where it fails to implement the directive correctly*'.[99] This direct effect test for directives therefore differed from that for ordinary Union law, as it added a temporal and a normative limitation. *Temporally*, the direct effect of directives could only arise *after* the failure of the State to implement the directive had occurred. Thus, before the end of the implementation period granted to Member States, no direct effect could take place. And even once this temporal condition had been satisfied, the direct effect would operate only as against the State. This *normative* limitation on the direct effect of directives has become famous as the 'no-horizontal-direct-effect rule'.

aa. The No-horizontal-direct-effect Rule

The Court's jurisprudence of the 1970s had extended the direct effect of Union law to directives. An individual could claim his European rights against a State that had failed to implement a directive into national law. This situation was one of 'vertical' direct effect. Could an individual equally invoke a directive against another private party? This 'horizontal' direct effect existed for direct Union law; yet should it be extended to directives?

The Court's famous answer is a resolute 'no': directives could not have horizontal direct effects. The 'no-horizontal-direct-effect rule' was first expressed in *Marshall*.[100] The Court here based its negative conclusion on a textual argument:

> [A]ccording to Article [288 TFEU] the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each member state to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person.[101]

The absence of horizontal direct effect was confirmed in *Dori*.[102] A private company had approached Ms Dori for an English language correspondence course. The contract had been concluded in Milan's busy central railway station. A few days later, she changed her mind and tried to cancel the contract. A right of cancellation had been provided by the European directive on consumer contracts concluded outside business premises,[103] but Italy had not implemented the directive into national law. Could a private party nonetheless directly rely on the unimplemented directive against another private party? The Court was firm:

[99] Case 80/86, *Kolpinghuis Nijmegen BV* [1987] ECR 3969, para. 7 (emphasis added).
[100] Case 152/84, *Marshall* v. *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.
[101] *Ibid.*, para. 48.
[102] Case C-91/92, *Faccini Dori* v. *Recreb* [1994] ECR I-3325.
[103] Directive 85/577 concerning protection of the consumer in respect of contracts negotiated away from business premises ([1985] OJ L 372/31).

> [A]s is clear from the judgment in *Marshall* … the case-law on the possibility of relying on directives against State entities is based on the fact that under Article [288] a directive is binding only in relation to 'each Member State to which it is addressed'. That case-law seeks to prevent 'the State from taking advantage of its own failure to comply with [European] law' … The effect of extending that case-law to the sphere of relations between individuals would be to recognise a power in the [Union] to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations. It follows that, in the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court.[104]

This denial of any direct effect of directives in horizontal situations was grounded in three arguments.[105] First, a textual argument: a directive is binding in relation to each Member State to which it is addressed. (But had the Court not used this very same argument to establish the direct effect of directives in the first place?) Second, the estoppel argument: the direct effect for directives exists to prevent a State from taking advantage of its own failure to comply with European law. And since individuals were not responsible for the non-implementation of a directive, direct effect should not be extended to them. Third, a systematic argument: if horizontal direct effect were given to directives, the distinction between directives and regulations would disappear. This was a weak argument, for a directive's distinct character could be preserved in different ways.[106] In order to bolster its reasoning, the Court added a fourth argument in subsequent jurisprudence: legal certainty.[107] Since directives were not originally published, they must not impose obligations on those to whom they are not addressed. This argument has lost some of its force,[108] but continues to be very influential today.

All these arguments may be criticised.[109] But the Court of Justice has stuck to its conclusion: directives cannot *directly* impose obligations on individuals. They lack horizontal direct effect. This constitutional rule of European law has nonetheless been qualified by one limitation and one exception.

[104] Case C-91/92, *Dori*, paras. 22–5.
[105] The Court silently dropped the 'useful effect argument' as it would have worked towards the opposite conclusion.
[106] On this point, see R. Schütze, 'The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers' (2006) 25 YEL 91.
[107] See Case C-201/02, *The Queen* v. *Secretary of State for Transport, Local Government and the Regions, ex p. Wells* [2004] ECR I-723, para. 56: 'the principle of legal certainty prevents directives from creating obligations for individuals'.
[108] The publication of directives is now, in principle, required by Art. 297 TFEU.
[109] For an excellent overview of the principal arguments, see P. Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 *EL Rev.* 349. But why does Professor Craig concentrate on arguments one and four, instead of paying close attention to the strongest of the Court's reasons in the form of argument two?

bb. The Limitation to the Rule: The Wide Definition of State (Actions)

One way to minimise the no-horizontal-direct-effect rule is to maximise the vertical direct effect of directives. The Court has done this by giving extremely extensive definitions to what constitutes the 'State', and what constitute 'public actions'.

What public authorities count as the 'State'? A minimal definition restricts the concept to a State's central organs. Because they failed to implement the directive, the estoppel argument suggested them to be vertically bound by the directive. Yet the Court has never accepted this consequence, and has endorsed a maximal definition of the State. It thus held that directly effective obligations 'are binding upon *all authorities of the Member States*'; and this included 'all organs of the administration, including decentralised authorities, such as municipalities',[110] even 'constitutionally independent' authorities.[111]

The best formulation of this maximalist approach was given in *Foster*.[112] Was the 'British Gas Corporation' – a statutory corporation for developing and maintaining gas supply – part of the British 'State'? The Court held this to be the case. Vertical direct effect would apply to any body 'whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, *for providing a public service under the control of the State and has for that purpose special powers* beyond those which result from the normal rules applicable in relations between individuals'.[113] This wide definition of the State consequently covers *private* bodies endowed with *public* functions.

This functional definition of the State, however, suggested that only 'public acts', that is: acts adopted in pursuit of a public function, would be covered. Yet there are situations where the State acts horizontally like a private person: it might conclude private contracts and employ private personnel. Would these 'private actions' be covered by the doctrine of vertical direct effect?

In *Marshall*, the plaintiff argued that the United Kingdom had not properly implemented the Equal Treatment Directive. But could an *employee* of the South-West Hampshire Area Health Authority invoke the direct effect of a directive against this State authority in this *horizontal* situation? The British government argued that direct effect would only apply 'against a Member State *qua* public authority and not against a Member State *qua* employer'. 'As an employer a State is no different from a private employer'; and '[i]t would not therefore be proper to put persons employed by the State in a better position than those who are employed by a private employer'.[114] This was an excellent argument, but the

[110] Case 103/88, *Costanzo SpA* v. *Comune di Milano* [1989] ECR 1839, para. 31 (emphasis added).

[111] Case 222/84, *Johnston* v. *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para. 49.

[112] Case C-188/89, *Foster and others* v. *British Gas* [1990] ECR I-3313.

[113] *Ibid.*, para. 20 (emphasis added). For recent confirmations of that test, see Case C-46/15, *Ambisig Ambiente e Sistemas de Informação Geográfica*, EU:C:2016:530, para. 22; Case C-413/15, Farrell, EU:C:2017:745.

[114] Case 152/84, *Marshall*, para. 43.

Court would have none of it. According to the Court, an individual could rely on a directive as against the State 'regardless of the capacity in which the latter is acting, whether employer or public authority'.[115]

Vertical direct effect would thus not only apply to *private* parties exercising public functions, but also to public authorities engaged in *private* activities.[116] This double extension of the doctrine of vertical direct effect can be criticised for treating similar situations dissimilarly, for it creates a discriminatory limitation to the no-horizontal-direct-effect rule. However, the Court has recently confirmed that both extensions are an integral result of the *Foster* doctrine.[117]

cc. The Exception to the Rule: Incidental Horizontal Direct Effect

In the two previous scenarios, the Court respected the rule that directives could not have direct horizontal effects, but limited the rule's scope of application. Yet in some 'incidents', the Court has found a directive *directly* to affect the horizontal relations between private parties. This 'incidental' horizontal effect of directives must, despite some scholastic effort to the contrary,[118] be seen as an *exception* to the rule. The incidental horizontal direct effect cases indeed *violate* the rule that directives cannot negatively affect private parties. The two 'incidents' chiefly responsible for the doctrine of incidental horizontal direct effects here are *CIA Security* and *Unilever Italia*.

In *CIA Security* v. *Signalson and Securitel*,[119] the Court dealt with a dispute between three Belgian competitors whose business was the manufacture and sale of security systems. CIA Security had applied to a commercial court for orders requiring Signalson and Securitel to cease libel. The defendants had alleged that the plaintiff's alarm system did not satisfy Belgian security standards. This was indeed the case, but the Belgian legislation itself violated a European notification requirement established by Directive 83/189. But because the European norm was in a directive, this violation could – theoretically – not be invoked in a horizontal dispute between private parties. Or could it? The Court held as follows:

[115] *Ibid.*, para. 49.

[116] *Ibid.*, para. 51: 'The argument submitted by the United Kingdom that the possibility of relying on provisions of the Directive against the respondent qua organ of the State would give rise to an arbitrary and unfair distinction between the rights of State employees and those of private employees does not justify any other conclusion. Such a distinction may easily be avoided if the Member State concerned has correctly implemented the Directive in national law.'

[117] Case C-413/15, *Farrell*, where the Court was asked whether the traditional *Foster* definition consisted of two cumulative or two alternative criteria; and the Court expressly clarified that the latter was the case (*ibid.*, esp. para. 33).

[118] This phenomenon has been referred to as the: 'incidental' horizontal effect of directives (P. Craig and G. de Búrca, *EU Law* (Oxford University Press, 2011), 207ff.); 'horizontal side effects of direct effect' (Prechal, *Directives in EC Law* (n. 97 above), 261–70); and the 'disguised' vertical effect of directives (M. Dougan, 'The "Disguised" Vertical Direct Effect of Directives' (2000) 59 *Cambridge Law Journal* 586–612).

[119] Case C-194/94, *CIA Security* v. *Signalson and Securitel* [1996] ECR I-2201.

> Articles 8 and 9 of Directive 83/189 lay down a precise obligation on Member States to notify draft technical regulations to the Commission before they are adopted. Being, accordingly, *unconditional and sufficiently precise in terms of their content, those articles may be relied on by individuals before national courts*. It remains to examine the legal consequences to be drawn from a breach by Member States of their obligation to notify and, more precisely, whether Directive 83/189 is to be interpreted as meaning that a breach of the obligation to notify, constituting a procedural defect in the adoption of the technical regulations concerned, renders such technical regulations inapplicable so that they may not be enforced against individuals … [I]t is undisputed that the aim of the directive is to protect freedom of movement for goods by means of preventive control and that the obligation to notify is essential for achieving such [Union] control. *The effectiveness of [Union] control will be that much greater if the directive is interpreted as meaning that breach of the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals.*[120]

CIA Security could thus rely on the directive as against its private competitors; and the national court had to 'decline to apply a national technical regulation which has not been notified in accordance with the directive'.[121] What else was this but horizontal direct effect?

This – puzzling – result was confirmed in *Unilever Italia* v. *Central Food*.[122] Unilever had supplied Central Food with olive oil that did not conform to Italian labelling legislation, and Central Food therefore refused to honour the sales contract between the two companies. Unilever, in turn, brought proceedings claiming that the Italian legislation violated Directive 83/189. The case was referred to the European Court of Justice, where the Italian and Danish governments intervened. Both governments protested that it was 'clear from settled case-law of the Court that a directive cannot of itself impose obligations on individuals and cannot therefore be relied on as such against them'.[123] But the Court's – strange – answer was again this:

> Whilst it is true, as observed by the Italian and Danish Governments, that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual, that case-law does not apply where non-compliance with Article 8 or Article 9 of Directive 83/189, which *constitutes a substantial procedural defect*, renders a technical regulation adopted in breach of either of those articles inapplicable. In such circumstances, and unlike the case of non-transposition of directives with which the case-law cited by those two Governments is concerned, Directive 83/189 does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. It creates neither rights nor obligations for individuals.[124]

[120] *Ibid.*, paras. 44–8 (emphasis added). [121] *Ibid.*, para. 55.
[122] Case C-443/98, *Unilever Italia* v. *Central Food* [2000] ECR I-7535.
[123] *Ibid.*, para. 35. [124] *Ibid.*, paras. 50–1 (emphasis added).

What did this mean? Could a 'substantial procedural effect' lead to the horizontal direct effect of the directive? Let us stick to hard facts. In both cases, the national court was required to disapply national legislation in *civil* proceedings between *private* parties. Did CIA Security and Unilever not 'win' a right from the directive to have national legislation disapplied; and did Signalson and Central Food not 'lose' the right to have national law applied? It seems impossible to deny that the directive *did* directly affect the rights and obligations of individuals. Even if it was addressed to the States by imposing a procedural obligation on them, it incidentally obliged private parties to accept forfeiting their national rights.

However, the exception to the no-horizontal-direct-effect rule has remained an exceptional exception.[125] But, even so, there are – strong – arguments for the Court to abandon its constitutional rule altogether.[126] And as we shall see in the Conclusion below, the entire debate surrounding directives might simply be the result of some linguistic confusion.

b. Indirect Effects through National and (Primary) European Law

aa. The Doctrine of Consistent Interpretation of National Law

Norms may have direct and indirect effects. A provision within a directive lacking direct effect may still have certain indirect effects in the national legal orders. The lack of direct effect means exactly that: a directive cannot itself – that is: *directly* – be invoked. However, a directive may still have indirect effects on the interpretation of national law. For the European Court has created a general duty on national courts (and administrations)[127] to interpret national law as far as possible in light of all European law.

[125] It may, at first sight, seem that the Court has broadened this exception to a second context in Case C-377/14, *Radlinger and Radlingerová* v. *Finway*, EU:C:2016:283. In this case, the plaintiff(s) had concluded an (unfair) credit agreement that the defendant sought to enforce. This credit agreement seemed to violate various EU consumer law directives; yet the national court had not investigated these, as there existed national legislation that did not permit a court to examine of its own motion the unfairness of contractual terms in this context. The Court of Justice found that this national rule itself violated the EU directives at issue (*ibid.*, paras. 54 and 66); but did this mean that the EU directives would need to be horizontally applied between the parties? The Court eschewed the answer. While invoking the *CIA/Unilever* idea that this was a situation in which 'a procedural rule [was] placed not on an individual but on the courts' (*ibid.*, para. 77), it nevertheless left open whether the obligation to apply the EU directives *ex officio* would have direct or only indirect effects on individuals (*ibid.*, paras. 79–80).
[126] See Opinion of Advocate General Jacobs in Case C-316/93, *Vaneetveld* v. *Le Foyer* [1994] ECR I-763, para. 31: '[I]t might well be conducive to greater legal certainty, and to a more coherent system, if the provisions of a directive were held in appropriate circumstances to be directly enforceable against individuals'; Craig, 'Legal Effect of Directives' (n. 109 above), 390: 'The rationales for the core rule that Directives do not have horizontal direct effect based on the Treaty text, legal certainty and the Regulations/Directives divide are unconvincing.'
[127] Case C-218/01, *Henkel* v. *Deutsches Patent- und Markenamt* [2004] ECR I-1725.

The doctrine of consistent interpretation was given an elaborate definition in *Von Colson*:

> [T]he Member States' obligation arising from a Directive to achieve the result envisaged by the Directive and their duty under Article [4(3) TEU] to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law in particular the provisions of a national law specifically introduced in order to implement [a Directive], national courts are required to interpret their national law in the light of the wording and the purpose of the Directive in order to achieve the result referred to in the third paragraph of Article [288].[128]

The duty of consistent interpretation is a duty to implement a directive by indirect means. Where a national legislator has *failed* to directly implement a directive, the task is (partly) transferred to the national judiciary. National courts are here under an obligation to 'implement' the directive judicially through a 'European' interpretation of national law. Temporally, the duty of consistent interpretation however only starts applying *after* the implementation period of the directive has passed.[129]

This duty of consistent interpretation applies regardless of 'whether the [national] provisions in question *were adopted before or after the directive*'.[130] The duty indeed extends to all national law – irrespective of whether the latter was intended to implement the directive. However, where domestic law had been specifically enacted to implement the directive, the national courts must operate under the particularly strong presumption 'that the Member State, following its exercise of the discretion afforded to it under that provision, had the intention of fulfilling entirely the obligations arising from the directive'.[131]

[128] Case 14/83, *Von Colson and Elisabeth Kamann* v. *Land Nordrhein-Westfalen* [1984] ECR 1891, para. 26. Because this paragraph was so important in defining the duty of consistent interpretation, it is sometimes referred to as the '*Von Colson* principle'.

[129] National courts are not required to interpret their national law in light of Union law *before* (!) the expiry of the implementation deadline. After Case C-212/04, *Adeneler and others* v. *Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-6057, there is no room for speculation on this issue: '[W]here a directive is transposed belatedly, the general obligation owed by national courts to interpret domestic law in conformity with the directive exists only once the period for its transposition has expired' (*ibid*., para. 115). However, once a directive has been adopted, a Member State will be under the immediate constitutional obligation to 'refrain from taking any measures liable seriously to compromise the result prescribed' in the directive, see C-129/96, *Inter-Environnement Wallonie ASBL* v. *Region Wallonne* [1997] ECR 7411, para. 45. This obligation is independent of the doctrine of indirect effect.

[130] Case C-106/89, *Marleasing* v. *La Comercial Internacional de Alimentacion* [1990] ECR I-4135, para. 8 (emphasis added).

[131] Joined Cases C-397/01 to C-403/01, *Pfeiffer*, para. 112. For a more recent confirmation of this rule, see Case C-306/12, Spedition Welter, EU:C:2013:650, esp. para. 32: '[I]n circumstances such as those of the case in the main proceedings, where national legislation reproduced word for word the provisions of Article 21(5) of the directive, the referring court is required, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, to interpret national law in a way that is compatible with the interpretation given to the directive by the Court.'

The duty of consistent interpretation leads to the *indirect* implementation of a directive. It can *indirectly* impose new obligations – both vertically and horizontally. An illustration of the horizontal *indirect* effect of directives can be seen in *Webb*.[132] The case concerned a claim by Mrs Webb against her employer. The latter had hired the plaintiff to replace a pregnant co-worker during her maternity leave. Two weeks after she had started work, Mrs Webb discovered that she was pregnant herself, and was dismissed for that reason. She brought proceedings before the Industrial Tribunal, pleading sex discrimination. The Industrial Tribunal rejected this on the grounds that the reason for her dismissal had not been her sex but her inability to fulfil the primary task for which she had been recruited. The case went on appeal to the (then) House of Lords, which confirmed the interpretation of national law but nonetheless harboured doubts about Britain's European obligations under the Equal Treatment Directive. On a preliminary reference, the European Court indeed found that there was sex discrimination under the directive and that the fact that Mrs Webb had been employed to replace another employee was irrelevant.[133] On receipt of the preliminary ruling, the House of Lords was thus required to change its previous interpretation of national law. Mrs Webb *won* a right, while her employer *lost* the right to dismiss her.

The doctrine of indirect effect here changed the horizontal relations between two private parties; and the duty of consistent interpretation has consequently been said to amount to '*de facto* (horizontal) direct effect of the directive'.[134] Normatively, this horizontal effect is however an *indirect* effect, as it operates through the medium of national law.

Are there limits to the duty of consistent interpretation? The duty is very demanding: national courts are required to interpret their national law '*as far as possible*, in the light of the wording and the purpose of the [Union act]'.[135] But what will 'as far as possible' mean? Should national courts be required to behave as if they were the national legislature? This might seriously undermine the (relatively) passive place reserved for judiciaries in most national constitutional orders. And the European legal order has therefore only asked national courts to adjust the interpretation of national law 'in so far as it is given discretion to do so *under national law*'.[136]

The European Court thus accepts that there exist established judicial methodologies within the Member States and has permitted national courts to limit themselves to 'the application of interpretative methods recognised by *national*

[132] Case C-32/93, *Webb* v. *EMO Air Cargo* [1994] ECR I-3567.

[133] *Ibid*., paras. 26–8.

[134] Prechal, *Directives in EC Law* (n. 97 above), 211.

[135] Case C-106/89, *Marleasing*, para. 8 (emphasis added).

[136] Case C-14/83, *Von Colson*, para. 28 (emphasis added).

law'.[137] National courts are thus not obliged to 'invent' or 'import' novel interpretative methods.[138] However, within the discretion given to the judiciary under national constitutional law, the European doctrine of consistent interpretation requires the referring court 'to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law'.[139]

Are there also European constitutional limits to the duty of the Union-conform interpretation of national law? The Court has clarified that the duty of consistent interpretation 'is limited by the general principles of law which form part of [European] law and in particular the principles of legal certainty and non-retroactivity'.[140] But, more importantly, the Court recognises that the clear and unambiguous wording of a national provision constitutes an absolute limit to its interpretation.[141] National courts are thus not required to interpret national law *contra legem*.[142] (This will however not protect 'established case-law' if the wording allows for an alternative interpretation.)[143] The duty of consistent interpretation would thus find a boundary in the clear wording of a provision. National courts are only required to interpret the text – and not to amend it! Textual amendments continue to be the task of the national legislatures – and not the national judiciaries.

bb. Indirect Effects through the Medium of European Law

The European Court has built an alternative – second – avenue to promote the indirect effect of directives. Instead of mediating their effect through *national*

[137] Joined Cases C-397–403/01, *Pfeiffer*, para. 116 (emphasis added).
[138] See M. Klammert, 'Judicial Implementation of Directives and Anticipatory Indirect Effect: Connecting the Dots' (2006) 43 *CML Rev.* 1251 at 1259. For the opposite view, see Prechal, *Directives in EC Law* (n. 97 above), 213.
[139] Joined Cases C-397–403/01, *Pfeffer*, para. 118.
[140] Case 80/86, *Kolpinghuis* [1987] ECR 3969, para. 13. This has been taken to imply that a Union-conform interpretation must not aggravate the criminal liability of a private party, as criminal law is subject to particularly strict rules of interpretation. For a general discussion here, see S. Drake, 'Twenty Years after *Von Colson*: The Impact of "Indirect Effect" on the Protection of the Individual's Community Rights' (2005) 30 *EL Rev.* 329.
[141] Case C-555/07, *Kücükdeveci* v. *Swedex* [2010] ECR I-365, para. 49. See now also Case C-176/12, *Association de Médiation sociale*, EU: C: 2014: 2, 39.
[142] Case C-212/04, *Adeneler* [2006] ECR I-5057, para. 110: 'It is true that the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem*.' For a more recent case here, see: Case C-282/10, *Dominguez*, EU:C:2012:33.
[143] Case C-441/14, *DI* v. *Estate of Rasmussen*, EU:C:2016:278, paras. 33–4: '[T]he requirement to interpret national law in conformity with EU law entails the obligation for national courts to change its established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive. Accordingly, the national court cannot validly claim in the main proceedings that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law by mere reason of the fact that it has consistently interpreted that provision in a manner that is incompatible with EU law.'

law, it indirectly translates their content into European law. How so? The way the Court has achieved this has been to capitalise on the general principles of European law. For the latter may – as primary Union law – have horizontal direct effect.[144]

This new avenue was opened in *Mangold*.[145] The case concerned the German law on Part-Time Working and Fixed-Term Contracts. The national employment law, transposing a European directive on the subject, permitted fixed-term employment contracts if the worker had reached the age of 52. However, the German law seemed to violate a second directive: Directive 2000/78 establishing a general framework for equal treatment in employment and occupation adopted to combat discrimination in the workplace. According to Article 6(1) of the directive, Member States could provide for differences in the workplace on grounds of age only if 'they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary'. In the present case, a German law firm had hired Mr Mangold, then aged 56, on a fixed-term employment contract. A few weeks after commencing employment, Mangold brought proceedings against his employer before the Munich Industrial Tribunal, where he claimed that the German law violated Directive 2000/78, as a disproportionate discrimination on grounds of age.

The argument was not only problematic because it was raised in *civil* proceedings between two *private* parties, which seemed to exclude the horizontal *direct* effect of Article 6(1). More importantly, since the implementation period of Directive 2000/78 had not yet expired, even the horizontal *indirect* effect of the directive could not be achieved through a 'Europe-consistent' interpretation of *national* law. Yet having found that the national law indeed violated the *substance* of the directive,[146] the Court was out to create a new way to review the legality of the German law. Instead of using the directive as such – directly or indirectly – it found a general principle of European constitutional law that stood *behind* the directive. That principle was the principle of non-discrimination on grounds of age. And it was *that* general principle that would bind the Member States when implementing European law.[147] From there, the Court reasoned as follows:

> Consequently, observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age … In those circumstances it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its

[144] On the normative quality of primary Union law, see section 1 above.
[145] Case C-144/04, *Mangold* v. *Helm* [2005] ECR I-9981.
[146] *Ibid.*, para. 65.
[147] On the so-called 'implementation situation', see Chapter 12, section 4(a).

jurisdiction, the legal protection which individuals derive from the rules of [European] law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law. Having regard to all the foregoing, the reply to be given to the [national court] must be that [European] law and, more particularly, *Article 6(1) of Directive 2000/78, must be interpreted as precluding a provision of domestic law such as that at issue in the main proceedings which authorises, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52.*[148]

This judgment has been – very – controversial. But it is less the individual components than their combination and context that was contentious. Past precedents had indeed established that the Union's (unwritten) general principles might dynamically derive from the constitutional traditions of the Member States.[149] And the Court had previously found that provisions in a directive could be backed up by such a general principle.[150] It was also undisputed that general principles could apply to the Member States implementing European law and thereby have direct effect.[151] However, to use all elements in *this* context was potentially explosive. If this technique were generalised, the limitations inherent in the directive as an instrument of secondary law could be outflanked. The generalised use of primary law as the medium for secondary law was dangerous 'since the subsidiary applicability of the principles not only gives rise to a lack of legal certainty but also distorts the nature of the system of sources, converting typical [Union] acts into merely decorative rules which may be easily replaced by the general principles'.[152] Put succinctly: if a *special* directive is adopted to make a *general* principle sufficiently precise, how can the latter have direct effect while the former has not?

Yet to the chagrin of some,[153] the *Mangold* ruling was confirmed *and* consolidated in *Kücükdeveci*.[154] This time, Germany was said to have violated Directive

[148] Case C-144/04, *Mangold*, paras. 76–8 (emphasis added).

[149] On this point, see Chapter 12, section 1(a). In the present case the 'genesis' of a general principle prohibiting age discrimination was indeed controversial. Apparently, only two national constitutions recognised such a principle (see Advocate General Mazák in Case C-411/05, *Palacios de la Villa* [2007] ECR I-8531).

[150] See Case 222/84, *Johnston* v. *Chief Constable*, para. 18: 'The requirement of judicial control stipulated by that article [of the directive] reflects a general principle of law which underlies the constitutional traditions common to the Member States.'

[151] In the present case, the actual conclusion was nonetheless controversial (see M. Dougan, 'In Defence of Mangold?', in A. Arnull et al. (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart, 2011), 219).

[152] Joined Cases C-55-07 and C-56/07, *Michaeler et al.* v. *Amt für sozialen Arbeitsschutz Bozen* [2008] ECR I-3135, para. 21.

[153] For a piece of German angst, consider the decision of the German Constitutional Court in *Honeywell* discussed in Chapter 4, section 2(b).

[154] Case C-555/07, *Kücükdeveci* v. *Swedex* [2010] ECR I-365.

2000/78 by having discriminated against *younger* employees. The bone of contention was Article 622 of the German Civil Code, which established various notice periods depending on the duration of the employment relationship. However, the provision only started counting the duration after an employee had turned 25.[155] After ten years of service to a private company, Ms Kücükdeveci had been sacked. Having started work at the age of 18, her notice period was thus calculated on the basis of a three-year period. Believing that this *shorter* notice period for young employees was discriminatory, she brought an action before the Industrial Tribunal. On reference to the Court of Justice, that Court found the German law to violate the directive.[156] And since the implementation period for Directive 2000/78 had now expired, there was no *temporal* limit to establishing the indirect effect of the directive through national law.

But the indirect effect of the directive via the medium of national law now encountered an – insurmountable – *normative* limit. Because of its clarity and precision, the German legal provision was 'not open to an interpretation in conformity with Directive 2000/78'.[157] The indirect effect of the directive could thus not be established via the medium of national law, and the Court chose once more a general principle of European law as the medium for the content of the directive. The Court thus held that it was 'the general principle of European Union law prohibiting all discrimination on grounds of age, *as given expression in Directive 2000/78*, which must be the basis of the examination of whether European Union law precludes national legislation such as that at issue in the main proceedings'.[158] And where this general principle had been violated, it was the obligation of the national court to disapply any provision of national legislation contrary to that principle – regardless of whether private or public parties are involved.[159] Yet, crucially, the Court remained ambivalent about whether the general principle was violated *because* the directive had been violated.[160] The better view would here be that this is not the case. From a constitutional

[155] The last sentence of Art. 622(2) of the German Civil Code states: 'In calculating the length of employment, periods prior to the completion of the employee's 25th year of age are not taken into account.'

[156] Case C-555/07, *Kücükdeveci*, para. 43.

[157] *Ibid*., para. 49.

[158] *Ibid*., para. 27 (emphasis added), see also para. 50. The Court has subsequently clarified that for any general principle to have direct effect in a particular situation, 'that situation must also fall within the scope of the prohibition of discrimination laid down by Directive 2000/78' (see Case C-441/14, *DI* v. *Estate of Rasmussen*, EU:C:2016:278), para. 24). The general principle thus must always be 'mediated'.

[159] Case C-555/07, *Kücükdeveci*, para. 51; Case C-441/14, *DI*, para. 36.

[160] In *ibid*., para. 43, the Court found that 'European Union law, more particularly the principle of non-discrimination on grounds of age as given expression by Directive 2000/78, must be interpreted as precluding national legislation, such as that at issue in the main proceedings'. But did this mean that the directive and the general principle were violated? In a later paragraph, the Court seems to leave the question to the national courts 'to ensure the full effectiveness of that law, disapplying *if need be* any provision of national legislation contrary to that principle' (para. 51, emphasis added).

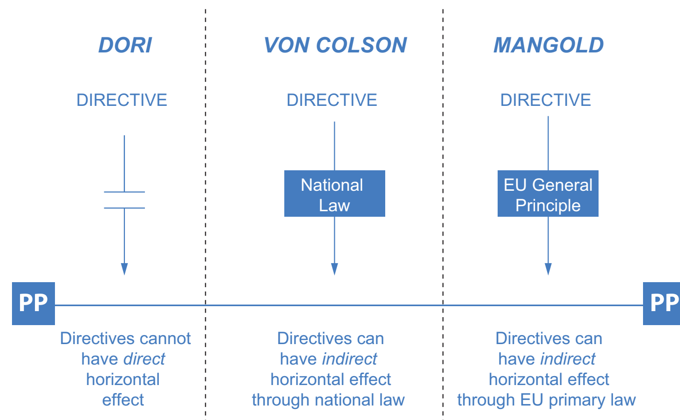

Figure 3.4 Indirect Effect in Proceedings Between Private Parties (PP)

perspective, the threshold for the violation of a general principle ought to be higher than that for a specific directive.[161]

4. External Union Law: International Agreements

In the 'globalised' world of the twenty-first century, international agreements have become important regulatory instruments. Instead of acting unilaterally, many States realise that the regulation of international trade or the environment requires a multilateral approach. And to facilitate international regulation, many legal orders have 'opened up' to international law and adopted a monist position. The European legal order has traditionally followed this monist approach. With regard to international agreements concluded by the Union, Article 216(2) TFEU states:

> Agreements concluded by the Union are binding upon the institutions of the Union *and on its Member States*.[162]

This definition suggested two things. First, international agreements were binding *in* the European legal order. And, indeed, the Court has expressly confirmed that international agreements 'form an integral part of the [European] legal system' from the date of their entry into force without the need for

[161] The Court seems indeed to be moving in this direction, see Case C-147/08, *Römer* v. *Freie und Hansestadt Hamburg* [2011] ECR I-3591; Case C-176/12, *Association de médiation sociale* v. *Union locale des syndicats CGT and others*, EU: C: 2014: 2.

[162] Emphasis added.

legislative acts of 'incorporation'.[163] Union agreements were external *Union* law. Second, these international agreements would also bind the Member States. And the Court here again favoured a monist philosophy. In treating international agreements as acts of the European institutions,[164] they would be regarded as European law; and as European law, they would be directly applicable 'in' the Member States. And, as directly applicable sources of European law, international agreements have the capacity to contain directly effective provisions that national courts must apply. When would such direct effects arise?

a. *The Conditions of Direct Effect*

Even in a monist legal order, not all international treaties will be directly effective.[165] The direct applicability of international agreements only makes them capable of having direct effects. Particular treaties may lack direct effect for 'when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not to the judicial department; and the legislature must execute the contract before it can become a rule for the Court'.[166] Where an international agreement asks for the adoption of implementing legislation it is indeed addressed to the legislative branch, and its norms will not be operational for the executive or the judiciary.

The question whether a Union agreement has direct effect has – again – been centralised by the European Court of Justice. The Court has justified this 'centralisation' by reference to the need to ensure legal uniformity in the European legal order. The effects of Union agreements may not be allowed to vary 'according to the effects in the internal legal order of each Member State which the law of that State assigns to international agreements'.[167] Once an agreement has thus been considered by the Court to unfold direct effects, it will be directly effective in the European as well as the national legal orders.

When will an international treaty have direct effects? The Court has devised a two-stage test.[168] In a first stage, it examines whether the agreement *as a whole* is capable of containing directly effective provisions. The signatory parties to the agreement may have positively settled this issue themselves.[169] If this is not the case, the Court will employ a 'policy test' that analyses the nature, purpose, spirit

[163] Case 181/73, *Haegemann* v. *Belgium* [1974] ECR 449.

[164] Case C-192/89, *Sevince* v. *Staatssecretaris van Justitie* [1990] ECR I-3461, para. 10.

[165] C. M. Vazquez, 'Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties' (2008) 122 *Harvard Law Review* 599.

[166] *Foster* v. *Neilson*, 27 US (2 Pet.) 253 at 314 (1829).

[167] Case 104/81, *Hauptzollamt Mainz* v. *Kupferberg & Cie* [1982] ECR 3641, para. 14.

[168] For an excellent analysis, see A. Peters, 'The Position of International Law within the European Community Legal Order' (1997) 40 *German Yearbook of International Law* 9–77 at 53–4 and 58–66.

[169] Case 104/81, *Kupferberg*, para. 17.

or general scheme of the agreement.[170] This evaluation is inherently 'political', and the first part of the analysis is essentially a 'political question'. The conditions for the direct effect of external Union law here differ from the analysis of direct effect in the internal sphere, as internal law is automatically *presumed* to be *capable* of direct effect.

Where the 'political question' hurdle has been crossed, the Court will turn to examining the direct effect of a specific provision of the agreement.[171] The second stage of the test constitutes a classic direct effect analysis. Individual provisions must represent a 'clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measures'.[172] While the second stage of the test is thus identical to that for internal legislation, the actual results can vary. Identically worded provisions in internal and external legislation may not necessarily be given the same effect.[173]

In the past, the European Courts have generally been 'favourably disposed' towards the direct effect of Union agreements, and thus created an atmosphere of 'general receptiveness' to international law.[174] The classic exception to this constitutional rule is the WTO agreement.[175] The Union is a member of the World Trade Organization, and as such formally bound by its constituent agreements. Yet the Union Courts have persistently denied that agreement a safe passage through the first part of the direct effect test. The most famous judicial ruling in this respect is *Germany* v. *Council (Bananas)*;[176] yet, it was a later decision that clarified the constitutional rationale for the refusal to grant direct effect. In *Portugal* v. *Council*, the Court found it crucial to note that:

> Some of the contracting parties, which are among the most important commercial partners of the [Union], have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law. Admittedly, the fact that the courts of one of the parties consider that some of the provisions of the agreement concluded by the [Union] are of direct application whereas the courts of the other party do not recognise such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement …
>
> However, the lack of reciprocity in that regard on the part of the [Union's] trading partners, in relation to the WTO agreements which are based on reciprocal and mutually advantageous arrangements and which must *ipso facto* be distinguished from agreements concluded by the [Union] … may lead to disuniform application of the WTO rules. *To accept that the role of ensuring that [European] law complies with those rules devolves directly on the [Union] judicature would deprive the legislative or executive organs of the [Union] of the scope for manoeuvre enjoyed by their counterparts in the [Union's] trading partners*.[177]

In light of the economic consequences of a finding of direct effect, the granting of such an effect to the WTO agreement was too political a question for the Court to decide. Not only was the agreement too 'political' in that it contained few hard-and-fast legal rules,[178] a unilateral decision to grant direct effect within the European legal order would have disadvantaged the Union vis-à-vis trading partners that had refused to allow for the agreement's enforceability in their domestic courts. The judicial self-restraint thus acknowledged that the constitutional prerogative for external relations lay primarily with the executive branch. Surprisingly, the Court's cautious approach to the WTO agreements, and their progeny,[179] has recently been extended into a second field.[180] And it seems likely that this less receptive approach will also apply to agreements concluded within the Union's Common Foreign and Security Policy. In light of the latter's specificity,[181] the Court might well find that the 'nature and broad logic' of CFSP agreements prevent their having direct effects within the Union legal order.

170 See Joined Cases 21–24/72, *International Fruit Company NV and others* v. *Produktschap voor Groenten en Fruit* [1972] ECR 1219, para. 20; Case C-280/93, *Germany* v. *Council* [1993] ECR I-4973, para. 105.

171 The two prongs of the test can be clearly seen in Case 104/81, *Kupferberg*. In paras. 18–22, the Court undertook the global policy test, while in paras. 23–7 it looked at the conditions for direct effectiveness of a specific provision.

172 Case 12/86, *Demirel* v. *Stadt Schwäbisch Gmünd* [1987] ECR 3719, para. 14.

173 J. H. J. Bourgeois, 'Effects of International Agreements in European Community Law: Are the Dice Cast?' (1983–4) 82 *Michigan Law Review* 1250–73 at 1261. See also the discussion on the pre-emptive effect of international treaties in Chapter 4, section 4(a/cc).

174 P. Eeckhout, *External Relations of the European Union* (Oxford University Press, 2004), 301. This however appears to be in a process of change. On this development especially with regard to free trade agreements, see the excellent analysis by A. Semertzi, 'The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements' (2014) 51 *CML Rev.* 1125.

175 P. Eeckhout, 'The Domestic Legal Status of the WTO Agreement: Interconnecting Legal System' (1997) 34 *CML Rev.* 11.

176 Case C-280/93, *Germany* v. *Council* [1994] ECR I-4973.

177 Case C-149/96, *Portuguese Republic* v. *Council of the European Union* [1999] ECR I-8395, paras. 43–6 (emphasis added).

178 For the GATT Agreement, see Joined Cases 21–24/72, *International Fruit Company*, para. 21: 'This agreement which, according to its preamble, is based on the principle of negotiations undertaken on the basis of "reciprocal and mutually advantageous arrangements" is characterised by the great flexibility of its provisions[.]'

179 For the lack of direct effect of WTO rulings in the Union legal order, see Case C-377/02, *Van Parys* [2005] ECR I-1465. On the relationship between the European Courts and decisions by international tribunals, see M. Bronckers, 'The Relationship of the EC Courts with Other International Tribunals: Non-committal, Respectful or Submissive?' (2007) 44 *CML Rev.* 601.

180 The Court dealt with the United Nations Convention on the Law of the Sea (UNCLOS), in Case C-308/06, *Intertanko et al.* v. *Secretary of State for Transport* [2008] ECR I-4057 and found (paras. 64–5): '[I]t must be found that UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship's flag State. It follows that the nature and the broad logic of UNCLOS prevent the Court from being able to assess the validity of a [Union] measure in the light of that Convention.'

181 On this point, see Chapter 8, sections 2(a) and 3(a).

b. The Dimensions of Direct Effect

What are the dimensions of direct effect for the Union's international agreements? Will a directly effective Union agreement be vertically *and* horizontally directly effective?[182]

Two constitutional options exist. First, international treaties can have horizontal direct effects. Then international agreements would come close to being 'external regulations'. Alternatively, the Union legal order could treat international agreements as 'external directives' and limit their direct effect to the vertical dimension. European citizens could then only invoke a directly effective provision of a Union agreement against the European institutions and the Member States, but they could not rely on a Union agreement in a private situation.

The Court has not expressly decided which option to follow. Yet, in *Polydor* v. *Harlequin* it seemed tacitly to assume the possibility of a horizontal direct effect of international agreements.[183] Doubts remained.[184] Yet the Court did not dispel them in *Sevince*.[185] However, the acceptance of the horizontal direct effect thesis has gained ground. In *Deutscher Handballbund eV* v. *Kolpak*,[186] the Court was asked whether rules drawn up by the German Handball Federation – a private club – would be discriminatory on grounds of nationality. The sports club had refused to grant Kolpak – a Slovakian national – the same rights as German players. This seemed to violate Article 38 of the Association Agreement between the Union and Slovakia stipulating that 'workers of Slovak Republic nationality legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals'. The question, therefore, arose whether

[182] For a good new look at this question, see S. Gáspár-Szilágyi, 'The "Horizontal Direct Effect" of EU International Agreements: Is the Court Avoiding a Clear Answer?' (2015) 42 *Legal Issues of Economic Integration* 93. The following section will not explore the special constitutional principles governing the indirect effect of international agreements within the Union legal order. For a brief overview here, see R. Schütze, 'Direct and Indirect Effects of Union Law', in R. Schütze and T. Tridimas (eds.), *Oxford Principles of European Union Law – Volume I* (Oxford University Press, 2018), 265 at 296ff.

[183] Case 270/80, *Polydor and others* v. *Harlequin and others* [1982] ECR 329.

[184] These doubts inevitably gave rise to a good degree of academic speculation. In 1985, the following questions were put to H. J. Glaesner, the then Director General of the Legal Service of the Council, by the House of Lords Select Committee on the European Communities: 'You are well acquainted with the direct effect doctrine of internal provisions of the Treaty of Rome. As regards external provisions, [European] case law only supports direct effects which can be invoked against Member States. Is there any likelihood of it being extended to relations between private individuals …?' 'Would the distinction be likely to be that the Court would be more ready to grant an individual's right arising out of an external treaty … but would they hesitate to impose obligations on individuals arising out of those external treaties?' The Director-General could only answer: 'That is my feeling; it is not a philosophical consideration but a *feeling* of mine' (see Select Committee on the European Communities, *External Competence of the European Communities* [1984–5] Sixteenth Report (HMSO, 1985), 154 (emphasis added)).

[185] Case C-192/89, *Sevince*.

[186] Case C-438/00, *Deutscher Handballbund eV* v. *Maros Kolpak* [2003] ECR I-4135.

this article had 'effects *vis-à-vis third parties inasmuch as it does not apply solely to measures taken by the authorities but also extends to rules applying to employees that are collective in nature*'.[187] The Court thought that this could indeed be the case.[188] And in allowing the rules to apply directly to private parties, the Court presumed that the international agreement would be horizontally directly effective.

This implicit recognition of the horizontal direct effect of Union agreements has been confirmed outside the context of association agreements.[189] And in the absence of any mandatory constitutional reason to the contrary, this choice seems preferable. Like US constitutionalism, the European legal order should not exclude the horizontal direct effect of international treaties. The problems encountered in the context of European directives would be reproduced – if not multiplied – if the European Court were to split the direct effect of international treaties into two halves. Self-executing treaties should thus be able 'to establish rights *and duties* of individuals directly enforceable in domestic courts'.[190]

Conclusion

For a norm to be a legal norm it must be enforceable.[191] The very questioning of the direct effect of European law was indeed an 'infant disease' of a young legal order.[192] 'But now that [European] law has reached maturity, direct effect should be taken for granted, as a normal incident of an advanced constitutional order.'[193]

The evolution of the doctrine of direct effect, discussed in this chapter, indeed mirrors this maturation. Today's test for the direct effect of European law is an extremely lenient test. A provision has direct effect, where it is 'unconditional' and thus 'sufficiently clear and precise' – two conditions that probe whether a norm can (or should) be applied in court or whether it first needs legislative concretisation. All sources of European law have been considered to be capable of producing law with direct effects. And this direct effect normally applies vertically as well as horizontally.

The partial exception to this rule is the 'directive'. For directives, the Union legal order prefers their indirect effects.[194] '[W]herever a directive is correctly

[187] *Ibid.*, para. 19 (emphasis added).

[188] *Ibid.*, paras. 32 and 37.

[189] See Case C-265/03, *Simutenkov* v. *Ministerio de Educacion y Cultura and Real Federacion Espanola de Futbol* [2005] ECR I-2579, where the Court confirmed *Deutscher Handballbund* in the context of the Partnership and Cooperation Agreement between the EC and the Russian Federation.

[190] S. A. Riesenfeld, 'International Agreements' (1989) 14 *Yale Journal of International Law* 455–67 at 463 (emphasis added).

[191] On the difference between (merely) 'moral' and (enforceable) 'legal' norms, see H. L. A. Hart, *The Concept of Law* (Clarendon Press, 1997).

[192] Pescatore, 'Doctrine of "Direct Effect"' (n. 45 above).

[193] A. Dashwood, 'From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity' (2006–7) 9 CYELS 81.

[194] Case 80/86, *Kolpinghuis*, para. 15: 'The question whether the provisions of a directive may be relied upon as such before a national court arises only if the Member State concerned

implemented, its effects extend to individuals *through the medium of the implementing measures adopted*.'[195] The Court even seems to insist on the mediated effect of directives for those parts of a directive that are directly effective.[196] The directive thus represents a form of 'background' or 'indirect' European law,[197] which is in permanent symbiosis with national (implementing) legislation.[198]

But even when directives have direct effect, they generally do not have horizontal direct effects. Why has the Court shown such 'childish' loyalty to the no-horizontal-direct-effect rule? Has that rule not created more constitutional problems than it solves? And is the Court perhaps discussing a 'false problem'? For if the Court simply wishes to say that an (unimplemented) directive may never directly prohibit *private* party actions, this does not mean that it cannot have horizontal direct effects in civil disputes challenging the legality of *State* actions.[199]

A final point still needs to be raised. Will the – direct or indirect – effects of European law be confined to the *judicial* application of European law? This argument has been made.[200] But this narrow view bangs its head against hard empirical facts.[201] It equally raises serious theoretical objections. For why should the recognition of an 'administrative direct effect' represent a 'constitutional

has not implemented the directive in national law within the prescribed period or has implemented the directive incorrectly.'

195 Case 8/81, *Becker* v. *Finanzamt Münster-Innenstadt* [1982] ECR 53, para. 19 (emphasis added).

196 Case 102/79, *Commission* v. *Belgium* [1980] ECR 1473, para. 12.

197 Case C-298/89, *Gibraltar* v. *Council* [1993] ECR I-3605, para. 16 (emphasis added): 'normally a form of *indirect regulatory or legislative measure*'.

198 The indirect effect of directives thereby never stops. Directives will always remain in the background as a form of 'fallback' legislation even where the national authorities have correctly implemented the directive; see Case 62/00, *Marks & Spencer plc* v. *Commissioners of Customs & Excise* [2002] ECR I-6325, paras. 27–8.

199 This – much – simpler reading of the substance of the case law would bring directives close to the normative character of Art. 107 TFEU – prohibiting State aid. For while the provision can be invoked as against the State as well as against a private party, it cannot prohibit private aids by private companies.

200 In this sense, see B. de Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press, 1999), 177 at 193; and B. de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press, 2011), 323 at 333.

201 Among the myriad judgments, see Case 103/88, *Costanzo SpA* v. *Comune di Milano* [1989] ECR 1839, para. 31, where the Court found it 'contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration … are obliged to apply those provisions.' See also Case C-118/00, *Larsy and Inasti* [2001] ECR 5063.

enormity'?[202] In most national legal orders the courts are as subordinate to national legislation as the executive branch. They may 'interpret' national legislation, but must not amend it. And, once we accept that European law entitles all national courts – even the lowest court in the remotest part of the country – to challenge an act of parliament or the national constitution, is it really such an enormous step to demand the same of the executive? Would it not be absurd *not* to require national administrations to apply European law, but to allow for judicial challenges of the resulting administrative act? The conclusions of this chapter indeed extend to the administrative direct effects of European law.

FURTHER READING

Books

J. Bast, *Grundbegriffe der Handlungsformen der EU: entwickelt am Beschluss als praxisgenerierter Handlungsform des Unions- und Gemeinschaftsrechts* (Springer, 2006)

J.-V. Louis, *Les Règlement de la Communauté économique européenne* (Presses universitaires des Bruxelles, 1969)

M. Mendez, *The Legal Effects of EU Agreements* (Oxford University Press, 2013)

S. Prechal, *Directives in EC Law* (Oxford University Press, 2006)

A. Schrauwen and J. Prinssen, *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (Europa Law Publishing, 2004)

Articles (and Chapters)

A. von Bogdandy, F. Arndt and J. Bast, 'Legal Instruments in European Union law and Their Reform: A Systematic Approach on an Empirical Basis' (2004) 23 YEL 91

J. H. J. Bourgeois, 'Effects of International Agreements in European Community Law: Are the Dice Cast?' (1983–4) 82 *Michigan Law Review* 1250

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A. Dashwood, 'From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity' (2006–7) 9 *CYELS* 81

M. Dougan, 'The "Disguised" Vertical Direct Effect of Directives' (2000) 59 *Cambridge Law Journal* 586

S. Drake, 'Twenty Years after *Von Colson*: The Impact of "Indirect Effect" on the Protection of the Individual's Community Rights' (2005) 30 *EL Rev.* 329

S. Gáspár-Szilágyi, 'The "Horizontal Direct Effect" of EU International Agreements: Is the Court Avoiding a Clear Answer?' (2015) 42 *Legal Issues of Economic Integration* 93

M. Klammert, 'Judicial Implementation of Directives and Anticipatory Indirect Effect: Connecting the Dots' (2006) 43 *CML Rev.* 1251

P. Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 8 *EL Rev.* 155

S. Prechal, 'Does Direct Effect Still Matter?' (2000) 37 *CML Rev.* 1047

202 De Witte, 'Direct Effect, Supremacy' (n. 200 above), 193.

J. Steiner, 'Direct Applicability in EEC Law: A Chameleon Concept' (1982) 98 *Law Quarterly Review* 229

S. Weatherill, 'Breach of Directives and Breach of Contract' (2001) 26 *EL Rev.* 177

G. Winter, 'Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law' (1972) *CML Rev.* 425

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Case 26/62, *Van Gend en Loos*; Case 6/68, *Zuckerfabrik*; Case 9/70, *Grad*; Case 2/74 *Reyners*; Case 41/74, *Van Duyn*; Case 43/75, *Defrenne*; Case 270/80, *Polydor* v. *Harlequin*; Case 14/83, *Von Colson*; Case 152/84, *Marshall*; Case C-188/89, *Foster*; Case C-192/89, *Sevince*; Case C-91/92, *Faccini Dori*; Case C-32/93, *Webb*; Case C-280/93, *Germany* v. *Council (Bananas)*; Case C-194/94, *CIA Security*; Case C-368/95, *Familiapress* v. *Bauer*; Case C-149/96, *Portugal* v. *Council*; Case C-403/98, *Azienda Agricola*; Case C-443/98, *Unilever Italia*; Case C-438/00, *Deutscher Handallbund eV* v. *Kolpak*; Case C-144/04, *Mangold*; Case C-555/07, *Kucukdeveci*

4

European Law II
Nature – Supremacy/Pre-emption

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Introduction

Since European law is directly applicable in the Member States, it must be recognised alongside national law by national authorities. And since European law can have direct effect, it might come into conflict with national law in a specific situation.[1] And where two legislative wills come into conflict, each legal order must determine *when* conflicts arise and *how* these conflicts are to be resolved.

[1] For the main theories on the relationship between direct effect and supremacy, see M. Dougan, 'When Worlds Collide! Competing Visions of the Relationship between

For the Union legal order, these two dimensions have indeed been developed. In Europe's constitutionalism they have been described as, respectively, the principle of pre-emption and the principle of supremacy: 'The problem of preemption consists in determining whether there exists a conflict between a national measure and a rule of [European] law. The problem of [supremacy] concerns the manner in which such a conflict, if it is found to exist, will be resolved.'[2] Pre-emption and supremacy thus represent 'two sides of the same coin'.[3] They are like Siamese twins: different though inseparable. There is no supremacy without pre-emption.

This chapter begins with an analysis of the supremacy doctrine. How supreme is European law? Will European law prevail over all national law? And what is the effect of the supremacy principle on national law? We shall see that there are *two* perspectives on the supremacy question. According to the *European* perspective, all Union law prevails over all national law. This 'absolute' view is not shared by the Member States. Indeed, according to their *national* perspective(s), the supremacy of European law is relative: some national law is considered to be beyond the supremacy of European law.

A third section then moves to the doctrine of pre-emption. This concept tells us to what extent European law 'displaces' national law; or, to put it the other way around: how much legislative space European law still leaves to the Member States. The Union legislator is generally free to choose to what extent it wishes to pre-empt national law within a certain area. However, there are two possible constitutional limits to this freedom. First, the type of *instrument* used – regulation, directive or international agreement – might limit the pre-emptive effect of Union law. And, second: the type of *competence* on which the Union act is based might determine the capacity of the Union legislator to pre-empt the Member States.

Direct Effect and Supremacy' (2007) 44 *CML Rev.* 931. This chapter, as will become clearer below, favours the view that supremacy requires direct effect. For where a European norm lacks direct effect, it cannot be applied in a specific case and for that reason cannot clash with a national norm. This is, in my view, also the traditional position of the European Court. The latter – for example – regularly holds that 'the question whether a national provision must be disapplied in as much as it conflicts with European Union law arises only if no compatible interpretation of that provision proves possible' (Case C-282/10 Dominguez, EU:C:2012:33, para. 23); and that seems to clearly suggest that, with regard to the indirect effect of, say, a European directive, it is not the doctrine of supremacy but another doctrine that applies. And it is that (!) other doctrine, for example, the duty of consistent interpretation derived from Art. 4(3) TEU that is here given direct effect in a specific case.

[2] M. Waelbroeck, 'The Emergent Doctrine of Community Preemption: Consent and Redelegation', in T. Sandalow and E. Stein (eds.), *Courts and Free Markets: Perspectives from the United States and Europe*, 2 vols. (Oxford University Press, 1982), II, 548–80, at 551.

[3] S. Krislov, C.-D. Ehlermann and J. Weiler, 'The Political Organs and the Decision-Making Process in the United States and the European Community', in M. Cappelletti, M. Seccombe and J. Weiler (eds.), *Integration through Law: Europe and the American Federal Experience*, 5 vols. (de Gruyter, 1986), I, 3 at 90.

1. The European Perspective: Absolute Supremacy

The resolution of legal conflicts requires a hierarchy of norms. Modern federal States typically resolve conflicts between federal and State legislation in favour of the former: federal law is supreme over State law.[4] This 'centralised solution' has become so engrained in our constitutional mentalities that we tend to forget that the 'decentralised solution' is also possible: local law may reign supreme over central law.[5] (Supremacy and direct effect are thus *not* different sides of the same coin. While the supremacy of a norm implies its direct effect, the direct effect of a norm will *not* imply its supremacy.)[6] Each compound legal order must thus determine which law prevails in the case of a normative conflict. The simplest supremacy format here is one that is absolute: all law from one legal order is superior to all law from the other. Absolute supremacy may here be given to the legal system of the smaller *or* the bigger political community. But between these two extremes lies a range of possible nuances.[7]

When the Union was born, the European Treaties did not expressly state the supremacy of European law.[8] Did this mean that supremacy was a matter to be determined by the national legal orders (decentralised solution)? Or was there a *Union* doctrine of supremacy (centralised solution)? And if the latter, how supreme would European law be over national law? Would it adopt an absolute doctrine, or would it permit areas in which national law could prevail over conflicting European law? And would the supremacy of European law lead to the 'invalidation' of State law; or would it only demand its 'disapplication'?

[4] Art. VI, Clause 2 of the US Constitution, for example, states: 'This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.'

[5] For a long time, the 'decentralised solution' structured federal relationships during the Middle Ages. Its constitutional spirit is best preserved in the old legal proverb: 'Town law breaks county law, county law breaks common law'. In the event of a legislative conflict, supremacy was thus given to the rule of the smaller political community.

[6] We can see direct effect without supremacy in the status given to customary international law in the British legal order.

[7] The status of international law in the German legal order depends on its legal source. While general principles of international law assume a hierarchical position between the German Constitution and federal legislation, international treaties have traditionally been placed at the hierarchical rank of normal legislation.

[8] The 2004 Constitutional Treaty *would* have added an express provision (Art. I-6 CT): 'The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.' However, the provision was not taken over by the Lisbon Treaty. Yet the latter has added Declaration 17 which states: 'The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.'

Let us tackle these questions in two steps. We shall first look at the scope of the supremacy doctrine and see that the Union prefers an absolute principle: all European law prevails over all national law. However, the supremacy of European law will not affect the validity of national norms. This 'executive' nature of supremacy will be discussed in a second step.

a. The Absolute Scope of the Supremacy Principle

The dualist traditions within some Member States in 1958 posed a serious legal threat to the unity of the Union legal order.[9] Within dualist States, the status of European law is seen as depending on the national act 'transposing' the European Treaties. Where this was a parliamentary act, any subsequent parliamentary acts could – expressly or implicitly – repeal the transposition law. Within the British tradition, this follows from the classic doctrine of parliamentary sovereignty: an 'old' Parliament cannot bind a 'new' one. Any 'newer' parliamentary act will thus theoretically prevail over the 'older' 1972 European Communities Act. But the supremacy of European law may even be threatened in constitutionally monist States, because the supremacy of European law can here find a limit in the State's constitutional identity.

Would the European legal order insist that its law was to prevail over all national law, including national constitutions? The Court of Justice did just that in a series of foundational cases. But, while the establishment of Union supremacy over internal national law was swift, its extension over the international treaties of the Member States was much slower.

aa. Supremacy over Internal Laws of the Member States

Frightened by the decentralised solution to the supremacy issue, the Court centralised the question of supremacy quickly by turning it into a principle of Union law. In *Costa* v. *ENEL*,[10] the European judiciary was asked whether national legislation adopted *after* 1958 could prevail over the Treaties. The litigation involved an unsettled energy bill owed by Costa to the Italian National Electricity Board. The latter had been created by the 1962 Electricity Nationalisation Act, which was challenged by the plaintiff as a violation of the European Treaties. The Italian dualist tradition responded that the European Treaties – like ordinary international law – had been transposed by national legislation in 1957 that could – following international law logic – be derogated by subsequent national legislation.

Could the Member States thus unilaterally determine the status of European law in their national legal orders? The Court rejected this reading and distanced itself from the international law thesis:

[9] C. Sasse, 'The Common Market: Between International and Municipal Law' (1965–6) 75 *Yale LJ* 696–753.

[10] Case 6/64, *Costa* v. *ENEL* [1964] ECR 585.

> By contrast with ordinary international treaties, the E[U] Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply … The integration into the laws of each Member State of provisions which derive from the [Union], and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The *executive force* of [European] law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty … It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as [European] law and without the legal basis of the [Union] itself being called into question.[11]

European law would need to reign supreme over national law, since its 'executive force' must not vary from one State to another. The supremacy of Union law could not be derived from classic international law;[12] and for that reason that Court had to declare the Union legal order autonomous from ordinary international law.

How supreme was European law? The fact that the European Treaties prevailed over national legislation did not automatically imply that *all* European law would prevail over *all* national law. Would the Court accept a 'nuanced' solution for certain national norms, such as national constitutional law? The European Court never accepted the relative scope of the supremacy doctrine. This was clarified in *Internationale Handelsgesellschaft*.[13] A German administrative court doubted that European legislation could violate fundamental rights granted by the German Constitution and raised this very question with the European Court of Justice. Were the fundamental structural principles of national constitutions, including human rights, beyond the scope of EU supremacy? The Court disagreed:

[11] *Ibid*., 593–4 (emphasis added).

[12] Some legal scholars refer to the 'supremacy' of international law vis-à-vis national law (see F. Morgenstern, 'Judicial Practice and the Supremacy of International Law' (1950) 27 *BYIL* 42). However, the concept of supremacy is here used in an imprecise way. Legal supremacy stands for the priority of one norm over another. For this, two norms must conflict and, therefore, form part of an integrated legal order. Yet classic international law is based on the sovereignty of States and that implied a dualist relation with national law. Reference to the international law doctrine *pacta sunt servanda* will hardly help. The fact that a State cannot invoke its internal law to justify a breach of international obligations is not supremacy. Behind the doctrine of *pacta sunt servanda* stands the concept of legal responsibility: a State cannot – without legal responsibility – escape its international obligations. The duality of internal and international law is thereby maintained: the former cannot affect the latter (as the latter cannot affect the former).

[13] Case 11/70, *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

> Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the [Union] would have an adverse effect on the uniformity and efficiency of [Union] law. The validity of such measures can only be judged in the light of [Union] law.[14]

The validity of Union law could thus not be affected – even by the most fundamental norms within the Member States. The Court's vision of the supremacy of European law over national law was an absolute one: 'The whole of [European] law prevails over the whole of national law.'[15]

bb. Supremacy over International Treaties of the Member States

While the Union doctrine of supremacy had quickly emerged with regard to national legislation,[16] its extension to international agreements of the Member States was much slower. From the very beginning, the Treaties here recognised an express exception to the supremacy of European law. According to Article 351 TFEU:

> The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.[17]

Article 351 here codified the 'supremacy' of *prior* international agreements of the Member States over conflicting European law. In the event of a conflict between the two, it was European law that could be disapplied *within the national legal orders*. Indeed, Article 351 'would not achieve its purpose if it did not imply a duty on the part of the institutions of the [Union] not to impede the performance of the obligations of Member States which stem from a prior

[14] *Ibid.*, para. 3.

[15] R. Kovar, 'The Relationship between Community Law and National Law', in EC Commission (ed.), *Thirty Years of Community Law* (EC Commission, 1981), 109 at 112–13.

[16] On the establishment of the *social* acceptance of the doctrine, see K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press, 2001).

[17] Para. 1. The provision continues (para. 2): 'To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.' On the scope of this obligation, see J. Klabbers, 'Moribund on the Fourth of July? The Court of Justice on Prior Agreements of the Member States' (2001) 26 *EL Rev.* 187; and R. Schütze, 'The "Succession Doctrine" and the European Union', in *Foreign Affairs and the EU Constitution* (Cambridge University Press, 2014), 91.

agreement'.[18] This was a severe incursion into the integrity of the European legal order, and as such had to be interpreted restrictively.[19]

But would there be internal or external limits to the 'supremacy' of prior international treaties of the Member States? The Court clarified that there existed internal limits to the provision. Article 351(1) would only allow Member States to implement their *obligations* towards *third* States.[20] Member States could thus not rely on Article 351 to enforce their rights; nor could they rely on the provision to fulfil their international obligations between themselves.

These internal limitations are complemented by external limitations. The Court clarified their existence in *Kadi*.[21] While admitting that Article 351 would justify even derogations from primary Union law, the Court insisted that the provision 'cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article [2] [T]EU as a foundation of the Union'.[22] In the opinion of the Court, 'Article [351 TFEU] may in no circumstances permit any challenge to the principles that form part of the very foundations of the [Union] legal order.'[23] The Union's constitutional identity constituted a limit to the supremacy of prior international treaties concluded by the Member States.

But can the – limited – application of Article 351 TFEU be extended, by analogy, to *all* international agreements concluded by the Member States? The main constitutional thrust behind the argument is that it protects the effective exercise of the treaty-making powers of the Member States. For: 'otherwise the Member States could not conclude any international treaty without running

[18] Case 812/79, *Attorney General* v. *Juan C. Burgoa* [1980] ECR 2787, para. 9 (emphasis added). This was confirmed in Case C-158/91, *Criminal Proceedings against Jean-Claude Levy* [1993] ECR I-4287, para. 22: 'In view of the foregoing considerations, the answer to the question submitted for a preliminary ruling must be that the national court is under an obligation to ensure [that the relevant European legislation] … is fully complied with by refraining from applying any conflicting provision of national legislation, unless the application of such a provision is necessary in order to ensure the performance by the Member State concerned of obligations arising under an agreement concluded with non-member countries prior to the entry into force of the EEC Treaty.'

[19] Case C-324/93, *The Queen* v. *Secretary of State for Home Department, ex p. Evans Medical Ltd and Macfarlan Smith Ltd* [1995] ECR I-563, para. 32.

[20] Case 10/61, *Commission* v. *Italy* [1962] ECR 1, 10–11: '[T]he terms "rights and obligations" in Article [351] refer, as regards the "rights", to the rights of third countries and, as regards the "obligations", to the obligations of Member States and that, by virtue of the principles of international law, by assuming a new obligation which is incompatible with rights held under a prior treaty, a State ipso facto gives up the exercise of these rights to the extent necessary for the performance of its new obligation … In fact, in matters governed by the [European] Treat[ies], th[ese] Treat[ies] take precedence over agreements concluded between Member States before [their] entry into force[.]'

[21] Case C-402/05P, *Kadi and Al Barakaat International Foundation* v. *Council and Commission* [2008] ECR I-6351.

[22] *Ibid.*, para. 303.

[23] Case C-402/05P, *Kadi*, para. 304.

the risk of a subsequent conflict with [European] law'.[24] This idea has been criticised: there would be no reason why the normal constitutional principles characterising the relationship between European law and unilateral national acts should not also apply to subsequently concluded international agreements.[25] A middle position has proposed limiting the analogous application of Article 351 to situations where the conflict between post-accession international treaties of Member States and subsequently adopted European legislation was 'objectively unforeseeable' and could therefore not be expected.[26]

None of the proposals to extend Article 351 by analogy has however been mirrored in the jurisprudence of the European Court of Justice.[27] The Court has unconditionally upheld the supremacy of European law over international agreements concluded by the Member States after 1958 (or their date of accession).

In light of the potential international responsibility of the Member States, is this a fair constitutional solution? Should it indeed make a difference whether a rule is adopted by means of a unilateral national measure or by means of an international agreement with a third State? Constitutional solutions still need to be found to solve the Member States' dilemma of choosing between the Scylla of liability under the European Treaties and the Charybdis of international responsibility for breach of contract. Should the Union legal order, therefore, be given an *ex ante* authorisation mechanism for Member States' international agreements? Or should the Union share financial responsibility for breach of contract with the Member State concerned? These are difficult constitutional questions. They await future constitutional answers.[28]

b. The 'Executive' Nature of Supremacy: Disapplication, Not Invalidation

What are the legal consequences of the supremacy of European law over conflicting national law? Must a national court 'hold such provisions inapplicable to the extent to which they are incompatible with [European] law', or must it

[24] E. Pache and J. Bielitz, 'Das Verhältnis der EG zu den völkerrechtlichen Verträgen ihrer Mitgliedstaaten' (2006) 41 *Europarecht* 316 at 327 (my translation).

[25] E. Bülow, 'Die Anwendung des Gemeinschaftsrechts im Verhältnis zu Drittländern', in A. Clauder (ed.), *Einführung in die Rechtsfragen der europäischen Integration* (Europa Union Verlag, 1972), 52, 54.

[26] E.-U. Petersmann, 'Artikel 234', in H. Von der Groeben, J. Thiesing and C.-D. Ehlermann (eds.), *Kommentar zum EWG-Vertrag* (Nomos, 1991) 5725 at 5731 (para. 6).

[27] See Joined Cases C-176–7/97, *Commission* v. *Belgium and Luxembourg* [1998] ECR I-3557.

[28] For the time being, one legislative answer can be seen in the inclusion of 'savings' clauses in the relevant Union legislation. A good illustration of this technique is Art. 28 of Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40. This clause constitutes a legislative extension of Art. 351 TFEU: the Union legislation will not affect international agreements of the Member States with third States concluded after 1958 but before the time when the Regulation was adopted.

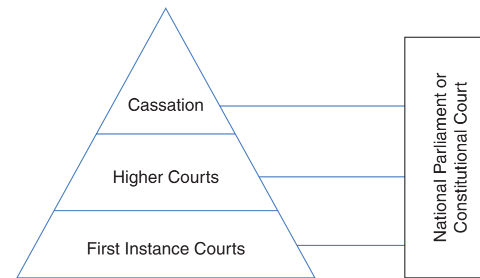

Figure 4.1 *Simmenthal* II: Centralised Constitutional Review

'declare them void'?[29] This question concerns the constitutional effect of the supremacy doctrine in the Member States.

The classic answer to these questions is found in *Simmenthal II*.[30] The issue raised in the national proceedings was this: 'what consequences flow from the direct applicability of a provision of [Union] law in the event of incompatibility with a subsequent legislative provision of a Member State'?[31] Within the Italian constitutional order, national legislation could be *repealed* solely by Parliament or the Supreme Court (see Figure 4.1). Would lower national courts thus have to wait until this happened and, in the meantime, apply national laws that violate Union laws?

Unsurprisingly, the European Court rejected such a reading. Appealing to the 'very foundations of the [Union]', the European Court stated that national courts were under a direct obligation to give immediate effect to European law. The supremacy of European law meant that 'rules of [European] law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force'.[32] But did this mean that the national court had to *repeal* the national law? According to one view, supremacy did indeed mean that national courts must declare conflicting national laws void. European law would 'break' national law.[33] Yet the Court preferred a milder – second – view:

[29] This very question was raised in Case 34/67, *Firma Gebrüder Luck* v. *Hauptzollamt KölnRheinau* [1968] ECR 245.

[30] Case 106/77, *Amministrazione delle Finanze dello Stato* v. *Simmenthal SpA* [1978] ECR 629. But see also Case 48/71, *Commission* v. *Italy* [1978] ECR 629.

[31] Case 106/77, *Simmenthal*, para. 13.

[32] *Ibid.*, para. 14.

[33] This is the very title of a German monograph by E. Grabitz, *Gemeinschaftsrecht bricht nationales Recht* (L. Appel, 1966). This position was shared by Hallstein: '[T]he supremacy of [European] law means essentially two things: its rules take precedence irrespective of the level of the two orders at which the conflict occurs, and further, [European] law *not only invalidates previous national law but also limits subsequent national legislation*' (W. Hallstein, quoted in Sasse, 'Common Market' (n. 9 above) at 717 (emphasis added)).

> [I]n accordance with the *principle of precedence* of [European] law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render *automatically inapplicable* any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – also preclude the valid adoption of new legislative measures to the extent to which they would be incompatible with [European] provisions.[34]

Where national measures conflict with European law, the supremacy of European law would thus not render them void, but only 'inapplicable'.[35] Not 'invalidation' but 'disapplication' was required of national courts, where European laws came into conflict with pre-existing national laws. Yet, in the above passage, the effect of the supremacy doctrine appeared stronger in relation to subsequent national legislation. Here, the Court said that the supremacy of European law would 'preclude the *valid adoption* of new legislative measures to the extent to which they would be incompatible with [European] provisions'.[36] Was this to imply that national legislators were not even *competent* to adopt national laws that would run counter to *existing* European law? Were these national laws void *ab initio*?[37]

In *Ministero delle Finanze* v. *IN. CO. GE. '90*,[38] the Commission picked up this second prong of the *Simmenthal* II ruling and argued that 'a Member State has *no power whatever to [subsequently] adopt* a fiscal provision that is incompatible with [European] law, with the result that such a provision … must be treated as *nonexistent*'.[39] But the European Court of Justice disagreed with this interpretation. Pointing out that *Simmenthal* II 'did not draw any distinction between preexisting and subsequently adopted national law',[40] the incompatibility of subsequently adopted rules of national law with European law did not have the effect of rendering these rules non-existent.[41] National courts were thus only under an obligation to disapply a conflicting provision of national law – be it prior *or* subsequent to the Union law.[42]

What will this tell us about the nature of the supremacy principle? It tells us that the supremacy doctrine is about the 'executive force' of European law. The Union legal order, while integrated with the national legal orders, is not a 'unitary' legal order. European law leaves the 'validity' of national norms untouched; and will not negate the underlying legislative competence of the Member States. The supremacy principle is thus not addressed to the State legislatures, but to the national executive and judicial branches. (And, while the national *legislator* will be required to amend or repeal national provisions that give rise to legal uncertainty,[43] this secondary obligation is not a direct result of the supremacy doctrine but derives from Article 4(3) TEU.)[44] The executive force of European law thus generally leaves the normative validity of national law intact. National courts are not obliged to 'break' national law. They must only not apply it when in conflict with European law in a specific case.

This federal supremacy doctrine has a number of advantages. First, some national legal orders may not grant their (lower) courts the power to invalidate parliamentary laws. The question of who may invalidate national laws is thus left to the national legal order.[45] Second, comprehensive national laws

[34] Case 106/77, *Simmenthal*, para. 17 (emphasis added).

[35] The Court's reference to 'directly applicable measures' was not designed to limit the supremacy of European law to regulations. The Union acts at issue in *Simmenthal* were, after all, directives. This point was clarified in subsequent jurisprudence: see Case 148/78, *Ratti* [1979] ECR 1629; Case 152/84, *Marshall* v. *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.

[36] Case 106/77, *Simmenthal*, para. 17 (emphasis added).

[37] A. Barav, 'Les effets du droit communautaire directement applicable' (1978) 14 CDE 265–86 at 275–6; Grabitz, *Gemeinschaftsrecht* (n. 33 above) and Hallstein, quoted in Sasse, 'Common Market' (n. 9 above).

[38] Joined Cases C-10–22/97, *Ministero delle Finanze* v. *IN.CO.GE. '90 Srl and others* [1998] ECR I-6307.

[39] *Ibid.*, para. 18 (emphasis added).

[40] The *Simmenthal* II Court had indeed not envisaged two different consequences for the supremacy principle. While para. 17 appears to make a distinction depending on whether national legislation existed or not, the operative part of the judgment referred to both variants. It stated that a national court should refuse of its own motion to 'apply any conflicting provision of national legislation' (Case 106/77, *Simmenthal*, dictum).

[41] Joined Cases C-10–22/97, *IN.CO.GE.*, paras. 20–1.

[42] The non-application of national laws in these cases is but a mandatory 'minimum requirement' set by the Union legal order. A national legal order can, if it so wishes, offer stricter consequences to protect the full effectiveness of European law: Case 34/67, *Firma Gebruder Luck* v. *Hauptzollamt Koln-Rheinau* [1968] ECR 245, at 251: '[Although European law] has the effect of excluding the application of any national measure incompatible with it, the article does not restrict the powers of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for the purpose of protecting the individual rights conferred by [European] law.'

[43] See Case C-185/96, *Commission* v. *Hellenic Republic* [1998] ECR 6601, para. 32: 'On that point, suffice it to recall that, according to established case-law, the maintenance of national legislation which is in itself incompatible with [European] law, even if the Member State concerned acts in accordance with [European] law, gives rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities for them of relying on [European] law.' See also Case 367/98, *Commission* v. *Portugal* [2002] ECR I-4731, esp. para. 41: 'The Court has consistently held that the incompatibility of provisions of national law with provisions of the Treaty, even those directly applicable, can be definitively eliminated only by means of binding domestic provisions having the same legal force as those which require to be amended.'

[44] See e.g. Case 74/86, *Commission* v. *Germany* [1988] ECR 2139, para. 12.

[45] Case C-314/08, *Filipiak* v. *Dyrektor Izby Skarbowej w Poznaniu* [2009] ECR I–11049, para. 82: 'Pursuant to the principle of the primacy of [European] law, a conflict between a provision of national law and a directly applicable provision of the Treaty is to be resolved by a national court applying [European] law, if necessary by refusing to apply the conflicting national provision, and not by a declaration that the national provision is invalid, the powers of authorities, courts and tribunals in that regard being a matter to be determined by each Member State.'

must only be disapplied to the extent to which they conflict with European law.[46] They will remain operable in purely internal situations. Third, once the Union act is repealed, national legislation may become fully operational again.[47]

2. The National Perspective: Relative Supremacy

The European Union is not a Federal State in which the sovereignty problem is solved. The European Union is a federal union of States.[48] Each federal union is characterised by a political dualism in which each citizen is a member of *two* political bodies. These *two* political bodies will compete for loyalty – and sometimes, the 'national' view on a political question may not correspond with the 'European' view on the matter. What happens when the political views of a Member State clash with those of the federal Union? Controversies over the supremacy of federal law are as old as the (modern) idea of federalism.[49] And, while the previous section exposed the European answer to the supremacy doctrine, this absolute vision is – unsurprisingly – not shared by the Member States.

There indeed exists a competing national view – or better: national views – on the supremacy issue. The extreme version of such a national view can be found in the (British) 2011 European Union Act. The latter unambiguously states as follows:

> Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.[50]

[46] B. de Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press, 1999), 177 at 190.

[47] *Ibid*.

[48] For an extensive discussion of this classification, see Chapter 2.

[49] R. Schütze, 'Federalism as Constitutional Pluralism: Letter from America', in J. Kommarek and M. Avbelj (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart, 2012), ch. 8.

[50] European Union Act 2011, s. 18. The text of s. 2(1) of the European Communities Act 1972 states: 'All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies.' For a discussion of the complex relationship between European Union law and the doctrine of parliamentary sovereignty, see e.g. C. Turpin and A. Tomkins, *British Government and the Constitution: Text and Materials* (Cambridge University Press, 2011), 335ff.; A. Le Sueur et al., *Public Law: Text, Cases, and Materials* (Oxford University Press, 2013), 814ff.

A milder national perspective, on the other hand, accepts the supremacy of European law over national *legislation*; yet the supremacy of European law is still relative, since it is granted and limited by national *constitutional* law.

The national view(s) on the supremacy of European law have traditionally been expressed in three contexts.[51] First, some Member States – in particular their Supreme Courts – have fought a battle over human rights within the Union legal order. It was claimed that European law could not violate *national* fundamental rights. The same power has been claimed in a second context: ultra vires control. While the Member States here generally accept the supremacy of European law within *limited fields*, they contest that the European Union can exclusively delimit these fields. Finally, a third national claim goes even further than this and argues that there are absolute limits to European integration set by the 'constitutional identity' of each Member State. The following section will briefly introduce each of these three battles over the supremacy of European law by focusing predominantly on the conflict between the European Court of Justice and the German Constitutional Court.

a. Fundamental Rights Limits: The 'So-long' Jurisprudence

A strong national view on supremacy crystallised around *Internationale Handelsgesellschaft*.[52] For after the European Court of Justice had espoused its view on the absolute supremacy of European law, the case moved back to the German Constitutional Court.[53] The German Court now defined its perspective on the question. Could national constitutional law, especially national fundamental rights, affect the application of European law in the domestic legal order?

Famously, the German Constitutional Court rejected the European Court's absolute vision and replaced it with the counter-theory of the *relative* supremacy of European law. The reasoning of the German Court was as follows: while the German Constitution expressly allowed for the transfer of sovereign powers to the European Union in its Article 24,[54] such a transfer was itself limited by the

[51] The following section concentrates on the jurisprudence of the German Constitutional Court. This court has long been the most pressing and – perhaps – prestigious national court in the Union legal order. For the reaction of the French Supreme Courts, see R. Mehdi, 'French Supreme Courts and European Union Law: Between Historical Compromise and Accepted Loyalty' (2011) 48 *CML Rev.* 439. For the views of the Central European Constitutional Courts, see W. Sadurski, '"Solange, Chapter 3": Constitutional Courts in Central Europe – Democracy – European Union' (2008) 14 ELJ 1.

[52] Case 11/70, *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

[53] BVerfGE 37, 271 (*Solange I (Re Internationale Handelsgesellschaft)*). For an English translation, see [1974] 2 CMLR 540.

[54] Art. 24(1) of the German Constitution states: 'The Federation may by a law transfer sovereign powers to international organisations.' In the wake of the Maastricht Treaty, a new article was inserted into the German Constitution expressly dealing with the European Union (see Art. 23 German Constitution).

'constitutional identity' of the German State. Fundamental constitutional structures were thus beyond the supremacy of European law:

> The part of the Constitution dealing with fundamental rights is an *inalienable essential feature of the valid Constitution of the Federal Republic of Germany and one which forms part of the constitutional structure of the Constitution*. Article 24 of the Constitution does not without reservation allow it to be subjected to qualifications. In this, the present state of integration of the [Union] is of crucial importance. The [Union] still lacks … in particular a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Constitution … *So long as* this legal certainty, which is not guaranteed merely by the decisions of the European Court of Justice, favourable though these have been to fundamental rights, is not achieved in the course of the further integration of the [Union], the reservation derived from Article 24 of the Constitution applies … *Provisionally, therefore, in the hypothetical case of a conflict between [European] law and a part of national constitutional law or, more precisely, of the guarantees of fundamental rights in the Constitution, there arises the question of which system of law takes precedence, that is, ousts the other. In this conflict of norms, the guarantee of fundamental rights in the Constitution prevails* so long as *the competent organs of the [Union] have not removed the conflict of norms in accordance with the Treaty mechanism.*[55]

Thus, 'so long' as the European legal order had not developed an adequate standard of fundamental rights, the German Constitutional Court would 'disapply' European law that conflicted with the fundamental rights guaranteed in the German legal order.[56] There were consequently *national* limits to the supremacy of European law. However, these national limits were also *relative*, as they depended on the evolution and nature of European law. This was the very essence of the 'so long' formula: once the Union legal order had developed equivalent human rights guarantees, the German Constitutional Court would no longer challenge the supremacy of European law.

The Union legal order did indeed subsequently develop extensive human rights bill(s),[57] and the dispute over the supremacy doctrine was significantly softened in the aftermath of a second famous European case with a national coda. In *Wünsche Handelsgesellschaft*,[58] the German Constitutional Court not only

[55] *Solange I* [1974] CMLR 540 at 550–1, paras. 23–4 (emphasis added).

[56] The German Constitutional Court here adopted the doctrine that the supremacy of the German Constitution could only lead to a 'disapplication' and not an 'invalidation' of European law. The German Court thus 'never rules on the validity or invalidity of a rule of [European] law'; but '[a]t most, it can come to the conclusion that such a rule cannot be applied by the authorities or courts of the Federal Republic of Germany as far as it conflicts with a rule of the Constitution relating to fundamental rights' (*ibid.*, 552).

[57] On this point, see Chapter 12.

[58] BVerfGE 73, 339 (*Solange II (Re Wünsche Handelsgesellschaft)*). For an English translation, see [1987] 3 CMLR 225.

recognised the creation of 'substantially similar' fundamental right guarantees, it drew a remarkably self-effacing conclusion from this:

> In view of those developments it must be held that, *so long as* the European [Union], and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the [Union] which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the [German] Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary [Union] legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution …[59]

This judgment became known as 'So-Long II', for the German Constitutional Court again had recourse to this famous formulation in determining its relationship with European law. But importantly, this time the 'so-long' condition was inverted. The German Court promised not to question the supremacy of European law 'so long' as the latter guaranteed substantially similar fundamental rights to those recognised by the German Constitution. This was not an absolute promise to respect the absolute supremacy of European law, but a result of the Court's own relative supremacy doctrine having been fulfilled. 'So-Long II' thus only refined the national perspective on the limited supremacy of European law in 'So-Long I'.

b. *Competence Limits I: From 'Maastricht' to* 'Mangold'

With the constitutional conflict over fundamental rights settled, a second concern emerged: the ever-growing competences of the European Union. Who was to control and limit the scope of European law? Was it enough to have the *European* legislator centrally controlled by the *European* Court of Justice? Or should the national constitutional courts be entitled to a decentralised ultra vires review?

The European view on this is crystal clear: national courts cannot disapply – let alone invalidate – European law.[60] Yet, unsurprisingly, this absolute view has not been shared by all Member States. And it was again the German Constitutional Court that set the tone and the vocabulary of the constitutional debate. The ultra vires question was at the heart of its famous *Maastricht* decision that would subsequently be refined in *Honeywell* – the German reaction to the European Court's (in)famous decision in *Mangold*.

[59] *Ibid.*, 265 (para. 48).

[60] On the *Foto-Frost* doctrine, see Chapter 11, Introduction.

The German Court set out its ultra vires review doctrine in *Maastricht*.[61] Starting from the premise that the Union only had limited powers, the Court found that the Union ought not to be able to extend its own competences. While the Treaties allowed for teleological interpretation, there existed a clear dividing line 'between a legal development within the terms of the Treaties and a making of legal rules which breaks through its boundaries and is not covered by valid Treaty law'.[62] This led to the following conclusion:

> Thus, if European institutions or agencies were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the Act of Accession, the resultant legislative instruments would not be legally binding within the sphere of German sovereignty. The German state organs would be prevented for constitutional reasons from applying them in Germany. Accordingly the Federal Constitutional Court will review legal instruments of European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred on them or transgress them …
>
> Whereas a dynamic extension of the existing Treaties has so far been supported on the basis of an open-handed treatment of Article [352] of the [FEU] Treaty as a 'competence to round-off the Treaty' as a whole, and on the basis of considerations relating to the 'implied powers' of the [Union], and of Treaty interpretation as allowing maximum exploitation of [Union] powers ('*effet utile*'), in future it will have to be noted as regards interpretation of enabling provisions by [Union] institutions and agencies that the Union Treaty as a matter of principle distinguishes between the exercise of a sovereign power conferred for limited purposes and the amending of the Treaty, so that its interpretation may not have effects that are equivalent to an extension of the Treaty. Such an interpretation of enabling rules would not produce any binding effects for Germany.[63]

The German Constitutional Court thus threatened to disapply European law that it considered to have been adopted ultra vires.

This national review power was subsequently confirmed.[64] Yet, the doctrine was limited and refined in *Honeywell*.[65] The case resulted from a constitutional complaint that targeted the European Court's ruling in *Mangold*.[66] The plaintiff

[61] BVerfGE 89, 155 (*Maastricht Decision*). For an English translation, see [1994] 1 CMLR 57.

[62] *Ibid.*, 105 (para. 98). [63] *Ibid.*, 105 (para. 99).

[64] BVerfGE 123, 267 (*Lisbon Decision*). For an English translation, see [2010] 3 CMLR 276. The Court here added a third sequel to its 'So-Long' jurisprudence (*ibid.*, 343): 'As long as, and insofar as, the principle of conferral is adhered to in an association of sovereign states with clear elements of executive and governmental cooperation, the legitimation provided by national parliaments and governments complemented and sustained by the directly elected European Parliament is sufficient in principle.'

[65] 2 BvR 2661/06 (*Re Honeywell*). For an English translation, see [2011] 1 CMLR 1067. For a discussion of the case, see M. Paydandeh, 'Constitutional Review of EU Law after *Honeywell*: Contextualising the Relationship between the German Constitutional Court and the EU Court of Justice' (2011) 48 *CML Rev.* 9.

[66] For an extensive discussion of the case, see Chapter 3, section 3(b/bb).

argued that the European Court's 'discovery' of a European principle that prohibited discrimination on grounds of age was ultra vires as it read something into the Treaties that was not there. In its decision, the German Constitutional Court confirmed its relative supremacy doctrine. It claimed the power to disapply European law that it considered not to be covered by the text of the Treaties. The principle of supremacy was thus not unlimited.[67] However, reminiscent of its judicial deference in *So-Long II*, the Court accepted a presumption that the Union would generally act within the scope of its competences:

> If each member State claimed to be able to decide through their own courts on the validity of legal acts by the Union, the primacy of application could be circumvented in practice, and the uniform application of Union law would be placed at risk. If however, on the other hand the Member States were completely to forgo ultra vires review, disposal of the treaty basis would be transferred to the Union bodies alone, even if their understanding of the law led in the practical outcome to an amendment of a Treaty or an expansion of competences. That in the borderline cases of possible transgression of competences on the part of the Union bodies – which is infrequent, as should be expected according to the institutional and procedural precautions of Union law – the [national] constitutional and the Union law perspective do not completely harmonise, is due to the circumstance that the Member States of the European Union also remain the masters of the Treaties …
>
> Ultra vires review by the Federal Constitutional Court can moreover *only be considered if it is manifest* that acts of the European bodies and institutions have taken place outside the transferred competences. A breach of the principle of conferral is only manifest if the European bodies and institutions have transgressed the boundaries of their competences *in a manner specifically violating the principle of conferral*, the breach of competences is in other words sufficiently qualified. This means that the act of the authority of the European Union *must be manifestly in violation of competences* and that the impugned act is highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law.[68]

This limits the national review of European law to 'specific' and 'manifest' violations of the principle of conferral. There was thus a *presumption that the Union institutions would generally act intra vires*; and only for clear and exceptional violations would the German Constitutional Court challenge the supremacy of European law. This has – so far – never happened.

But if the German court's behaviour was 'all bark and no bite',[69] another Supreme Court appears to have recently taken a bite and openly refused to

[67] *Honeywell* [2011] 1 CMLR 1067 at 1084 (para. 39): 'Unlike the primacy of application of federal law, as provided for by Article 31 of the Basic Law for the German legal system, the primacy of application of Union law cannot be comprehensive.' (It is ironic that this is said by a German *federal* court.)

[68] *Ibid.*, 1085–6 (paras. 42 and 46 (emphasis added)).

[69] C. U. Schmid, 'All Bark and No Bite: Notes on the Federal Constitutional Court's "Banana Decision"' (2001) 7 ELJ 95.

apply European Union law. Rebelling against the European Court's *Mangold* jurisprudence, the Danish Supreme Court has stated that the idea of a directly effective unwritten general principle of European law was not acceptable. In *Dansk Industri (Ajos)*,[70] it thus held:

> Following the EU Court of Justice's judgments in *Mangold*, C-144/04, EU:C:2005:709, *Kücükdeveci*, C-555/07, EU:C:2010:21, and the present case, we find that the principle prohibiting discrimination on grounds of age is a general principle of EU law which, according to the EU Court of Justice, is to be found in various international instruments and in the constitutional traditions common to the Member States. The EU Court of Justice does not refer to provisions in those treaties covered by the Law on Accession as a basis for the principle.
>
> Even though the principle is inferred from legal sources outside the EU Treaties, it is obvious that the three aforementioned judgments must be construed as involving an unwritten principle which applies at treaty level. *There is nothing in those judgments, however, to indicate that there is a specific treaty provision providing the basis for the principle. A situation such as this, in which a principle at treaty level under EU law is to have direct effect (thereby creating obligations) and be allowed to take precedence over conflicting Danish law in a dispute between individuals, without the principle having any basis in a specific treaty provision, is not foreseen in the Law on Accession … It follows from the foregoing that, under the Law on Accession, principles developed or established on the basis of Article 6(3) TEU have not been made directly applicable in Denmark*.[71]

The Danish Supreme Court thus found that unwritten general principles of EU law could not have direct effect within Denmark, because the Danish Accession Law simply did not cover the European Court's *Mangold* jurisprudence.[72] The judgment is a novelty and has been criticised as a 'mutual disempowerment' and a 'breakdown of mutual trust' between the European Court of Justice and the Danish Supreme Court.[73]

[70] Case 15/2014, *Dansk Industri, acting on behalf of Ajos* v. *Estate of A*. For an unofficial English translation, see the textbook's companion website. The case is a reaction to the ECJ case of the same name in which the Supreme Court had referred a number of preliminary questions to the ECJ, see: Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S* v. *Estate of Karsten Eigil Rasmussen*, EU:C:2016:278.

[71] *Ibid*., pp. 45 and 47 (emphasis added).

[72] This conclusion faces, in my view, a major obstacle that was identified by the Danish Supreme Court itself. The Danish Accession Law had been amended in 2008 to allow for the Lisbon Treaty and since *Mangold* had been decided in 2005, the 2008 Amendment had arguably absorbed and implicitly ratified that judicial development. The fact that the *Mangold* judgment was not expressly referred in the *travaux préparatoires* of the 2008 amendment cannot, in my view, change that conclusion. The Danish Supreme Court however held otherwise (*ibid*., p. 47).

[73] For an extensive discussion of the *Ajos* ruling, see M. Madsen, H. Olsen and U. Šadl, 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the *Ajos* Case and the National Limits of Judicial Cooperation' (2017) 23 ELJ 140; and U. Neergaard and K. Engsig Sørensen, 'Activist Infighting among Courts and Breakdown of Mutual Trust' (2017) 36 YEL 275.

c. Competence Limits II: National Constitutional Identities

The *Solange* jurisprudence as well as the *ultra vires* jurisprudence had both set *relative* limits to European integration: *so long as* the Union acknowledged fundamental rights and respected the competence limits *as set by the EU Treaties*, European law could be given supremacy over conflicting national law.

This integration-friendly position however received an absolute 'national' limit in a third famous judgment of the German Constitutional Court: the Lisbon Decision.[74] In this decision, the Court asserted that even in a situation where the German Parliament had agreed to a further transfer of competences to the Union, that (democratic) choice was limited by the 'constitutional identity' of the German State. What was this 'constitutional identity', and why could it not be limited? This was the answer given by the Constitutional Court:

> From the perspective of the principle of democracy, the violation of the constitutional identity codified in art. 79.3 of the Basic Law is at the same time an encroachment upon the constituent power of the people. *In this respect, the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution* … The safeguarding of sovereignty, demanded by the principle of democracy in the valid constitutional system prescribed by the Basic Law in a manner that is open to integration and to international law, does not mean that a pre-determined number or certain types of sovereign rights should remain in the hands of the state … *European unification on the basis of a treaty union of sovereign states may, however, not be achieved in such a way that not sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions* … Particularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, inter alia, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5).[75]

Invoking the idea of (national) democracy, the German Constitutional Court here set absolute limits to European integration – at least European integration within the scope of the German Constitution. In order to remain a 'sovereign State' – what

[74] *Lisbon Decision* (n. 64 above). For an excellent analysis of the decision, see D. Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court' (2009) 46 *CML Rev.* 1795.

[75] *Lisbon Decision* (n. 64 above), 332–41 (emphasis added). Article 79(3) of the German Constitution is the so-called 'Eternity Clause' and states: 'Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.'

an anachronistic idea in our global times! – national competences must guarantee that 'sufficient space' is left for the national legislature. And, in order to guarantee that guarantee, the German Court would engage in an 'identify review' that could, in the future, result in 'Union law being declared inapplicable in Germany'.[76]

3. Legislative Pre-emption: Nature and Effect

The contrast between the academic presence of the supremacy doctrine and the shadowy existence of the doctrine of pre-emption in the European law literature is arresting.[77] Everyone talks about supremacy but no one knows about pre-emption! One reason for the under-theorised nature of the pre-emption phenomenon has perhaps been a lack of clarity in distinguishing between the two doctrines. But though related, the two doctrines ought to be kept apart. Supremacy denotes the superior hierarchical status of the Union legal *order* over the national legal *orders* and thus gives Union law the *capacity* to pre-empt national law. The doctrine of pre-emption, on the other hand, denotes the *actual degree* to which national law will be set aside by European law.

The supremacy clause does not determine 'what constitutes a conflict between state and federal law; it merely serves as a traffic cop, mandating a federal law's survival instead of a state law's'.[78] Pre-emption, on the other hand, specifies when such conflicts have arisen, that is: to what extent Union law 'displaces' national law. The important question behind the doctrine of pre-emption is this: to what degree will European law displace national law on the same matter? The pre-emption doctrine is thus a 'relative' doctrine: not all European law pre-empts all national law.

The doctrine of pre-emption is essentially a doctrine of normative conflict. Conflicts arise where there is friction between two legal norms. The spectrum of conflict is open-ended and ranges from purely hypothetical frictions to literal contradictions between norms. There is no easy way to measure normative conflicts; and, in an attempt to classify degrees of normative conflict, pre-emption categories have been developed. Most pre-emption typologies will, to a great extent, be arbitrary classifications. They will only try to *reflect* the various judicial reasons and arguments created to explain why national law conflicts with European law. Sadly, unlike the US Supreme Court,[79] the European Court has yet to define and

[76] *Ibid.*, 338. On the relationship between the identity review and the Court's *Solange* jurisprudence, see G. Anagnostaras, '*Solange III*? Fundamental Rights Protection under the National Identity Review' (2017) 42 *EL Rev.* 234.

[77] For an illustration of this point, see P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press, 2015), which dedicates one (!) out of over 1,100 pages to the doctrine of pre-emption; yet spends 50 pages on the supremacy doctrine. The previous edition did not treat pre-emption at all.

[78] S. C. Hoke, 'Preemption Pathologies and Civic Republican Values' (1991) 71 *Boston University Law Review* 685 at 755.

[79] The US Supreme Court has summarised the different types of pre-emption in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, 461 US 190 (1983), 203–4 (quotations and references omitted) in the following manner: 'Congress' intent to supersede state law altogether may be found from a scheme of the federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or because the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose … Even where Congress has not entirely displaced state regulation in a specific area, each state is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility … or where state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.' The three identified pre-emption types are, respectively, field pre-emption, rule pre-emption and obstacle pre-emption.

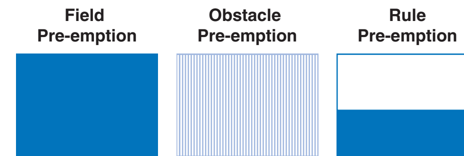

Figure 4.2 Pre-emption Types: Field, Obstacle, Rule Pre-emption

name a pre-emption typology for its legal order.[80] In linguistic alliance with US constitutionalism, we shall, therefore, analyse the European Court's jurisprudence through the lens of the three pre-emption categories developed in that Union, that is: field pre-emption, obstacle pre-emption, and rule pre-emption. A way to visualise these pre-emption categories is shown in Figure 4.2.

a. Field Pre-emption

Field pre-emption refers to those situations where the Court does not investigate any *material* normative conflict, but simply excludes the Member States on the grounds that the Union has exhaustively legislated for the field. This is the most powerful format of federal pre-emption: any national legislation within the occupied field is prohibited. The reason for the total exclusion lies in the perceived fear that *any* supplementary national action may endanger or interfere with the strict uniformity of Union law. Underlying the idea of field pre-emption is a purely abstract conflict criterion: national legislation conflicts with the *jurisdictional* objective of the Union legislator to establish an absolutely uniform legal standard.[81]

[80] Unfortunately, the European Court has not (yet) committed itself to a principled pre-emption statement like *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*. It came close in Case 218/85, *Association comité économique agricole régional fruits et légumes de Bretagne* v. *A. Le Campion (CERAFEL)* [1986] ECR 3513. However, the Court has never extrapolated this pre-emption statement from its specific agricultural policy context. Moreover, not even in the agricultural context has *CERAFEL* become a standard point of reference in subsequent cases.

[81] The total prohibition for national legislators will thus to a certain extent reproduce the effects of a 'real' exclusive competence within the occupied field. On this point, see Chapter 7, section 2(a).

In order to illustrate the argumentative structure of field pre-emption, let us take a closer look at the jurisprudence of the European Court. In *Ratti*,[82] the ECJ found that a Union directive pre-empted any national measures falling within its scope. Member States were therefore 'not entitled to maintain, parallel with the rules laid down by the Directive for imports, different rules for the domestic market'. It was a consequence of the Union system that 'a Member State may not introduce into its national legislation conditions which are more restrictive than those laid down in the directive in question, or which are even more detailed *or in any event different*'.[83] The Union act represented an exhaustive set of rules, and, thus, totally pre-empted national legislators.

b. Obstacle Pre-emption

In contrast to field pre-emption, obstacle pre-emption – our second pre-emption category – requires some *material* conflict between European and national law. Unlike rule pre-emption, however, it refers to a form of argumentative reasoning that does not base the exclusionary effect of European law on the normative friction between a national law and *a particular European rule*. The Court will not go into the details of the legislative scheme, but will be content in finding that the national law somehow interferes with the proper functioning or impedes the objectives of the Union legislation. The burden of proof for finding a legislative conflict is, therefore, still relatively light.

Obstacle pre-emption reasoning can be found in *Bussone*.[84] In the '*absence of express provisions on the compatibility* with the organisation of the market established by [the] Regulation … it is necessary to seek the solution to the question asked in the light of the aims and objectives of the regulations [as such]'. The Court noted that the Regulation did not seek to establish uniform prices, but that the organisation was 'based on freedom of commercial transactions under fair competitive conditions'. '[S]uch a scheme precludes the adoption of any national rules which may hinder, directly or indirectly, actually or potentially, trade within the [Union].'[85]

The Court here employed a functional conflict criterion to oust supplementary national legislation: those national measures that limit the scope, impede the functioning or jeopardise the aims of the European scheme will conflict with the latter. While not as abstract and potent as field pre-emption, the virility of this functional conflict criterion is nonetheless remarkable. Where the Court selects the 'affect' or 'obstacle' criterion, European law will widely pre-empt national legislation. Any national law that reduces the effectiveness of the Union system may be seen to be in conflict with European law.

[82] Case 148/78, *Ratti* [1979] ECR 1629.
[83] *Ibid*., paras. 26–7 (emphasis added).
[84] Case 31/78, *Bussone* v. *Italian Ministry of Agriculture* [1978] ECR 2429.
[85] *Ibid*., paras. 43, 46–7.

c. Rule Pre-emption

The most concrete form of conflict will occur where national legislation literally contradicts a *specific European rule*. Compliance with both sets of rules is (physically) impossible. This scenario can be described as rule pre-emption. The violation of Union legislation by the national measure follows from its contradicting a Union rule 'fairly interpreted'. Put negatively, where the national law does not contradict a specific Union provision, it will *not* be pre-empted.

We can find an illustration of this third type of pre-emption in *Gallaher*.[86] Article 3(3) of the Union Directive on the labelling of tobacco products had required that health warnings should cover 'at least 4% of the corresponding surface'. Reading the 'at least' qualification as a provision allowing for stricter national standards, the British government had tightened the obligation on manufacturers by stipulating that the specific warning ought to cover 6 per cent of the surfaces on which they are printed.

Was this higher national standard supplementing the European rule pre-empted and, thus, to be disapplied? The European Court did not think so in an answer that contrasts strikingly with its previous ruling in *Ratti*. Interpreting Articles 3 and 8 of the directive, the European Court found that '[t]he expression "at least" contained in both articles must be interpreted as meaning that, if they consider it necessary, Member States are at liberty to decide that the indications and warnings are to cover a greater surface area in view of the level of public awareness of the health risks associated with tobacco consumption'.[87] The Court – applying a rule pre-emption criterion – thus allowed the stricter national measure. The national law did not contradict the Union rule and the national rules were therefore not pre-empted by the European standard.

4. Constitutional Limits to Union Pre-emption

When exercising a competence, the Union legislator is generally free to determine to what extent it wishes to pre-empt national law. However, that legislative freedom could – theoretically – be restricted in two ways. First, it could make a difference if the Union legislator used a regulation instead of a directive as a Union act. For a long time, it was indeed thought that a regulation would automatically lead to field pre-emption, while a directive could never do so. We shall examine the pre-emptive capacity of the Union's various legal instruments and see that this view is – presently – mistaken.[88] However, a second constitutional limit to the pre-emptive effect of Union legislation might be found in the type of competence given to the Union.

Let us look at both (potential) limitations in turn.

[86] Case C-11/92, *The Queen* v. *Secretary of State for Health, ex p. Gallaher Ltd, Imperial Tobacco Ltd and Rothmans International Tobacco (UK) Ltd* [1993] ECR I-3545.
[87] *Ibid*., para. 20.
[88] For an argument in favour of a reconceptualisation of the directive, see R. Schütze, 'The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers' (2006) 25 *YEL* 91, conclusion.

a. Union Instruments and Their Pre-emptive Capacity

When the Union was born, its various legal instruments were seen to structure the vertical division of power between the European and the national level. Some early commentators thus argued that for each policy area the Treaty had fixed a specific format of legislative or regulatory intervention.[89] This reading of the various legal instruments has occasionally been expressed by the European Court of Justice.[90] Will this mean that the use of a particular instrument limits the Union legislator from pre-empting the Member States? This section investigates the *pre-emptive* quality of the Union's three 'regulatory' instruments: regulations, directives and international agreements.

aa. The Pre-emptive Capacity of Regulations

Regulations are binding in their entirety, and have been characterised as the 'most integrated form' of European legislation.[91] Typically considered to be the instrument of uniformity, will regulations automatically field pre-empt all national law within their scope of application?

The early jurisprudence of the ECJ indeed emphasised their field pre-emptive nature. In order to protect their 'direct applicability' within the national legal orders, the Court thus employed a strong pre-emption criterion. This initial approach is best illustrated in *Bollmann*.[92] Discussing the effect of a regulation on the legislative powers of the Member States, the ECJ found that since a regulation 'is directly applicable in all Member States, the latter, unless otherwise expressly provided, are precluded from taking steps, for the purposes of applying the regulation, which are *intended to alter its scope or supplement its provisions*'.[93] Early jurisprudence thus suggested that all national rules that fell within the scope of a regulation were automatically pre-empted.[94] Any supplementary national action would be prohibited.

It was this early jurisprudence that created the myth that regulations would automatically field pre-empt national law. Their direct applicability was wrongly associated with field pre-emption.[95] But subsequent jurisprudence quickly disapproved

[89] See P. Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities* (Sijthoff, 1974), 62–3; V. Constantinesco, *Compétences et pouvoirs dans les communautés européennes: contribution à l'étude de la nature juridique des communautés* (Pichon & Durand-Auzias, 1974), 85.

[90] Case C-91/92, *Faccini Dori* v. *Recreb* [1994] ECR I-3325.

[91] G. Gaja, P. Hay and R. D. Rotunda, 'Instruments for Legal Integration in the European Community: A Review', in M. Cappelletti, M. Seccombe and J. Weiler (eds.), *Integration through Law: Europe and the American Federal Experience*, 5 vols. (de Gruyter, 1986), I, 113 at 124.

[92] Case 40/69, *Hauptzollamt Hamburg Oberelbe* v. *Bollmann* [1970] ECR 69.

[93] *Ibid.*, para. 4 (emphasis added).

[94] Case 18/72, *Granaria* v. *Produktschap voor Veevoeder* [1972] ECR 1163, para. 16.

[95] 'This capacity to pre-empt or preclude national measures can be regarded as a characteristic peculiar to a Regulation (as opposed to any other form of [Union] legislation) and may shed some light on the nature of direct applicability under Article [288] of the Treaty' (M. Blumental, 'Implementing the Common Agricultural Policy: Aspects of the Limitations on the Powers of the Member States' (1984) 35 *Northern Ireland Legal Quarterly* 28–51 at 39).

of the simplistic correlation. In *Bussone*, the Court did not find the relevant regulation to field pre-empt national law, but analysed whether national laws were '*incompatible with the provisions of that regulation*'.[96] And in *Maris* v. *Rijksdienst voor Werknemerspensioenen*,[97] the Court clarified that this incompatibility could sometimes require a material conflict as a regulation would only preclude 'the application of any provisions of national law to a *different or contrary effect*'.[98] Regulations thus do not automatically field pre-empt. They will not always achieve 'exhaustive' legislation. On the contrary, a regulation may confine itself to laying down minimum standards.[99] It is thus misleading to classify regulations as instruments of strict uniformity.[100] While Member States are precluded from unilateral 'amendment' or 'selective application',[101] these constitutional obligations apply to all Union acts and do not specifically characterise the format of regulations.

bb. The Pre-emptive Capacity of Directives

Directives shall be binding 'as to the result to be achieved' and 'leave to the national authorities the choice of form and methods'.[102] Binding as to the result to be achieved, the instrument promised to respect the Member States' freedom to select a national path to a European end. The very term 'directive' suggested an act that would confine itself to 'directions', and the instrument's principal use for the harmonisation of *national* law reinforced that vision.

Do directives thus represent broad-brush 'directions' that guarantee a degree of national autonomy? An early academic school indeed argued this view.[103]

[96] Case 31/78, *Bussone* v. *Italian Ministry of Agriculture* [1978] ECR 2429, paras. 28–31.

[97] Case 55/77, *M. Maris, wife of R. Reboulet* v. *Rijksdienst voor Werknemerspensioenen* [1977] ECR 2327.

[98] *Ibid.*, paras. 17–18 (emphasis added).

[99] Council Regulation No. 259/93 on the supervision and control of shipments of waste within, into and out of the European Community ([1993] OJ L 30, p. 1) provides such an example of a 'minimum harmonisation' regulation. The regulation has been described as 'far from providing for a complete harmonisation of the rules governing the transfer of waste, and might in part even be regarded (in the words of one commentator) as an "organised renationalisation" of the subject' (Advocate General F. Jacobs, Case C-187/93, *Parliament* v. *Council* [1994] ECR I-2857, para. 22).

[100] Contra, J. A. Usher, *EC Institutions and Legislation* (Longman, 1998), 130: 'In effect Regulations could be said simply, if inelegantly, to amount to a "keep out" sign to national legislation.'

[101] Case 39/72, *Commission* v. *Italy* [1973] ECR 101, para. 20.

[102] Art. 288(3) TFEU.

[103] See R. W. Lauwaars, *Lawfulness and Legal Force of Community Decisions* (Sijthoff, 1973) 30–1 (emphasis added): 'But can this be carried so far that no freedom at all is left to the member States? In my opinion it follows from Art. [288] that the directive *as a whole* must allow member States the possibility of carrying out the rules embodied in the directive in their own way. A directive that constitutes a uniform law is not compatible with this requirement because, by definition, it places a duty on the member States to take over the uniform text and does not allow any freedom as to choice of form and method'; and Gaja, Hay and Rotunda, 'Instruments for Legal Integration' (n. 91 above), 133 (emphasis added): 'The detailed character of many provisions may be inconsistent with the *concept of directive* as defined in the [FEU] Treaty.'

These voices championed a constitutional frame limiting the directive's pre-emptive effect. To be a 'true' directive, it would need to leave a degree of legislative freedom, and as such could never field pre-empt national legislation within its scope of application. This position thus interpreted the directive in competence terms: the Union legislator would act ultra vires, if it went beyond the constitutional frame set by a directive. But when precisely the pre-emptive Rubicon was crossed remained shrouded in linguistic mist.

In any event, past constitutional practice within the Union legal order has never endorsed a constitutional limit to the pre-emptive effect of directives. On the contrary, in *Enka* the Court of Justice expressly recognised a directive's ability to be 'exhaustive' or 'complete' harmonisation, wherever strict legislative uniformity was necessary.[104] Directives can – and often do – occupy a regulatory field.[105] Their pre-emptive *capacity* therefore equals that of regulations. The national choice, referred to in Article 288[3] TFEU indeed only guarantees the power of Member States to implement the European *content* into national *form*: '[T]he choice is limited to the *kind* of measures to be taken; their *content* is entirely determined by the directive at issue. Thus the discretion as far as form and methods are concerned does not mean that Member States necessarily have a margin in terms of policy making.'[106]

cc. The Pre-emptive Capacity of International Agreements

The pre-emptive effect of Union agreements may be felt in two ways. First, directly effective Union agreements will pre-empt inconsistent *national* law.[107] But, second, self-executing international obligations of the Union will also pre-empt inconsistent *European* secondary law. The pre-emptive potential of international agreements over internal European law follows from the 'primacy' of the former over the latter.[108] For the Court considers international agreements of the Union hierarchically above ordinary Union secondary law.

[104] Case 38/77, *Enka BV* v. *Inspecteur der invoerrechten en accijnzen* [1977] ECR 2203, paras. 11– 12: 'It emerges from the third paragraph of Article [288] of the Treaty that the choice left to the Member States as regards the form of the measures and the methods used in their adoption by the national authorities depends upon the result which the Council or the Commission wishes to see achieved. As regards the harmonisation of the provisions relating to customs matters laid down in the Member States by law, regulation or administrative action, in order to bring about the uniform application of the common customs tariff it may prove necessary to ensure the *absolute identity of those provisions*' (*ibid.*, paras. 11–12).

[105] E.g. Case 148/78, *Ratti* [1979] ECR 1629.

[106] S. Prechal, *Directives in EC Law* (Oxford University Press, 2005), 73.

[107] E.g. Case C-61/94, *Commission* v. *Germany (IDA)* [1996] ECR I-3989, where the European Court did find a national measure pre-empted by an international agreement. The agreement at stake was the international dairy agreement and the Court found 'that Article 6 of the annexes precluded the Federal Republic of Germany from authorising imports of dairy products, including those effected under inward processing relief arrangements, at prices lower than the minimum' (*ibid.*, para. 39).

[108] *Ibid.*, para. 52.

Let us solely concentrate on the first aspect: the pre-emptive ability of Union agreements in relation to *national* law. Will the pre-emptive effect of an international norm be the same as that of an identically worded provision within a regulation or a directive? The Court has responded to this question in an indirect manner. In *Polydor*,[109] it was asked to rule on the compatibility of the 1956 British Copyright Act with the agreement between the European Union and Portugal. The bilateral free trade agreement envisaged that quantitative restrictions on imports and all measures having an equivalent effect to quantitative restriction should be abolished, but exempted all those restrictions justified on the grounds of the protection of intellectual property. Two importers of pop music had been charged with infringement of Polydor's copyrights and had invoked the directly effective provisions of the Union agreement as a sword against the British law.

Would the Union agreement pre-empt the national measure? If the Court had projected the 'internal' Union standard established by its jurisprudence in relation to Articles 34–6 TFEU, the national measure would have been pre-empted. But the Court did not. It chose to interpret the identically worded provision in the Union agreement more restrictively.[110] Identical text will, therefore, not guarantee identical interpretation:

> [T]he fact that the provisions of an agreement and the corresponding [Union] provisions are identically worded does not mean that they must necessarily be interpreted identically. An international treaty is to be interpreted not only on the basis of its wording, but also in the light of its objectives.[111]

Context will thus prevail over text. The context or function of the international treaty will be decisive. Only where an international norm fulfils the 'same function' as the internal European norm, will the Court project the 'internal' pre-emptive effect to the international treaty.[112] But, while the Court may

[109] Case 270/80, *Polydor and others* v. *Harlequin and others* [1982] ECR 329.

[110] *Ibid.*, paras. 15, 18–19.

[111] *Opinion 1/91* (EEA Draft Agreement) [1991] ECR I-6079, para. 14. In relation to the EEA, the Court found that it was 'established on the basis of an international treaty which, essentially, *merely creates rights and obligations as between the Contracting Parties* and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up' (*ibid.*, para. 20, emphasis added). The EU Treaty, by way of contrast, constituted 'the constitutional charter of a [Union] based on the rule of law', one of whose particular characteristics would be 'the direct effect of a whole series of provisions which are applicable to their nationals' (*ibid.*, para. 21).

[112] An illustration can be found in Case 17/81, *Pabst & Richarz KG* v. *Hauptzollamt Oldenburg* [1982] ECR 1331, where the ECJ was asked to compare Art. 53(1) of the association agreement between the Union and Greece with the relevant provision in the TFEU: 'That provision, the wording of which is similar to that of Article [110] of the Treaty, fulfils, within the framework of the association between the [Union] and Greece, the

apply a milder form of pre-emption to international agreements, it has not announced any constitutional limits to the pre-emptive capacity of international agreements.

In sum, Union agreements have the capacity to pre-empt inconsistent national law. The pre-emptive potential of international agreements however appears to be milder than equivalently worded internal legislation. Only where the agreement has the same function as an internal European norm will the Court accept the same pre-emptive effect that would be triggered by identically worded European law.

b. Excursus: Competence Limits to Pre-emption

When legislating, the Union legislator is typically free to decide what pre-emption category it wishes to choose. Union discretion thus determines the degree to which national legislators are pre-empted by European legislation. However, there are legislative competences – to be discussed in Chapter 7 – that seem to restrict this liberty. For certain policy areas the Union legislator is indeed limited to setting minimum standards only. The constitutional relationship between the European and the national legislator is here essentially this: the EU Treaty guarantees the ability of the national legislator to adopt *higher* standards; and this seems to constitutionally rule out field pre-emption for these competences. A second variant of constitutionally limited pre-emption flows from the Union's 'complementary competences'. They will also be discussed in Chapter 7 and typically confine the Union legislator to adopt 'incentive measures' that exclude all harmonisation within the field.[113]

The central question for both types of competence is this: how much legislative space will the European Union need to leave to the national level? Do minimum harmonisation competences prevent the Union from ever laying down exhaustive standards with regard to a specific legislative *measure?* And can 'incentive measures' pre-empt national laws – even though a complementary competence excludes all harmonisation within the field? We shall explore these questions in Chapter 7 when looking specifically at the competence categories of the Union.

same function as that of Article [110] … It accordingly follows from the wording of Article 53(1), cited above, and from the objective and nature of the association agreement of which it forms part that that provision precludes a national system of relief from providing more favourable tax treatment for domestic spirits than for those imported from Greece' (*ibid.*, paras. 26–7). While the ECJ had found that the European Treaties and the EEA Treaty had different purposes and functions, the General Court seemed to favour a parallel interpretation of the EEA Agreement with identically worded provisions of the European Treaties and secondary law in Case T-115/94, *Opel Austria GmbH* v. *Council* [1997] ECR II-39.

[113] On this point, see Chapter 7, section 2(d).

Conclusion

The doctrine of direct effect demands that a national court *applies* European law; and the doctrine of supremacy demands that a national court *disapplies* national law that conflicts with European law. Direct effect and supremacy are nonetheless *not* twin doctrines. (There can be direct effect without supremacy.) The previous chapter explored the doctrine of direct effect, this chapter concentrated on the doctrine of supremacy and its twin doctrine: the doctrine of pre-emption. The doctrine of pre-emption determines to what extent national law must be disapplied or displaced. It is a theory of legislative conflict. The doctrine of supremacy is a theory of conflict resolution. The two doctrines are vital for any Union of States with overlapping legislative spheres.

For the European legal order, the supremacy of European law means that all Union law prevails over all national law. The absolute nature of the supremacy doctrine is, however, contested by the Member States. While they generally acknowledge the supremacy of European law, they have insisted on national constitutional limits. Is this relative nature of supremacy a 'novelty' or 'aberration'?[114] This view is introverted and unhistorical when compared with the constitutional experiences of the United States.[115] Indeed, the normative ambivalence surrounding the supremacy principle in the European Union is part and parcel of Europe's *federal* nature.[116]

What is the principle of pre-emption? As we saw above, the doctrine of pre-emption complements the supremacy of Union law. It determines when a conflict between Union law and national law has arisen; and this is a relative question. The question is not whether European law pre-empts national law but to what degree. Not all European law will thus displace all national law. So, when will a conflict between European and national law arise? There is no absolute answer to this question. The Union legislator and the European Court of Justice will not always attach the same conflict criterion to all European legislation. Sometimes a purely 'jurisdictional' conflict will be enough to pre-empt national law. In other cases, some material conflict with the European legislative scheme is necessary. Finally, the Court may insist on a direct conflict with a specific Union rule. In parallel to US constitutionalism we consequently distinguished three pre-emption categories within the Union legal order: field pre-emption, obstacle pre-emption and rule pre-emption.

[114] See N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *MLR* 317 at 338. This terribly narrow-minded – 'Eurocentric' – view strikingly ignores the US experience, in which the Union and the States were seen to have 'constitutional' claims and in which the 'Union' was – traditionally – not (!) conceived in statist terms (see E. Zoeller, 'Aspects Internationaux du droit constitutionnel. Contribution à la théorie de la féderation d'états' (2002) 194 *Recueil des Cours de l'Académie de la Haye* 43).

[115] Schütze, 'Federalism as Constitutional Pluralism' (n. 49 above).

[116] On this point, see Chapter 2.

Are there any constitutional limits on the freedom of the Union legislator to pre-empt national law? We saw above that there may indeed exist limits that some competences impose; yet no such limits are inherent on the type of legislative instrument that the Union uses.

FURTHER READING

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10

Judicial Powers I

(Centralised) European Procedures

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Introduction

When compared to the legislative and executive branches, the judiciary looks like a poor relation. For the classic civil law tradition reduces courts

to 'the mouth that pronounces the words of the law',[1] and even the common law tradition finds that '[w]hoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be *the least dangerous* to the political rights of the constitution'.[2] In the eyes of both traditions, the judiciary is thus 'the least dangerous branch'.[3]

This traditional view originates in the eighteenth century. It reduces the judiciary to its *adjudicatory* function, that is: the power to decide disputes between private parties. Yet this position was to change dramatically in the nineteenth and twentieth centuries.[4] Courts not only succeeded in imposing their control over the executive branch; some States even allowed for the constitutional review of legislation.[5] These judicial 'victories' over the executive and legislative branch were inspired by the idea that all public power should be subject to the 'rule of law'; and this idea would, in some legal orders, include the sanctioning power of the judiciary to order a State to make good damage caused by a public 'wrong'.[6]

A modern definition of the judicial function therefore needs to treat three core powers, which – in descending order – are: the power to *annul* legislative or executive acts, the power to *remedy* public wrongs and the power to *adjudicate* legal disputes between parties.

The following chapters explores these three judicial prerogatives within the Union legal order. Importantly: the judicial function is here 'split' between the Court of Justice of the European Union and the national courts. For the Union legal order decided, early on, to recruit national courts in the exercise of some judicial functions – and has thereby turned them into decentralised 'European'

[1] C. Montesquieu, *The Spirit of the Laws*, ed. and translated A. M. Cohler et al. (Cambridge University Press, 1989), 163.

[2] A. Hamilton, *Federalist 78* in A. Hamilton et al., *The Federalist*, ed. T. Ball (Cambridge University Press, 2003), 377 at 378. The quote continues: 'The judiciary … has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.'

[3] For a famous analysis of this claim, see A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 1986).

[4] For a comparative constitutional perspective on the rise of the judiciary, see M. Cappelletti, *Judicial Review in the Contemporary World* (Bobbs-Merrill, 1971).

[5] The US Supreme Court for example has, long ago, claimed the power to 'unmake' a law adopted by the legislature, see *Marbury* v. *Madison*, 5 US 137 (1803).

[6] This challenged the classic common law principle that the 'sovereign can do no wrong'. In the words of W. Blackstone, *Commentaries on the Laws of England* (Forgotten Books, 2010), Book III, ch. 17, 254: 'That the king can do no wrong, is a necessary and fundamental principle of the English constitution: meaning only, as has formerly been observed, that, in the first place, whatever may be amiss in the conduct of public affairs is not chargeable.'

courts. This judicial federalism has indeed been a cornerstone of the Union and will be discussed in Chapter 11.

This chapter, however, will concentrate on the 'centralised' powers of the Court of Justice of the European Union (see Figure 10.1). Section 1 starts with an analysis of its annulment power. The power of judicial review is the founding pillar of a Union 'based on the rule of law'.[7] Section 2 moves to the remedial power of the European Court,[8] and the question when the Union legislative or executive branches will be liable to pay damages for an illegal action. Finally, sections 3 and 4 investigate the Court's power to adjudicate disputes between parties. In addition to a number of direct actions (direct actions start directly in the European Court), the EU Treaties here envisage an indirect action starting in the national courts: the preliminary reference procedure. This procedure is the judicial cornerstone of the Union's cooperative federalism. For it combines the *central* interpretation of Union law by the Court of Justice with the *decentralised* application of European law by the national courts.

It goes without saying that this chapter cannot discuss all judicial competences of the European Court. An overview of the various judicial powers and procedures in the TFEU can nevertheless be found in Table 10.1.[9] Importantly, the EU Treaties here acknowledge two general jurisdictional limitations: Articles 275 and 276 TFEU. The former declares that the European Court will generally '*not* have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions'.[10] By contrast, the latter article decrees that the European Court 'shall have *no* jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.[11] These two 'holes' in the judicial competences of the Court are deeply regrettable, for they effectively replace the 'rule of law' with the rule of the executive.

[7] Case 294/83, *Parti Écologiste 'Les Verts'* v. *European Parliament* [1986] ECR 1339, para. 23: 'The European [Union] is a [union] based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the [Treaties].'

[8] The remedial powers of the national courts for breaches of European law by the Member States will be discussed in Chapter 11, section 3.

[9] Part Six – Title I – Chapter 1 – Section 5 TFEU. The section is – roughly – divided into an 'institutional' part (Arts. 251–7), and a 'competence and procedure' part (Arts. 258–81).

[10] *Ibid.*, Art. 275(1) (emphasis added). There are two exceptions within that exception. The first relates to the power of the Court to review the borderline, established by Art. 40 TEU, between the CFSP and the Union's special external policies. Second, a CFSP act is reviewable, where it is claimed to restrict the rights of a natural or legal person. The latter aspect will be discussed in (online) Chapter 18B, section 3(d).

[11] Art. 276 TFEU (emphasis added).

Table 10.1 Judicial Competences and Procedures

Judicial Competences and Procedures (Articles 258–81 TFEU)			
Article 258	**Enforcement Action Brought by the Commission**	**Article 268**	**Jurisdiction in Damages Actions under Article 340**
Article 259	**Enforcement Action Brought by Another Member State**	Article 269	Jurisdiction for Article 7 TEU
Article 260	**Action for a Failure to Comply with a Court Judgment**	Article 270	Jurisdiction in Staff Cases
Article 261	Jurisdiction for Penalties in Regulations	Article 271	Jurisdiction for Cases Involving the European Investment Bank and the European Central Bank
Article 262	(Potential) Jurisdiction for Disputes Relating to European Intellectual Property Rights	Article 272	Jurisdiction Granted by Arbitration Clauses
Article 263	**Action for Judicial Review**	Article 273	Jurisdiction Granted by Special Agreement between the Member States
Article 264	Consequences of an Annulment Ruling	Article 274	Jurisdiction of National Courts Involving the Union
Article 265	**(Enforcement) Action for the Union's Failure to Act**	Article 275	Non-jurisdiction for the Union's CFSP
Article 266	Consequences of a Failure to Act Ruling	Article 276	Jurisdictional Limits within the Area of Freedom, Security and Justice
Article 267	**Preliminary Rulings**	**Article 277**	**Collateral (Judicial) Review for Acts of General Application…**
Protocol No. 3 on the Statute of the Court of Justice of the European Union Rules of Procedure of the Court of Justice Rules of Procedure of the General Court			

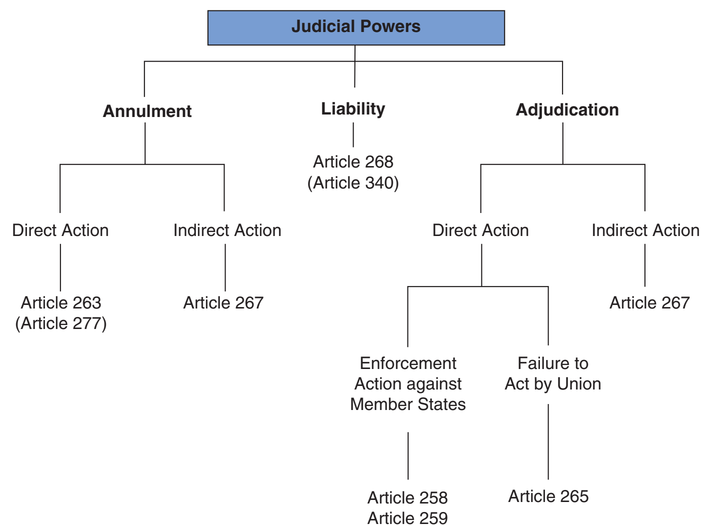


Figure 10.1 European Court: Powers (Flowchart)

1. Annulment Powers: Judicial Review

The most powerful prerogative of a court is the power to 'unmake' law, that is: to annul an act that was adopted by the legislative or executive branches. The competence and procedure for judicial review in the European Union legal order is set out in Article 263 TFEU. The provision reads:

> [1] The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.
>
> [2] It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.
>
> [3] The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

> [4] Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures …
>
> [6] The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.[12]

Where an action for judicial review is well founded, the Court of Justice 'shall declare the acts concerned to be void'.[13] The Union will henceforth 'be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union';[14] and may even be subject to compensation for damage caused by the illegal act.[15]

What are the procedural requirements for a judicial review action? Article 263 follows a complex structure; and the easiest way to understand its logic is to break it down into four constituent components. Paragraph 1 concerns the question *whether* the Court has the power to review particular types of Union acts. Paragraph 2 tells us *why* there can be judicial review, that is: on what grounds one can challenge the legality of a European act. Paragraphs 2–4 concern the question of *who* may ask for judicial review and thereby distinguishes between three classes of applicants. Finally, paragraph 6 tells us *when* an application for review must be made, namely, within two months. After that, a Union act should – theoretically – be immune and permanent. (But, as we shall see below, while direct review is henceforth expired, an applicant may still be entitled to challenge the legality of a Union act *indirectly*.)

This section looks at the first three constitutional components before analysing the indirect routes to the judicial review of European law.

[12] The omitted para. 5 lays down special rules for Union agencies and bodies. It states: 'Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.' The following section will not deal with this special aspect of judicial review. Importantly, however, for some agencies, the review of an administrative decision may start internally with a 'Board of Appeal'. For an excellent analysis of this administrative review stage within agencies, see P. Chirulli and L. de Lucia, 'Specialised Adjudication in EU Administrative Law: The Boards of Appeal of EU Agencies' (2015) 40 *Europ EL Rev.* 832.

[13] Art. 264(1) TFEU. However, according to Art. 264(2) TFEU, the Court can – exceptionally – 'if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive'.

[14] *Ibid.*, Art. 266.

[15] *Ibid.*, Arts. 268 and 340. On this point, see section 2 below.

a. The Existence of a 'Reviewable' Act

Paragraph 1 determines whether there can be judicial review. This question has two dimensions. The first dimension relates to *whose* acts may be challenged; the second dimension clarifies *which* acts might be reviewed.

Whose acts can be challenged in judicial review proceedings? According to Article 263(1) TFEU, the Court is entitled to review 'legislative acts', that is: acts whose authors are the European Parliament and the Council both following the ordinary or a special legislative procedure. It can also review executive acts of all Union institutions and bodies – except for the Court of Auditors. By contrast, the Court cannot judicially review acts of the Member States. And this prohibition includes unilateral national acts, as well as international agreements of the Member States. (The European Treaties thus cannot – despite their being the foundation of European law – ever be reviewed by the Court.) So, even if national acts or international agreements of the Member States fall within the scope of European law, as collective acts of the Member States, they cannot be attributed to the Union institutions, and as such are beyond the review powers of the European Court.[16]

Which acts of the Union institutions can be reviewed? Instead of a positive definition, Article 263(1) only tells us which acts *cannot* be reviewed. Accordingly, there can be no judicial review for 'recommendations' or 'opinions'. The reason for this exclusion is that both instruments 'have no binding force',[17] and there is thus no need to challenge their *legality*.[18] The provision equally excludes judicial review for acts of the European Parliament, the European Council, and of other Union bodies not 'intended to produce legal effects vis-à-vis third parties'. The rationale behind this limitation is to exclude acts that are 'internal' to an institution. And despite being textually limited to *some* Union institutions, the requirement of an 'external' effect has been extended to all Union acts.

The Court has equally clarified that purely preparatory acts of the Commission or the Council cannot be challenged because 'an act is open to review only if it is a measure definitely laying down the position of the Commission or the Council'.[19] In a legislative or executive procedure involving several stages, all

[16] On the non-reviewability of international agreements concluded by the Member States, see Case C-146/13, *Spain* v. *Parliament and Council (Unitary Patent)*, EU:C:2015:298, esp. para. 101: '[I]t should be borne in mind that, in an action brought under Article 263 TFEU, the Court does not have jurisdiction to rule on the lawfulness of an international agreement concluded by Member States.' The use of so-called *inter se* agreements is thus one way to remove ECJ jurisdiction – unless the Court has specifically been granted jurisdiction under the international agreement itself.

[17] Art. 288(5) TFEU.

[18] Strangely, sometimes such 'soft law' may however have 'legal' effects. On this point, see L. Senden, *Soft Law in European Community Law* (Hart, 2004).

[19] Case 60/81, *International Business Machines (IBM)* v. *Commission* [1981] ECR 2639, para. 10.

preparatory acts are consequently considered 'internal' acts; and as such cannot be reviewed.[20]

But apart from these – minor – limitations, the Court has embraced a wide teleological definition of which acts may be reviewed. The nature of the (final) act would thereby be irrelevant. In *ERTA*,[21] the Court thus found:

> Since the only matters excluded from the scope of the action for annulment open to the Member States and the institutions are 'recommendations or opinions' – which by the final paragraph of Article [288 TFEU] are declared to have no binding force – Article [263 TFEU] treats as acts open to review by the Court all measures adopted by the institutions which are intended to have legal force. The objective of this review is to ensure, as required by Article [19 TEU], observance of the law in the interpretation and application of the Treaty. It would be inconsistent with this objective to interpret the conditions under which the action is admissible so restrictively as to limit the availability of this procedure merely to the categories of measures referred to by Article [288 TFEU]. An action for annulment must therefore be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects.[22]

The Court's wide review jurisdiction is however externally limited by Articles 275 and 276 TFEU – as discussed in the Introduction to this chapter, above.

b. Legitimate Grounds for Review

Not every reason is a sufficient reason to request judicial review. While the existence of judicial review is an essential element of all political orders subject to the 'rule of law', the extent of judicial review will differ depending on whether a procedural or a substantive version is chosen. The British legal order has traditionally followed a formal definition of the rule of law. Accordingly, courts are (chiefly) entitled to review whether in the adoption of an act the respective legislative or executive procedures have been followed.[23] The 'merit' or 'substance' of a legislative act is here beyond the review powers of the courts. By contrast, the US constitutional order has traditionally followed a *substantive* definition of the rule of law. Courts are also obliged to review the content of a legislative act, and, in particular, whether it violates fundamental human rights as guaranteed in the Constitution.

[20] However, the Court clarified that preparatory acts can indirectly be reviewed once the (final) 'external act' is challenged (*ibid*., para. 12): 'Furthermore, it must be noted that whilst measures of a purely preparatory character may not themselves be the subject of an application for a declaration that they are void, any legal defects therein may be relied upon in an action directed against the definitive act for which they represent a preparatory step.'

[21] Case 22/70, *Commission* v. *Council (ERTA)* [1971] ECR 263.

[22] *Ibid*., paras. 39–42.

[23] A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law* (Pearson, 2003), chs. 30 and 31.

Be that as it may, for the European legal order, Article 263(2) TFEU limits judicial review to four legitimate grounds: 'lack of competence', 'infringement of an essential procedural requirement', 'infringement of the Treaties or any rule of law relating to their application', and 'misuse of powers'. Do these reasons indicate whether the Union subscribes to a formal or substantive rule of law? Let us look at this general question first, before analysing the principle of proportionality as a specific ground of review.

aa. 'Formal' and 'Substantive' Grounds

The Union legal order recognises three 'formal' grounds of review.

First, a European act can be challenged on the grounds that the Union lacked the competence to adopt it. The ultra vires review of European law extends to all secondary and tertiary Union law. The review of the former originates in the principle of conferral.[24] Since the Union may only exercise those powers conferred on it by the Treaties, any action beyond these powers is ultra vires and thus voidable.[25] With regard to delegated legislation, the Court will not only review whether the delegate has acted within the scope of the powers delegated, but it must also ensure that the absolute limits to such a delegation have not been violated.[26] This follows not from the (vertical) principle of conferral, but from the (horizontal) principle protecting the institutional balance of powers within the Union.[27]

Second, a Union act can be challenged if it infringes an essential procedural requirement. According to this second ground of review, not all procedural irregularities may invalidate a Union act but only those that are 'essential'. When are 'essential' procedural requirements breached? The constitutional principles developed under this jurisdictional head are the result of an extensive 'legal basis litigation'.[28] An essential procedural step is breached when the Union adopts an act under a procedure that leaves out an institution that was entitled to be involved.[29] Alternatively, the Union may have adopted an act on the basis of a wrong voting arrangement *within* one institution. Thus, where the Council voted by unanimity instead of a qualified majority, an essential procedural requirement is breached.[30] By contrast, no essential procedural requirement is infringed when

[24] On the principle of conferral, see Chapter 7, section 1.

[25] The European Court has traditionally been reluctant to declare Union legislation void on the ground of lack of competence. This judicial passivity stemmed from the Court's unwillingness to interfere with a consensual decision of the Member States in the Council. On the 'culture of consent' after the Luxembourg compromise, see Chapter 1, section 2(b).

[26] On the delegation doctrine in the Union legal order, see Chapter 9, section 2.

[27] On the 'essential elements' principle, see Chapter 9, section 2(a/bb).

[28] On the phenomenon of 'legal basis litigation' in the Union legal order, see H. Cullen and A. Worth, 'Diplomacy by Other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States' (1999) 36 *CML Rev.* 1243.

[29] See Case 22/70, *Commission* v. *Council (ERTA)* [1971] ECR 263; Case C-70/88, *Parliament* v. *Council (Chernobyl)* [1990] ECR I-2041.

[30] See Case 68/86, *United Kingdom* v. *Council* [1988] ECR 855; Case C-300/89, *Commission* v. *Council* [1991] ECR I-2867.

the Union acts under a 'wrong' competence, which nonetheless envisages an identical legislative procedure.[31]

The third formal ground of review is 'misuse of powers', which has remained relatively obscure.[32] The subjective rationale behind it is the prohibition on pursuing a different objective from the one underpinning a legal competence.[33]

Finally, a Union act can be challenged on the grounds that it represents an 'infringement of the Treaties or any other rule of law relating to their application'. This constitutes a 'residual' ground of review. The European Court has used it as a constitutional pass-partout to import a range of 'unwritten' general principles into the Union legal order.[34] These principles include, most importantly, the principle of proportionality. With the introduction of these principles, the rule of law has received a *substantive* dimension in the European Union.[35] The most important expression of this substantive rule of law idea is the ability of the European Courts to review Union acts against EU fundamental rights.[36] They impose substantive limits on all governmental powers of the Union. In light of their importance, they will be dealt with extensively in Chapter 12.

bb. In Particular: The Proportionality Principle

The constitutional function of the proportionality principle is to protect liberal values.[37] It constitutes one of the 'oldest' general principles of the Union legal order.[38] Beginning its career as an unwritten principle, the proportionality principle is now codified in Article 5(4) TEU:

> Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.[39]

[31] Case 165/87, *Commission* v. *Council* [1988] ECR 5545, para. 19: 'only a purely formal defect which cannot make the measure void'.

[32] For a more extensive discussion of this ground of review, see H. Schermers and D. Waelbroeck, *Judicial Protection in the European Union* (Kluwer, 2001), 402ff.

[33] See Joined Cases 18 and 35/65, *Gutmann* v. *Commission* [1965] ECR 103.

[34] On the general principles in the Union legal order, see T. Tridimas, *The General Principles of EU Law* (Oxford University Press, 2007).

[35] For an express confirmation that the Union legal order subscribes to the substantive rule of law version, see Case C-367/95P, *Commission* v. *Sytraval and Brink's* [1998] ECR I-1719, para. 67; Case C-378/00, *Commission* v. *Parliament and Council* [2003] ECR I-937, para. 34.

[36] On the emergence of fundamental rights as general principles of Union law, see Chapter 12, section 1.

[37] On the origins of the proportionality principle, see J. Schwarze, *European Administrative Law* (Sweet & Maxwell, 2006), 678–9.

[38] An implicit acknowledgement of the principle may be found in Case 8/55, *Fédération Charbonnière de Belgique* v. *High Authority of the ECSC* [1955] ECR (English Special Edition) 245 at 306: 'not exceed the limits of what is strictly necessary'.

[39] The provision continues: 'The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.'

The proportionality principle has been characterised as 'the most far-reaching ground for review', and 'the most potent weapon in the arsenal of the public law judge'.[40]

But how will the Court assess the proportionality of a Union act? In the past, the Court has developed a proportionality *test*. In its most elaborate form, the test follows a tripartite structure.[41] It analyses the *suitability, necessity* and *proportionality* (in the strict sense) of a Union act. However, the Court does not always distinguish between the second and third prongs.

Within its suitability review, the Court will check whether the European measure is suitable to achieve a given objective. This might be extremely straightforward.[42] The necessity test is, on the other hand, more demanding. The Union will have to show that the act adopted represents the least restrictive means to achieve a given objective. Finally, even the least restrictive means to achieve a public policy objective might disproportionately interfere with EU fundamental rights. Proportionality in a strict sense thus weighs whether the burden imposed on an individual is excessive or not.

While this tripartite test may – in theory – be hard to satisfy, the Court has granted the Union a wide margin of appreciation wherever it enjoys a sphere of discretion. The legality of a discretionary Union act will thus only be affected 'if the measure is *manifestly inappropriate*'.[43] This relaxed standard of review has meant that the European Court rarely finds a Union measure to be disproportionately interfering with, say, fundamental rights.

We do, however, find a good illustration of a disproportionate Union act in *Kadi*.[44] In its fight against international terrorism, the Union had adopted a regulation freezing the assets of people suspected to be associated with Al-Qaida. The applicant alleged, *inter alia*, that the Union act disproportionately restricted his right to property. The Court held that the right to property was not absolute and 'the exercise of the right to property may be restricted, provided that those restrictions in fact correspond to objectives of public interest pursued by the [Union] and do not constitute, in relation to the aim pursued, a

[40] Tridimas, *General Principles* (n. 34 above), 140.

[41] See Case C-331/88, *The Queen* v. *Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex p. Fedesa and others* [1990] ECR I-4023, para. 13: '[T]he principle of proportionality is one of the general principles of [Union] law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.'

[42] For a rare example, where the test is not satisfied, see Case C-368/89, *Crispoltoni* v. *Fattoria autonoma tabacchi di Città di Castello* [1991] ECR I-3695, esp. para. 20.

[43] Case C-331/88, Fedesa (n. 41 above), para. 14 (emphasis added); Case C-122/95, *Germany* v. *Council (Bananas)* [1998] ECR I-973, para. 79.

[44] Case C-402/05P, *Kadi and Al Barakaat International Foundation* v. *Council and Commission* [2008] ECR I-6351.

disproportionate and intolerable interference, impairing the very substance of the right so guaranteed'.[45] And this required that 'a fair balance has been struck between the demands of the public interest and the interest of the individuals concerned'.[46] This fair balance had not been struck for the applicant; and the Union act would, so far as it concerned the applicant,[47] therefore have to be annulled.

c. Legal Standing before the European Court

The Treaties distinguish between three types of applicants in three distinct paragraphs of Article 263.

Paragraph 2 mentions the applicants who can always bring an action for judicial review. These 'privileged' applicants are: the Member States,[48] the European Parliament,[49] the Council and the Commission. The reason for their privileged status is that they are *ex officio* deemed to be affected by the adoption of every Union act.[50]

[45] *Ibid.*, para. 355.

[46] *Ibid.*, para. 360.

[47] *Ibid.*, paras. 371–2. However, the Court found that the Union act as such could, in principle, be justified (*ibid.*, para. 366).

[48] On the position of regions within Member States, see K. Lenaerts and N. Cambien, 'Regions and the European Courts: Giving Shape to the Regional Dimension of Member States' (2010) 35 *EL Rev.* 609.

[49] Under the original Rome Treaty, the European Parliament was not a privileged applicant. The reason for this lay in its mere 'consultative' role in the adoption of Union law. With the rise of parliamentary involvement after the Single European Act, this position became constitutionally problematic. How could Parliament cooperate or even co-decide in the legislative process, yet not be able to challenge an act that infringed its procedural prerogatives? To close this constitutional gap, the Court judicially 'amended' ex-Art. 173 EEC by giving the Parliament the status of a 'semi-privileged' applicant (see Case 70/88, *Parliament* v. *Council (Chernobyl)*, paras. 24–7: '[T]he Court cannot, of course, include the Parliament among the institutions which may bring an action under [ex-]Article 173 of the EEC Treaty or Article 146 of the Euratom Treaty without being required to demonstrate an interest in bringing an action. However, it is the Court's duty to ensure that the provisions of the Treaties concerning the institutional balance are fully applied and to see to it that the Parliament's prerogatives, like those of the other institutions, cannot be breached without it having available a legal remedy, among those laid down in the Treaties, which may be exercised in a certain and effective manner. The absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities. Consequently, an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging their infringement'). This status was codified in the Maastricht Treaty; and the Nice Treaty finally recognised Parliament's status as a fully privileged applicant under ex-Art. 230(2) EC.

[50] One notable absentee from the list of privileged applicants is the European Council. However, its interests are likely to be represented by the Council.

Paragraph 3 lists applicants that are 'semi-privileged'. These are the Court of Auditors, the European Central Bank and the Committee of the Regions.[51] They are 'partly privileged', as they may solely bring review proceedings 'for the purpose of protecting their prerogatives'.[52]

Paragraph 4 – finally – addresses the standing of natural or legal persons. These applicants are 'non-privileged' applicants, as they must demonstrate that the Union act affects them specifically. This fourth paragraph has been highly contested in the past 60 years. And, in order to make sense of the Court's past jurisprudence, we must start with a historical analysis of the 1957 'Rome formulation', before moving to the current 2007 'Lisbon formulation' of that paragraph.

aa. The Rome Formulation and its Judicial Interpretation

The Rome Treaty granted individual applicants the right to apply for judicial review in ex-Article 230 EC. Paragraph 4 of that provision stated:

> Any natural or legal person may … institute proceedings against a *decision* addressed to that person or against a *decision* which, although in the form of a regulation or *decision* addressed to another person, is of *direct and individual concern* to the former.[53]

This 'Rome formulation' must be understood against the background of two constitutional choices. *First*, the drafters of the Rome Treaty had wished to confine the standing of private parties to challenges of individual 'decisions', that is: administrative acts. The Rome Treaty thereby distinguished between three types of decisions: decisions addressed to the applicant, decisions addressed to another person, and decisions 'in the form of a regulation'. This third decision was a decision 'in substance', which had been put into the wrong legal form.[54] Judicial review was here desirable to avert an abuse of powers.

[51] On the right to consultation of the Committee of the Regions, see Art. 307 TFEU. And Art. 8(2) of Protocol No. 2 On the Application of the Principles of Subsidiarity and Proportionality states: 'In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted.'

[52] For a definition of this phrase in the context of Parliament's struggle to protect its prerogatives before the Nice Treaty, see Case C-316/91, *Parliament* v. *Council* [1994] ECR I-625; Case C-187/93, *Parliament* v. *Council* [1994] ECR I-2857.

[53] Ex-Art. 230(4) EC (emphasis added).

[54] On the various instruments in the European legal order, see Chapter 3, Introduction. On the material distinction between 'decisions' and 'regulations', see Joined Cases 16–17/62, *Confédération nationale des producteurs de fruits et légumes and others* v. *Council* [1962] ECR 471, where the Court found that the Treaty 'makes a clear distinction between the concept of a 'decision' and that of a 'regulation' (*ibid.*, 478). Regulations were originally considered the sole 'generally applicable' instrument of the European Union, and their general character distinguished them from individual decisions. The crucial characteristic of a regulation was the 'openness' of the group of persons to whom it applied. Where the group of persons was 'fixed in time', the Court regarded the European act as a bundle of individual decisions addressed to each member of the group (see Joined Cases 41–4/70, *International Fruit Company and others* v. *Commission* [1971] ECR 411, esp. para. 17).

Second, not every challenge of a decision by private parties was permitted. Only those decisions that were of 'direct and individual concern' to a private party could be challenged. And, while this effect was presumed for decisions addressed to the applicant, it had to be proven for all other decisions. Private applicants were thus 'non-privileged' applicants in a dual sense. Not only could they *not* challenge all legal acts, they were – with the exception of decisions addressed to them – not presumed to have a legitimate interest in challenging the act.

Both constitutional choices severely restricted the standing of private parties and were heavily disputed. In the Union legal order prior to Lisbon, they were subject to an extensive judicial and academic commentary.[55]

In a first line of jurisprudence, the Court succeeded in significantly 'rewriting' ex-Article 230(4) EC by deserting the text's insistence on an (administrative) 'decision'. While it had originally paid homage to that text by denying private party review of generally applicable acts,[56] the Court famously abandoned its classic test and clarified that the general or specific nature of the Union act was irrelevant. In *Codorniu*,[57] the Court thus found:

> Although it is true that according to the criteria in the [fourth] paragraph of [ex-] Article [230] of the [EC] Treaty the contested provision is, by nature and by virtue of its sphere of application, of a legislative nature in that it applies to the traders concerned in general, that does not prevent it from being of individual concern to some of them.[58]

[55] For the academic controversy (in chronological order), see A. Barav, 'Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court' (1974) 11 *CML Rev.* 191; H. Rasmussen, 'Why Is Article 173 Interpreted against Private Plaintiffs?' (1980) 5 *EL Rev.* 112; N. Neuwahl, 'Article 173 Paragraph 4 EC; Past, Present and Possible Future' (1996) 21 *EL Rev.* 17; A. Arnull, 'Private Applicants and the Action for Annulment since *Codorniu*' (2001) 38 *CML Rev.* 8; A. Ward, *Judicial Review and the Rights of Private Parties in EU Law* (Oxford University Press, 2007).

[56] The Court's classic test concentrated on whether – from a material point of view – the challenged act was a 'real' regulation. The 'test' is spelled out in Case 790/79, *Calpak* v. *Commission* [1980] ECR 1949, paras. 8–9: 'By virtue of the second paragraph of Article [288] of the Treaty [on the Functioning of the European Union] the criterion for distinguishing between a regulation and a decision is whether the measure at issue is of general application or not … A provision which limits the granting of production aid for all producers in respect of a particular product to a uniform percentage of the quantity produced by them during a uniform preceding period is by nature a measure of general application within the meaning of Article [288] of the Treaty. In fact the measure applies to objectively determined situations and produces legal effects with regard to categories of persons described in a generalised and abstract manner. The nature of the measure as a regulation is not called into question by the mere fact that it is possible to determine the number or even the identity of the producers to be granted the aid which is limited thereby.'

[57] Case C-309/89, *Codorniu* v. *Council* [1994] ECR I-1853.

[58] *Ibid.*, para. 19. See also Case 76/01P, *Eurocoton et al.* v. *Council* [2003] ECR I-10091, para. 73: 'Although regulations imposing anti-dumping duties are legislative in nature and scope, in that they apply to all economic operators, they may nevertheless be of individual concern[.]'

This judicial 'amendment' cut the Gordian knot between the 'administrative' nature of an act and ex-Article 230(4) EC. Private parties could henceforth challenge *any* legal act – even generally applicable legislative acts like regulations or directives – as long as they could demonstrate 'direct and individual concern'.

This brings us to the second famous battleground under ex-Article 230(4) EC. What was the meaning of the 'direct and individual concern' formula?

The criterion of *direct* concern was taken to mean that the contested measure *as such* would have to directly affect the position of the applicant. This would *not* be the case, where the contested measure allowed for any form of discretionary implementation. Where an additional – and intervening – act was envisaged, there would thus be no 'direct' link between the measure and the applicant.[59] (In this case, the Union legal order would require the applicant to challenge the implementing measure – and not the 'parent' act.)

Sadly, the criterion of 'individual concern' was less straightforward. It was given an authoritative interpretation in *the* seminal case on the standing of private parties under ex-Article 230(4) EC: the *Plaumann* case. Plaumann, an importer of clementines, had challenged a Commission decision refusing to lower European customs duties on that fruit. But since the decision was not addressed to him – it was addressed to his Member State: Germany – he had to demonstrate that the decision was of 'individual concern' to him. The European Court defined the criterion as follows:

> Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.[60]

This formulation became famous as the '*Plaumann* test'. If private applicants wish to challenge an act not addressed to them, it is not sufficient to rely on the adverse – absolute – effects that the act has on them. Instead, they must show that – relative to everybody else – the effects of the act are 'peculiar to them'. This *relational* standard insists that they must be 'differentiated from all other persons'. The applicants must be *singled* out as if they were specifically addressed.

[59] See Case 294/83, *Les Verts*, para. 31: 'The contested measures are of direct concern to the applicant association. They constitute a complete set of rules which are sufficient in themselves and which require no implementing provisions.' In Case C-417/04P, *Regione Siciliana* v. *Commission* [2006] ECR I-3881, the Court however clarified that 'direct concern' was not about whether or not there – formally – needed to be additional implementing measures. It was only interested in whether the act directly determined – in a substantive sense – the situation of the applicant. Directives could thus be of direct concern – even if they always formally require implementation by the Member States (see Case T-135/96, *Union Européenne de l'artisanat et des petites et moyennes entreprises (UEAPME)* v. *Council* [1998] ECR II-02335).

[60] Case 25/62, *Plaumann* v. *Commission* [1963] ECR 95 at 107.

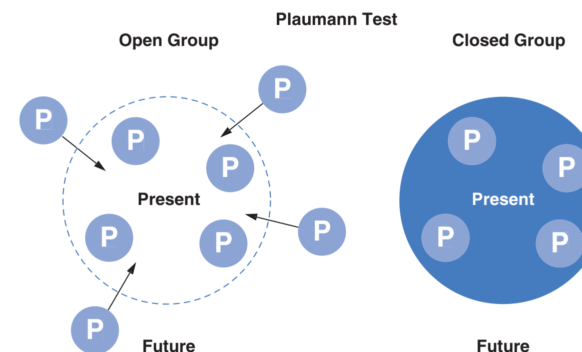


Figure 10.2 *Plaumann* Test

In the present case, the Court denied this *individual* concern, as Plaumann was seen to be only *generally* concerned 'as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practised by any person'.[61] The *Plaumann* test is therefore *very* strict: whenever a private party is a member of an 'open group' of persons – anybody could decide to become an importer of clementines tomorrow – legal standing under ex-Article 230(4) EC was denied.[62] A person would thus have to belong to a 'closed group' so as to be entitled to challenge a Union act (see Figure 10.2).

Unsurprisingly, this restrictive reading of private party standing was heavily criticised as an illiberal limitation on an individual's fundamental right to judicial review.[63] And the Court would partly soften its stance in specific are of European law.[64] However, it has refused to introduce a more general liberal approach to the standing of private applicants. In *Unión de Pequeños Agricultores (UPA)*,[65] the Court indeed expressly rejected the invitation to overrule its own jurisprudence on the – disingenuous – ground that '[w]hile it is, admittedly, possible to envisage

[61] *Ibid*.

[62] Even assuming that Plaumann was the only clementine importer in Germany at the time of the decision, the category of 'clementine importers' was open: future German importers could wish to get involved in the clementine trade. Will there ever be 'closed groups' in light of this definition? For the Court's approach in this respect, see Case 100/74, *CAM* v. *Commission* [1975] ECR 1393; Case 11/82, *Piraiki-Patraiki and others* v. *Commission* [1985] ECR 207.

[63] See Art. 6 of the European Convention on Human Rights: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

[64] This had happened – for example – in the area of European competition law; see Case 26/76, *Metro-SB-Großmärkte* v. *Commission* [1977] ECR 1875. For a recent analysis of the – softer – standing rules in the area of State aid, see S. Poli, 'The Legal Standing of Private Parties in the Area of State Aids after the Appeal in *Commission* v. *Kronoply/Kronotex*' (2012) 39 *Legal Issues of Economic Integration* 357.

[65] Case C-50/00, *Unión de Pequeños Agricultores (UPA)* v. *Council* [2002] ECR I-6677.

a system of judicial review of the legality of [Union] measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 TEU, to reform the system currently in force'.[66]

Has this – requested – constitutional amendment taken place? Let us look at the Lisbon formulation dealing with the standing of private parties.

bb. The Lisbon Formulation and Its Interpretative Problems

The Lisbon Treaty has substantially amended the Rome formulation. The standing of private parties is now enshrined in Article 263(4) TFEU. The provision states:

> Any natural or legal person may … institute proceedings against an *act* addressed to that person or which is of *direct and individual concern* to them, and against a *regulatory act* which is of direct concern to them and does not entail implementing measures.[67]

The new formulation of paragraph 4 textually recognises the decoupling of private party standing from the nature of the Union act challenged. In codifying *Codorniu*, an individual can thus potentially challenge any Union 'act' with legal effects. However, depending on the nature of the act, Article 263(4) TFEU still distinguishes three scenarios.

First: decisions addressed to the applicant can automatically be challenged.

Second, with regard to 'regulatory' acts, a private party must prove 'direct concern'.[68] It also needs to prove that the act does not require implementing measures. This has introduced an additional formal hurdle that may not be easy to overcome.[69] For it seems that any type of act – even a formal communication –

[66] Case C-50/00, *UPA* v. *Council*, para. 45. The *Plaumann* test is a result of the Court's own interpretation of what 'individual concern' means, and the Court could have therefore – theoretically – 'overruled' itself. This has indeed happened in other areas of European law; see Joined Cases C-267/91 and C-268/91, *Criminal proceedings against Keck and Mithouard* [1993] ECR I-6097.

[67] Art. 263(4) TFEU (emphasis added).

[68] On the concept of 'direct concern' before the Lisbon amendments, see. above n. 59 The Court has confirmed that this jurisprudence also applies post-Lisbon, see Case T-262/10, *Microban* v. *Commission* [2011] ECR II-7697, para. 32: '[T]he concept of direct concern, as recently introduced in that provision cannot, in any event, be subject to a more restrictive interpretation than the notion of direct concern as it appeared in the fourth paragraph of [ex-]Article 230 EC.'

[69] The pre-Lisbon jurisprudence on 'direct concern' may explain why the Lisbon treaty-makers insisted on the further formal criterion that no implementing act be needed. As we saw in n. 59 above, the Court did not link direct concern with the question of whether or not an additional act of implementation was required. From this perspective, the new Art. 263(4) TFEU, and its insistence on the absence of any implementing act, signals the wish of the Lisbon Treaty-makers to return to a more restrictive – formal – position. And the post-Lisbon Court has indeed moved in this direction (see Case C-274/12P, *Telefónica* v. *Commission* EU:C:2013:852; Case C-553/14P, *Kyocera* v. *Commission*, EU:C:2015:805).

whether by the Union or the Member States can count as an implementing measure.[70]

Third, for all other acts, the applicant must continue to show 'direct *and* individual concern'. The Lisbon amendment has thus abandoned the requirement of 'individual concern' only for the second but not the third category of acts.

The dividing line between the second and third category was poised to become *the* post-Lisbon interpretative battlefield within Article 263(4) TFEU; and this dividing line is determined by the concept of 'regulatory act'.

What are 'regulatory acts'? The term is not defined in the EU Treaties. Two constitutional options exist. According to a first view, 'regulatory acts' are liberally defined as all 'generally applicable acts'.[71] This reading liberalises the standing of private applicants significantly, as the second category would cover all legislative as well as executive acts of a general nature. According to a second view, on the other hand, the concept of 'regulatory act' should be defined in contradistinction to 'legislative acts'. Regulatory acts are here understood as non-legislative general acts.[72] This view places acts adopted under the – ordinary or special – legislative procedure outside the second category. The judicial review of formal legislation would consequently require 'direct *and* individual concern', and would thus remain relatively immune from private party challenges.

Which of the two options should be chosen? Legally, the drafting history of Article 263(4) TFEU is inconclusive.[73] Nor do textual arguments clearly favour one view over the other.[74] And teleological arguments point in both directions – depending which *telos* one prefers. Those favouring individual rights will thus prefer the – wider – first view, whereas those wishing to protect democratic values will prefer the second – narrower – view.

[70] *Ibid*., para. 55. This – tough – result should mean that a regulatory act adopted in the form of a 'directive' should never fall within the second class of acts within Art. 263(4), since they – by definition – always require a formal act of implementation by the Member States. On the format of the 'directive', see Chapter 3, section 3.

[71] See M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) 45 *CML Rev.* 617; and J. Bast, 'Legal Instruments and Judicial Protection', in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Hart, 2009), 345 at 396.

[72] A. Ward, 'The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures', in T. Tridimas and P. Nebbia (eds.), *European Union Law for the Twenty-first Century* (Hart, 2005), 201 at 221; A. Dashwood and A. Johnston, 'The Institutions of the Enlarged EU under the Regime of the Constitutional Treaty' (2004) 41 *CML Rev.* 1481 at 1509.

[73] Final Report of the Discussion Circle on the Court of Justice (CONV 636/03). See also M. Varju, 'The Debate on the Future of Standing under Article 230(4) TEC in the European Convention' (2004) 10 *European Public Law* 43.

[74] A comparison of the different language versions of Art. 263(4) TFEU is not conclusive. Systematic and textual arguments are equally inconclusive. For Art. 277 TFEU (on collateral review) uses the term 'act of general application' – a fact that could be taken to mean that the phrase 'regulatory act' is different. However, Art. 290 TFEU expressly uses the concept of 'non-legislative acts of general application'– which could, in turn, be taken to mean that 'regulatory act' in Art. 263(4) TFEU must mean something different here too.

How have the European Courts decided? In *Inuit I*,[75] the General Court sided with the second – narrower – view. The case involved a challenge by seal products traders to a Union regulation banning the marketing of such products in the internal market. Having been adopted on the basis of Article 114 TFEU, under the ordinary legislative procedure, the question arose as to what extent Union legislation could be challenged by interested private parties. After a comprehensive analysis of the various arguments for and against the inclusion of legislative acts into the category of regulatory acts, the General Court found the two classes of acts to be mutually exclusive. In the word of the Court:

> [I]t must be held that the meaning of 'regulatory act' for the purposes of the fourth paragraph of Article 263 TFEU must be understood as covering all acts of general application *apart from legislative acts*.[76]

The judgment was confirmed on appeal,[77] where the Court of Justice held as follows:

> [T]he purpose of the alteration to the right of natural and legal persons to institute legal proceedings, laid down in the fourth paragraph of [ex-]Article 230 EC, was to enable those persons to bring, under less stringent conditions, actions for annulment of acts of general application other than legislative acts. The General Court was therefore correct to conclude that the concept of 'regulatory act' provided for in the fourth paragraph of Article 263 TFEU does not encompass legislative acts.[78]

For private party challenges to legislative acts, the Union legal order therefore continues to require proof of a 'direct *and individual* concern' (see Figure 10.3). Reports on the death of *Plaumann* have also turned out to be greatly exaggerated.[79] For the Court in *Inuit I* expressly identified 'individual concern' under Article 263(4) TFEU with the *Plaumann* test. Rejecting the argument that the Lisbon Treaty makers had wished to replace the 'old' test with a 'new' less restrictive test, the Court here held:

> In that regard, it can be seen that the second limb of the fourth paragraph of Article 263 TFEU corresponds … to the second limb of the fourth paragraph of [ex-]Article 230 EC. The wording of that provision has not been altered. Further, there is nothing

[75] Case T-18/10, *Inuit* v. *Parliament & Council*, [2011] ECR II-5599.
[76] *Ibid*., para. 56 (emphasis added).
[77] Case C-583/11P, *Inuit* v. *Parliament & Council*, EU:C:2013:625.
[78] *Ibid*., paras. 60–1.
[79] On the 'end' *of Plaumann*, see S. Balthasar, '*Locus standi* Rules for Challenges to Regulatory Acts by Private Applicants: The New Article 263(4) TFEU' (2010) 35 *EL Rev.* 542 at 548; M. Kottmann, '*Plaumanns* Ende: ein Vorschlag zu Art. 263 Abs. 4 AEUV' (2010) 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547.

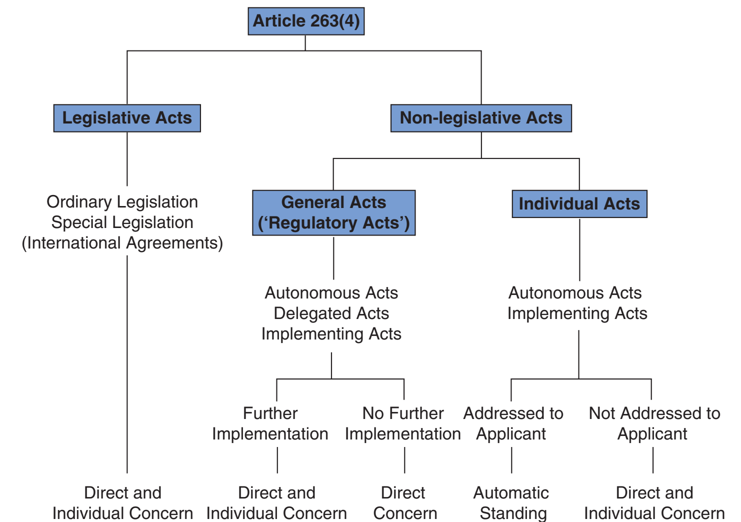


Figure 10.3 Types of Acts under Article 263(4)

> to suggest that the authors of the Treaty of Lisbon had any intention of altering the scope of the conditions of admissibility already laid down in the fourth paragraph of [ex-]Article 230 EC … In those circumstances, it must be held that the content of the condition that the act of which annulment is sought should be of individual concern, as interpreted by the Court in its settled case-law since *Plaumann* v *Commission*, was not altered by the Treaty of Lisbon … According to that case-law, natural or legal persons satisfy the condition of individual concern only if the contested act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed …[80]

The Court thus wishes to stick to *Plaumann*.[81] This however does not mean that there are no good arguments against it. The strongest critique of the *Plaumann* test has thereby come from the pen of Advocate General Jacobs. In *Unión de Pequeños Agricultores (UPA)*,[82] his learned opinion pointed to the test's

[80] Case C-583/11P, *Inuit*, paras. 70–2.
[81] For recent confirmations here, see Joined Cases C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, *Borealis Polyolefine*, EU:C:2016:311; Case C-456/13P *T&L Sugars and others* v. *Commission*.
[82] Case C-50/00, *UPA*.

anomalous logic. It is indeed absurd that 'the greater the number of persons affected the less likely it is that effective judicial review is available'.[83] But what alternative test might then be suitable? 'The only satisfactory solution is therefore to recognise that an applicant is individually concerned by a [Union] measure where the measure has, or is liable to have, a *substantial adverse effect* on his interests.'[84] Yet as we saw above, the Court has rejected this reinterpretation on the formal ground that abandoning *Plaumann* would require Treaty amendment. However, the Court also provided a additional substantive ground to justify its restrictive stance towards private parties:

> By Article [263] and Article [277], on the one hand, and by Article [267], on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the [Union] Courts. Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article [263] of the Treaty, directly challenge [Union] measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the [European] Courts under Article [277] of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court of Justice for a preliminary ruling on validity.[85]

The Court here justified its restrictive stance on the *direct* review of European law by pointing to its expansive stance on the *indirect* review of European law.[86]

Let us look at this claim in more detail.

d. The Indirect Review of European Law

aa. Collateral Review: The Plea of Illegality

The first possibility of an indirect review of EU law can be found in the 'plea of illegality'.[87] Its procedure is set out in Article 277 TFEU:

[83] Opinion of Advocate General Jacobs, *ibid*., para. 59.

[84] *Ibid*., para. 102 (emphasis added).

[85] *Ibid*., para. 40.

[86] *Ibid*., paras. 41–2: 'Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection. In that context, in accordance with the principle of sincere cooperation laid down in Article [4(3)] of the [EU] Treaty, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a [Union] act of general application, by pleading the invalidity of such an act.' This was confirmed in Case C-263/02P, *Commission* v. *Jégo-Quéré* [2004] ECR I-3425, paras. 31–2.

[87] For an academic discussion of this plea, see M. Vogt, 'Indirect Judicial Protection in EC Law: The Case of the Plea of Illegality' (2006) 31 *EL Rev.* 364.

> Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act.

An applicant can thus invoke the illegality of a Union act 'of general application' in the course of proceedings for a – different – *direct action* under Article 263 TFEU. That is why this form of review is called 'collateral review'. The review is indeed not an independent action. The primary object of the review proceedings must be a *different* act.

This will typically be an act that implements the collaterally challenged 'parent' act. A good illustration of this technique can be found in the second *Inuit* case.[88] The applicants in *Inuit I* here challenged the Commission regulation implementing the Union legislation prohibiting trade in seal products within the internal market. This second challenge is – procedurally – easier in light of the fact that the Commission regulation represented a 'regulatory act' for which no individual concern had to be shown; and within the course of that second challenge, the applicants indeed tried – albeit unsuccessfully – to 'collaterally' challenge the legality of the parent – legislative – act.[89]

The constitutional advantage of the collateral review route may thus be twofold. It not only bypasses the two-month time limit under Article 263. It equally grants individuals the possibility of (indirectly) challenging legislative acts or regulatory acts that require further implementation.[90]

bb. Indirect Review through Preliminary Rulings

The second form of indirect review of European law may take place under the preliminary reference procedure – to be discussed in section 4 below. Under this

[88] Case T-526/10, *Inuit* v. *Commission (Inuit II)* EU:T:2013:215; C-398/13P, *Inuit* v. *Commission (Inuit II P)*, EU:C:2015:535.

[89] For an analysis of this dynamic, see A. Albors-Llorens, 'Remedies against the EU Institutions after Lisbon: An Era of Opportunity' (2012) 71 *Cambridge Law Journal* 507 at 529.

[90] In the past, the Court has explained the advantages of the collateral review route as follows (Case 92/78, *Simmenthal* v. *Commission* [1979] ECR 777, paras. 37 and 41): 'Article [277] of the [FEU] Treaty gives expression to the general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being attacked, if that party was not entitled under Article [263] of the Treaty to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void ... This wide interpretation of Article [277] derives from the need to provide those persons who are precluded by the [fourth] paragraph of Article [263] from instituting proceedings directly in respect of general acts with the benefit of a judicial review of them at the time when they are affected by implementing decisions which are of direct and individual concern to them.'

procedure, the European Court may also give rulings on 'the *validity* … of acts of the institutions, bodies, offices or agencies of the Union'.[91] The complementary nature of the indirect review route of Article 267 TFEU has been emphasised by the Court in *Les Verts*:

> [T]he European [Union] is a [Union] based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treat[ies]. In particular, in Articles [263] and [277], on the one hand, and in Article [267], on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions …
>
> Where the [Union] institutions are responsible for the administrative implementation of [European] measures, natural or legal persons may bring a direct action before the Court against implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling.[92]

Individuals can thus challenge the legality of a Union act in national courts; and the indirect judicial review of Union acts through the preliminary reference procedure has indeed become the European Court's favoured option.

Why has the Court favoured the indirect review of European law under Article 267 over its direct review under Article 263? Under European law, the arguments in favour of the indirect review route are straightforward. Indirect challenges may be brought against *any* Union act – even those of a non-binding nature.[93] They can be brought on *any* grounds – even those outside Article 263(2). They can be launched by *anyone* – without regard to 'direct and individual concern'. And – finally – they can be brought at *any* time. (With regard to the last advantage, there exists however an important 'estoppel' exception. For in *TWD*, the Court insisted that where the applicant could 'without any doubt' have challenged a Union act directly under Article 263, it cannot subsequently ask for the indirect review of the measure via a preliminary reference.[94] The Court however interprets this '*TWD* principle' restrictively.)[95]

[91] Art. 267(1)(b) TFEU.
[92] Case 294/83, *Les Verts*, para. 23.
[93] Case 322/88, *Grimaldi* v. *Fonds des maladies professionnelles* [1989] ECR 4407, paras. 7–9.
[94] See Case C-263/02P, *Jégo Quéré*.
[95] See e.g. Case C-239/99, *Nachi* v. *Hauptzollamt Krefeld* [2001] ECR I-1197. For an analysis of the case law, see R. Schwensfeier, 'The *TWD* Principle Post-Lisbon' (2012) 37 *EL Rev.* 156.

Importantly, however, there are also serious disadvantages in the indirect review route via the preliminary reference procedure.[96] First, the latter can only be used if a national court has jurisdiction, and this may not be the case where there are no national implementing acts to challenge.[97] Second, the applicant may need to *breach* European law before challenging the legality of the act on which the illegal behaviour rests. Third, individual applicants in national courts have no 'right' to demand the indirect review of Union law by the European Court. Where the relevant national court entertains no doubts as to the validity of the Union act, no private party appeal to the European Court will be possible. We shall explore all of these points in greater detail further below in the context of the preliminary reference procedure.

2. Remedial Powers: Liability Actions

Where the Union legislature or executive has acted illegally, may the Court grant damages for losses incurred? The European Treaties do acknowledge an action for damages in Article 268 TFEU;[98] yet, for a strange reason the article refers to another provision: Article 340 TFEU, which reads:

> The contractual liability of the Union shall be governed by the law applicable to the contract in question.
>
> In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.[99]

The provision distinguishes between *contractual* liability in paragraph 1, and *non*-contractual liability in paragraph 2. While the former is governed by national law, the latter is governed by European law. Paragraph 2 recognises that the Union can do 'wrong' either through its institutions or through its servants,[100] and that it will in this case be under an obligation to make good damage incurred.

What are the European constitutional principles underpinning an action for the non-contractual liability of the Union? Article 340[2] TFEU has had a colourful and complex constitutional history. It has not only been transformed

[96] For a brilliant and extensive analysis, see Opinion of Advocate General Jacobs in Case C-50/00, *UPA*, paras. 38–44.
[97] See Case C-263/02P, *Jégo Quéré*.
[98] Art. 268 TFEU: 'The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.'
[99] Art. 340(1) and (2) TFEU.
[100] As regards the Union's civil servants, only their 'official acts' will be attributed to the Union. With regard to their personal liability, Art. 340(4) TFEU states: 'The personal liability of its servants towards the Union shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them.'

from a dependent action to an independent action, its substantial conditions have changed significantly. This section will briefly analyse the procedural and substantive conditions of Union liability actions.

a. Procedural Conditions: From Dependent to Independent Action

The action for damages under Article 340(2) TFEU started its life as a dependent action, that is: an action that hinged on the prior success of another action. In *Plaumann*, a case discussed in the previous section, a clementine importer had brought an annulment action against a Union decision while at the same time asking for compensation equivalent to the customs duties that had been paid as a consequence of the challenged European decision. However, as we saw above, the action for annulment failed due to the restrictive standing requirements under Article 263(4) TFEU; and the Court found that this would equally end the liability action for damages:

> In the present case, the contested decision has not been annulled. An administrative measure which has not been annulled cannot of itself constitute a wrongful act on the part of the administration inflicting damage upon those whom it affects. The latter cannot therefore claim damages by reason of that measure. The Court cannot by way of an action for compensation take steps which would nullify the legal effects of a decision which, as stated, has not been annulled.[101]

A liability action thus had to be preceded by a successful (!) annulment action. The *Plaumann* Court here insisted on a 'certificate of illegality' before even considering the substantive merits of Union liability.

This dramatically changed in *Lütticke*.[102] The case constitutes the 'declaration of independence' for liability actions:

> Article [340] was established by the Treaty as an independent form of action with a particular purpose to fulfil within the system of actions and subject to conditions for its use, conceived with a view to its specific purpose to fulfil within the system of actions and subject to conditions for its use, conceived with a view to its specific purpose.[103]

According to the Court, it would be contrary to 'the independent nature' of this action as well as to 'the efficacy of the general system of forms of action created by the Treaty' to deny admissibility of the damages action on the grounds that it might lead to a similar result as an annulment action.[104]

[101] Case 25/62, *Plaumann*, 108.
[102] Case 4/69, *Lütticke* v. *Commission* [1971] ECR 325.
[103] *Ibid.*, para. 6.
[104] *Ibid.* In the present case, the Court dealt with an infringement action for failure to act under Art. 265 TFEU (see section 3(b) below), but the same result applies to annulment actions; see Case 5/71, *Schöppenstedt* v. *Council* [1971] ECR 975, para. 3: 'The action for damages provided for by Articles [268] and [340], paragraph 2, of the Treaty was introduced as an autonomous form of action with a particular purpose to fulfil within the system of actions and subject to conditions on its use dictated by its specific nature. It differs from an application for annulment in that its end is not the abolition of a particular measure, but compensation for damage caused by an institution in the performance of its duties.'

What are the procedural requirements for liability actions? The proceedings may be brought against any Union action or inaction that is claimed to have caused damage. The act (or omission) must normally be an 'official act', that is: it must be attributable to the Union.[105] Unlike Article 263 TFEU, there are no limitations on the potential applicants: anyone who feels 'wronged' by a Union (in)action may bring proceedings under Article 340(2) TFEU.[106]

Against whom does the action have to be brought? With the exception of the European Central Bank,[107] the provision only generically identifies the Union as the potential defendant. However, the Court has clarified that 'in the interests of a good administration of justice', the Union 'should be represented before the Court by the institution or institutions against which the matter giving rise to liability is alleged'.[108]

When will the action have to be brought? Unlike the strict two-month limitation period for annulment actions, liability actions can be brought within a five-year period.[109] The procedural requirements for liability actions are thus much more liberal than the procedural regime governing annulment actions.

[105] In the past, the European Court of Justice has insisted that the EU Treaties themselves – as collective acts of the Member States – cannot be the basis of a liability action (see Case 169/73, *Compagnie Continentale France* v. *Council* [1975] ECR 117, para. 16). For institutional acts, the Court has taken a teleological view on what constitutes the 'Union' (see Case C-370/89, *SGEEM & Etroy* v. *European Investment Bank* [1993] ECR I-2583). In the recent *Ledra* judgment (Joined Cases C-8/15P to C-10/15P, *Ledra and others* v. *Commission and European Central Bank*, EU:C:2016:701), the Court has further elaborated this teleological understanding.
[106] See Case 118/83, *CMC Cooperativa muratori e cementisti and others* v. *Commission* [1985] ECR 2325, para. 31: 'Any person who claims to have been injured by such acts or conduct must therefore have the possibility of bringing an action, if he is able to establish liability, that is, the existence of damage caused by an illegal act or by illegal conduct on the part of the [Union].' This also included the Member States (see A. Biondi and M. Farley, *The Right to Damages in European Law* (Kluwer, 2009), 88).
[107] Art. 340(3) TFEU. The provision specifically clarifies that the Bank *as such* – not the European Union – will be called to pay damages. The ECB has an independent personality (see Chapter 6, section 3(a)).
[108] Joined Cases 63–9/72, *Werhahn Hansamühle and others* v. *Council* [1973] ECR 1229, para. 7.
[109] Art. 46 Statute of the Court: 'Proceedings against the Union in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court of Justice or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Union. In the latter event the proceedings must be instituted within the period of two months provided for in Article 263 of the Treaty on the Functioning of the European Union; the provisions of the second paragraph of Article 265 of the Treaty on the Functioning of the European

b. Substantive Conditions: From Schöppenstedt to Bergaderm

The constitutional regime governing the substantive conditions for liability actions may be divided into two historical phases. In the first phase, the European Court distinguished between 'administrative' and 'legislative' Union acts.[110] The former were subject to a relatively low liability threshold. The Union would be liable for (almost) any illegal action that had caused damage.[111] By contrast, legislative acts were subject to the so-called '*Schöppenstedt* formula'.[112] This formula stated as follows:

> [W]here *legislative* action involving measures of economic policy is concerned, the [Union] does not incur non-contractual liability for damage suffered by individuals as a consequence of that action, by virtue of the provisions contained in Article [340], second paragraph, of the Treaty, *unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred*.[113]

This formula made Union liability for legislative acts dependent on the breach of a 'superior rule' of Union law, whatever that meant,[114] which aimed to grant rights to individuals.[115] And the breach of that rule would have to be sufficiently serious.[116]

This test was significantly 'reformed' in *Bergaderm*.[117] The reason for this reform was the Court's wish to align the liability regime for breaches of European law

Union shall apply where appropriate. This Article shall also apply to proceedings against the European Central Bank regarding non-contractual liability.'

110 Tridimas, *General Principles* (n. 34 above), 478ff.

111 See Case 145/83, *Adams* v. *Commission* [1985] ECR 3539, para. 44: '[B]y failing to make all reasonable efforts … the Commission has incurred liability towards the applicant in respect of that damage.' On the liability regime for administrative acts in this historical phase, see M. van der Woude, 'Liability for Administrative Acts under Article 215(2) EC', in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law* (Kluwer, 1997), 109–28.

112 Case 5/71, *Schöppenstedt* v. *Council* [1971] ECR 975.

113 *Ibid*., para. 11 (emphasis added).

114 On the concept of a 'superior rule', see Tridimas, *General Principles* (n. 37 above), 480–2.

115 Case C-282/90, *Vreugdenhil BV* v. *Commission* [1992] ECR I-1937, paras. 20–1: 'In that context, it is sufficient to state that the aim of the system of the division of powers between the various [Union] institutions is to ensure that the balance between the institutions provided for in the Treaty is maintained, and not to protect individuals. Consequently, a failure to observe the balance between the institutions cannot be sufficient on its own to engage the [Union's] liability towards the traders concerned.'

116 See Joined Cases 83 and 94/76, 4, 15 and 40/77, *Bayerische HNL Vermehrungsbetriebe and others* v. *Council and Commission* [1978] ECR 1209, para. 6: 'In a legislative field such as the one in question, in which one of the chief features is the exercise of a wide discretion essential for the implementation of the common agricultural policy, the [Union] does not therefore incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers.'

117 Case C-352/98P, *Bergaderm et al.* v. *Commission* [2000] ECR I-5291.

by the Union with the liability regime governing breaches of European law by the Member States.[118] Today, European law confers a right to reparation:

> where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.[119]

Two important changes were reflected in the '*Bergaderm* formula'.[120] First, the Court abandoned the distinction between 'administrative' and 'legislative' acts. The new test would apply to all Union acts regardless of their nature.[121]

Second, the Court dropped the idea that a 'superior rule' had to be infringed. Henceforth, it was only necessary to show that the Union had breached a rule intended to confer individual rights, that the breach was sufficiently serious, and that the breach had caused damage.[122] The second criterion is the most important one; and the decisive test for finding that a breach of European law was sufficiently serious was whether the Union 'manifestly and gravely disregarded the limits on its discretion'.[123]

One final question remains: can the Union ever be liable for *lawful* actions that nevertheless cause damage? Some legal orders indeed recognise governmental liability for lawful acts, where the latter demand a 'special sacrifice' from a limited category of persons. The early Union legal order seemed averse to

118 *Ibid*., para. 41. This inspiration was 'mutual' for, as we shall see in Chapter 11, section 3, the Court used Art. 340(2) TFEU as a rationale for the creation of a liability regime for the Member States.

119 Case C-352/98P, *Bergaderm*, para. 42.

120 See C. Hilson, 'The Role of Discretion in EC Law on Non-contractual Liability' (2005) 42 *CML Rev.* 676 at 682.

121 Case C-352/98P, *Bergaderm*, para. 46. See also Case C-282/05P, *Holcim* v. *Commission* [2007] ECR I-2941, para. 48: 'The determining factor in deciding whether there has been such an infringement is not the general or individual nature of the act in question. Accordingly, the applicant is not justified in submitting that the criterion of a sufficiently serious breach of a rule of law applies only where a legislative act of the [Union] is at issue and is excluded when, as in the present case, an individual act is at issue.'

122 For an overview of the three criteria in light of the case law, see K. Gutman, 'The Evolution of the Action for Damages against the European Union and its Place in the System of Judicial Protection (2011) 48 *CML Rev.* 695.

123 Case C-352/98P, *Bergaderm*, para. 43. However, where there was no discretion, 'the mere infringement of [Union] law may be sufficient to establish the existence of a sufficiently serious breach' (*ibid*., para. 44). For an extensive discussion on when the Commission commits a sufficiently serious breach in its assessment in the context of competition law, see Case T-351/03, *Schneider* v. *Commission* [2007] ECR II-2237.

124 In the words of Case 5/71, *Schöppenstedt*, para. 11 (emphasis added): '[t]he non-contractual liability of the [Union] presupposes at the very least the *unlawful* nature of the act alleged to be the cause of the damage'.

this idea.[124] Yet in *Dorsch Consult*,[125] the General Court flirted with the possibility.[126] The Court of Justice has however put a – temporary – end to this in *FIAMM*.[127] It here held that by assuming 'the existence of a regime providing for non-contractual liability of the [Union] on account of the lawful pursuit by it of its activities falling within the legislative sphere, the [General Court] erred in law'.[128] The Union will therefore not be liable for damage caused by actions that it considers to be legal – even if they harm parties vested in the status quo.

3. Adjudicatory Powers I: Enforcement Actions

One of the essential tasks of courts is to apply and thereby enforce the law in disputes between private and public parties. This judicial form of law enforcement is 'reactive' because, unlike the 'active' enforcement by administrative authorities, it needs to be initiated by a party outside the court.

The adjudication of European law follows, like the administration of European law, a central and a decentralised route. The central route principally takes the form of two types of enforcement actions: enforcement actions against a Member State, and enforcement actions against the Union. With regard to the former, the Treaties allow the Commission or a Member State to bring proceedings, where they consider that a Member State has failed to fulfil an obligation under the Treaties. But the Treaties also establish an infringement procedure against the Union for a failure to act.

a. Enforcement Actions against Member States

Where a Member State breaches European law, the central way to 'enforce' the EU Treaties is to bring that State to the European Court.[129] As can be seen in

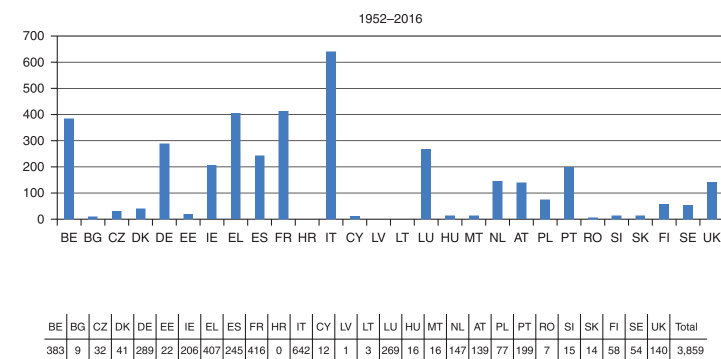
[125] Case T-184/95, *Dorsch Consult* v. *Council and Commission* [1998] ECR II-667.

[126] *Ibid*., para. 80. '[I]n the event of the principle of [Union] liability for a lawful act being recognised in [European] law, such liability can be incurred only if the damage alleged, if deemed to constitute a "still subsisting injury", affects a particular circle of economic operators in a disproportionate manner by comparison with others (unusual damage) and exceeds the limits of the economic risks inherent in operating in the sector concerned (special damage), without the legislative measure that gave rise to the alleged damage being justified by a general economic interest.'

[127] Case C-120/06P, *FIAMM et al.* v. *Council and Commission* [2008] ECR I-6513.

[128] *Ibid*., para. 179.

[129] Exceptionally, and in the case of 'a serious and persistent breach' by a Member State of the values of the Union it is not the Court but the 'political forum' of the European Council that principally makes that determination (see Art. 7(2) TEU). Where such a serious and persistent breach is found, the membership rights of a State may be suspended (Art. 7(3) TEU). Art. 7 TEU stands behind the recent confrontations between the EU and Hungary and Poland; and it is by far the most dramatic 'enforcement' action that the Treaties know – albeit a political not a legal action. For a discussion of this extrajudicial enforcement mechanism, see C. Closas and D. Kochenov, *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016).



BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	HR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK	Total
383	9	32	41	289	22	206	407	245	416	0	642	12	1	3	269	16	16	147	139	77	199	7	15	14	58	54	140	3,859

Figure 10.4 Infringement Proceedings Brought against Member States

Figure 10.4, this does not happen too often (even if it happens more often to some Member States).

The Union legal order envisages two potential applicants for enforcement actions against a failing Member State: the Commission and another Member State. The procedure governing the former scenario is set out in Article 258 TFEU; and the – almost – identical procedure governing the second scenario is set out in Article 259 TFEU. Both procedures are – partly – inspired by international law logic. For not only are individuals excluded from enforcing their rights under that procedure, the European Court cannot repeal national laws that violate European law. Its judgment will simply 'declare' that a violation of European law has taken place. However, as we shall see below, this declaration may be backed up by financial sanctions.

aa. The Procedural Conditions under Article 258

Enforcement actions against a Member State are 'the *ultima ratio* enabling the [Union] interests enshrined in the Treat[ies] to prevail over the inertia and resistance of Member States'.[130] They are typically brought by the Commission.[131] It is the Commission, acting in the general interest of the Union, that is charged with ensuring that the Member States give effect to European law.[132]

[130] Case 20/59, *Italy* v. *High Authority* [1960] ECR 325 at 339.

[131] The following section therefore concentrates on proceedings brought by the Commission. The procedure under Art. 259 TFEU, in any event, also requires Member States to bring the matter before the Commission (para. 2). However, unlike the procedural regime under Art. 258 TFEU, the matter will go to the Court even in the absence of a reasoned opinion by the Commission (para. 4). Member States very rarely bring actions against another Member State, but see Case C-145/04, *Spain* v. *United Kingdom* [2006] ECR I-7917.

[132] Case C-431/92, *Commission* v. *Germany* [1995] ECR I-2189, para. 21: 'In exercising its powers under Articles [17 TEU] and [258] of the [FEU] Treaty, the Commission does not have to show that there is a specific interest in bringing an action. Art. [258] is not

The procedural regime for enforcement actions brought by the Commission is set out in Article 258 TFEU, which states:

> If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

The provision clarifies that before the Commission can bring the matter to the Court, it must pass through an administrative stage. The purpose of this pre-litigation stage is 'to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under [European] law and, on the other, to avail itself of its right to defend itself against the complaints made by the Commission'.[133] This administrative stage expressly requires a 'reasoned opinion', and before that – even if not expressly mentioned in Article 258 – a 'letter of formal notice'.[134] In the 'letter of formal notice', the Commission will notify the State that it believes it to violate European law, and ask it to submit its observations. Where the Commission is not convinced by the explanations offered by a Member State, it will issue a 'reasoned opinion'; and after that second administrative stage,[135] it will go to court.

What violations of European law may be litigated under the enforcement procedure? With the general exceptions mentioned above,[136] the Commission can raise any violation of European law, including breaches of the Union's international agreements.[137] However, the breach must be committed by the 'State'.

intended to protect the Commission's own rights. The Commission's function, in the general interest of the [Union], is to ensure that the Member States give effect to the Treaty and the provisions adopted by the institutions thereunder and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end.'

133 Case 293/85, *Commission* v. *Belgium* [1988] ECR 305, para. 13.

134 There are exceptions to this rule. The most important practical exception can be found in the shortened procedure in the context of the Union's state aid provisions (see Art. 108(2) TFEU).

135 The Court has insisted that the Member State must – again – be given a reasonable period to correct its behaviour; see Case 293/85, *Commission* v. *Belgium* [1988] ECR 305, para. 14: '[T]he Commission must allow Member States a reasonable period to reply to the letter of formal notice and to comply with a reasoned opinion, or, where appropriate, to prepare their defence. In order to determine whether the period allowed is reasonable, account must be taken of all the circumstances of the case. Thus very short periods may be justified in particular circumstances, especially where there is an urgent need to remedy a breach or where the Member State concerned is fully aware of the Commission's views long before the procedure starts.'

136 See Arts. 275 and 276 TFEU.

137 Case C-61/94, *Commission* v. *Germany (IDA)* [1996] ECR I-3989.

This includes its legislature, its executive and – in theory – its judiciary.[138] The Member State will also be responsible for violations of Union law by territorially autonomous regions.[139] And even the behaviour of its nationals may – exceptionally – be attributed to the Member State.[140]

Are there any defences that a State may raise to justify its breach of European law? Early on, the Court clarified that breaches of European law by one Member State cannot justify breaches of another. In *Commission* v. *Luxembourg and Belgium*,[141] the defendants had argued that 'since international law allows a party, injured by the failure of another party to perform its obligations, to withhold performance of its own, the Commission has lost the right to plead infringement of the Treaty'.[142] The Court did not accept this 'international law' logic of the European Treaties. The Treaties were 'not limited to creating reciprocal obligations between the different natural and legal persons to whom [they are] applicable, but establish … a new legal order, which governs the powers, rights and obligations of the said persons, as well as the necessary procedures for taking cognisance of and penalising any breach of it'.[143] The binding effect of European law was thus comparable to the effect of ' 'institutional' law.[144] The Court has also denied the availability of 'internal' constitutional problems,[145] or budgetary restraints, as justifications.[146] However, one of the arguments that the Court has accepted in the past is the idea of *force majeure* in an emergency situation.[147]

bb. Judicial Enforcement through Financial Sanctions

The European Court is not entitled to nullify national laws that violate European law. It may only 'declare' national laws or practices incompatible with

138 The Court of Justice has been fairly reluctant to find that a national court has violated the Treaty. In the past, it has preferred to attribute the fact that a national judiciary persistently interpreted national law in a manner that violated European law to the *legislature's* failure to adopt clearer national laws; see Case C-129/00, *Commission* v. *Italy* [2003] ECR I-14637. On this point, see M. Taborowski, 'Infringement Proceedings and Non-compliant National Courts' (2012) 49 *CML Rev.* 1881.

139 See Case C-383/00, *Commission* v. *Germany* [2002] ECR I-4219, para. 18: 'the Court has repeatedly held that, a Member State may not plead provisions, practices or situations in its internal legal order, including those resulting from its federal organisation, in order to justify a failure to comply with the obligations'.

140 Case 249/81, *Commission* v. *Ireland (Buy Irish)* [1982] ECR 4005.

141 Joined Cases 90–1/63, *Commission* v. *Luxembourg and Belgium* [1964] ECR 625.

142 *Ibid.*, 631. 143 *Ibid.*

144 P. Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations Based on the Experience of the European Communities* (Sijthoff, 1974), 67 and 69.

145 See Case C-39/88, *Commission* v. *Ireland* [1990] ECR I-4271, para. 11: 'a Member State may not plead internal circumstances in order to justify a failure to comply with obligations and time-limits resulting from [European] law'.

146 See Case 30/72, *Commission* v. *Italy* [1973] ECR 161.

147 For an excellent discussion of the case law, see L. Prete and B. Smulders, 'The Coming of Age of Infringement Proceedings' (2010) 47 *CML Rev.* 9 at 44.

European law.[148] Where the Court has found that a Member State has failed to fulfil an obligation under the Treaties, 'the State shall be required to take the necessary measures to comply with the judgment of the Court'.[149] Inspired by international law logic, the European legal order here builds on the normative distinctiveness of European and national law. It remains within the competence of the Member States to remove national laws or practices that are incompatible with European law.

Nonetheless, the Union legal order may 'punish' violations by imposing financial sanctions on a recalcitrant State. The sanction regime for breaches by a Member State is set out in Article 260(2) and (3) TFEU. Importantly, financial sanctions will not automatically follow from every breach of European law. According to Article 260(2) TFEU, the Commission may only apply for a 'lump sum or penalty payment',[150] where a Member State has failed to comply with a *judgment of the Court*. The special enforcement action is thus confined to the enforcement of one type of Union act: Court judgments. And even in this limited situation, the Commission must bring a second (!) case before the Court.[151]

There is only one exception to the requirement of a second judgment. This 'exceptional' treatment corresponds to a not too exceptional situation: the failure of a Member State properly to transpose a 'directive'.[152] Where a Member State fails to fulfil its obligation 'to notify measures transposing a Directive adopted under a legislative procedure',[153] the Commission can apply for a financial sanction in the first enforcement action. The payment must take effect on the date set by the Court in its judgment, and is thus directed at this specific breach of European law.

b. Enforcement Actions against the Union: Failure to Act

Enforcement actions primarily target a Member State's failure to act (properly). However, 'infringement' proceedings may also be brought against Union

[148] Cases 15 and 16/76, *France* v. *Commission* [1979] ECR 32.
[149] Art. 260(1) TFEU.
[150] The Court has held that Art. 265 allows it to impose a 'lump sum' *and* a 'penalty payment' at the same time (see Case C-304/02, *Commission* v. *France (French Fisheries II)* [2005] ECR I-6262). For one of the more spectacular orders, see Case C-196/13, *Commission* v. *Italy*, EU:C:2014:2407. For failure to comply with a 2007 judgment against Italy, the country was ordered to pay a lump sum of about €40 million and to make a regular penalty payment of the same amount for each six-month period of delay.
[151] The Court has softened this procedural requirement somewhat by specifically punishing 'general and persistent' infringements; see Case C-494/01 *Commission* v. *Ireland (Irish Waste)* [2005] ECR I-3331. For an extensive discussion of this type of infringement, see P. Wennerås, 'A New Dawn for Commission Enforcement under Articles 226 and 228 EC: General and Persistent (GAP) Infringements, Lump Sums and Penalty Payments' (2006) 43 *CML Rev.* 31 at 33–50.
[152] On the legal instrument 'directive', see Chapter 3, section 3.
[153] Art. 260(3) TFEU. For a brief overview of the sanctioning activity under Art. 260(3), see E. Vârnay, 'Sanctioning under Article 260(3) TFEU: Much Ado About Nothing?' (2017) 23 *European Public Law* 301.

institutions. Actions for failure to act are thereby governed by Article 265 TFEU, which states:

> Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.
>
> The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.
>
> Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

An action for failure to act may thus be brought against any Union institution or body – with the exception of the Court of Auditors and the European Court. It can be brought by another Union institution or body, a Member State as well as a private party. (And while Article 265 TFEU makes no express distinctions with regard to the standing requirements of public and private applicants, it seems that the Court mirrors its jurisprudence under Article 263(4) TFEU here.)[154]

[154] Despite the more restrictive wording ('failed to address to that person'), the Court is likely to read the 'direct and individual concern' criterion into Art. 265 TFEU. For past jurisprudence to that effect, see Case 247/87, *Star Fruit Co.* v. *Commission* [1989] ECR 291, para. 13: 'It must also be observed that in requesting the Commission to commence proceedings pursuant to Article [258] the applicant is in fact seeking the adoption of acts which are not of direct and individual concern to it within the meaning of the [fourth] paragraph of Article [263] and which it could not therefore challenge by means of an action for annulment in any event.' See also Case C-68/95, *T. Port GmbH & Co. KG* v. *Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065, para. 59: 'It is true that the third paragraph of Article [265] of the Treaty entitles legal and natural persons to bring an action for failure to act when an institution has failed to address to them any act other than a recommendation or an opinion. The Court has, however, held that Articles [263] and [265] merely prescribe one and the same method of recourse. It follows that, just as the fourth paragraph of Article [263] allows individuals to bring an action for annulment against a measure of an institution not addressed to them provided that the measure is of direct and individual concern to them, the third paragraph of Article [265] must be interpreted as also entitling them to bring an action for failure to act against an institution which they claim has failed to adopt a measure which would have concerned them in the same way. The possibility for individuals to assert their rights should not depend upon whether the institution concerned has acted or failed to act.'

What are the procedural stages of this action? As with enforcement actions against Member States, the procedure is divided into a (shortened) administrative and a judicial stage. The judicial stage will only commence once the relevant institution has been 'called upon to act', and has not 'defined its position' within two months.[155]

What types of 'inactions' can be challenged? In its early jurisprudence, the Court appeared to interpret the scope of Article 265 in parallel with the scope of Article 263.[156] This suggested that only those inactions with (external) legal effects might be challenged.[157] However, the wording of the provision points the other way – at least for non-private applicants. And this wider reading was indeed confirmed in *Parliament* v. *Council (Comitology)*,[158] where the Court found that '[t]here is no necessary link between the action for annulment and the action for failure to act'.[159] Actions for failure to act can thus also be brought in relation to 'preparatory acts'.[160] The material scope of Article 265 is, in this respect, wider than that of Article 263.

However, in one important respect the scope of Article 265 is much smaller than that of Article 263. For the European Court has added an 'unwritten' limitation that cannot be found in the text of Article 265. It insists that a finding of a failure to act requires the existence of an *obligation to act*. Where an institution has 'the right, but not the duty' to act, no failure to act can ever be established.[161] This is, for example, the case with regard to the Commission's competence to bring enforcement actions under Article 258 TFEU. Under this article 'the Commission is not bound to commence the proceedings provided for in that provision but in this regard has a discretion which excludes the right for individuals to require that institution to adopt a specific position'.[162] The existence of institutional discretion thus excludes an obligation to act.

In *Parliament* v. *Council (Common Transport Policy)*,[163] the Court offered further commentary on what the existence of an obligation to act requires. Parliament

[155] On what may count as a 'defined' position, see Case 377/87, *Parliament* v. *Council* [1988] ECR 4017; and Case C-25/91, *Pesqueras Echebastar* v. *Commission* [1993] ECR I-1719.
[156] Case 15/70, *Chevallery* v. *Commission* [1970] ECR 975, para. 6: '[T]he concept of a measure capable of giving rise to an action is identical in Articles [263] and [265], as both provisions merely prescribe one and the same method of recourse.'
[157] On this point, see section 1(a) above.
[158] Case 302/87, *Parliament* v. *Council* [1988] ECR 5615.
[159] *Ibid*., para. 16: 'There is no necessary link between the action for annulment and the action for failure to act. This follows from the fact that the action for failure to act enables the European Parliament to induce the adoption of measures which cannot in all cases be the subject of an action for annulment.'
[160] Case 377/87, *Parliament* v. *Council* [1988] ECR 4017.
[161] Case 247/87, *Star Fruit Co*. v. *Commission*, esp. para. 12.
[162] *Ibid*., para. 11. There is however a Commission duty to act on a complaint claiming a violation of EU competition law (see Case T-442/07, *Ryanair* v. *Commission* [2011] ECR II-333).
[163] Case 13/83, *Parliament* v. *Council* [1985] ECR 1513.

had brought proceedings against the Council claiming that it had failed to lay down a framework for a common transport policy. The Council responded by arguing that a failure to act under Article 265 'was designed for cases where the institution in question has a legal obligation to adopt a *specific* measure and that it is an inappropriate instrument for resolving cases involving the introduction of a whole system of measures within the framework of a complex legislative process'.[164] The Court joined the Council and rejected the idea that enforcement proceedings could be brought for a failure to fulfil the *general* obligation to develop a Union policy. The failure to act would have to be 'sufficiently defined'; and this would only be the case, where the missing Union act can be 'identified individually'.[165]

What are the consequences of an established failure to act on the part of the Union? According to Article 266, the institution 'whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union'. And, in the absence of an express time limit for such compliance, the Court requires that the institution 'has a reasonable period for that purpose'.[166]

4. Adjudicatory Powers II: Preliminary Rulings

The European Court would not be able, on its own, to shoulder the adjudicatory task of deciding European law disputes. Yet, unlike the US constitutional order,[167] the European Union has not developed a parallel system of federal courts designed to apply Union law. The Union is based on a system of cooperative federalism: *all* national courts are entitled and obliged to apply European law to disputes before them.[168] The general role of national courts in the judicial application of European law will be extensively discussed in Chapter 11. This section however wishes to focus on the *Union* procedure that has allowed the

[164] *Ibid*., para. 29 (emphasis added).
[165] *Ibid*., para. 37. The Court thus held in para. 53 that 'the absence of a common policy which the Treaty requires to be brought into being does not in itself necessarily constitute a failure to act sufficiently specific in nature to form the subject of an action under Article [265]'.
[166] *Ibid*., para. 69.
[167] On US judicial federalism, see R. H. Fallon et al., *Hart and Wechsler's the Federal Courts and the Federal System* (Foundation Press, 1996); E. Chemerinski, *Federal Jurisdiction* (Aspen, 2007).
[168] We saw in Chapter 4 that this duty applies to every national court, see: Case 106/77, *Amministrazione delle Finanze dello Stato* v. *Simmenthal* [1978] ECR 629, para. 21: 'every national court must, in a case within its jurisdiction, apply [European] law in its entirety and protect rights which the latter confers on individuals'. On the 'cooperative' nature of the Art. 267 procedure, see recently Case C-160/14, *Ferreira da Silva e Brito and others* v. *Estado Português*, EU:C:2015:565, para. 37: '[T]he procedure laid down in Article 267 TFEU is an instrument for cooperation between the Court of Justice and the national courts[.]'

European Court of Justice to guarantee some uniformity in the decentralised adjudication of European law: the preliminary reference procedure.

From the beginning, the Treaties contained a mechanism for the interpretative assistance of national courts. Where national courts encounter problems relating to the interpretation of European law, they could ask 'preliminary questions' to the European Court. The questions are 'preliminary', since they *precede* the final application of European law by the national court. Thus, importantly: the European Court will not 'decide' the case. It is only *indirectly* involved in the judgment delivered by the national court; and for that reason preliminary rulings are called 'indirect actions'. The preliminary rulings procedure constitutes the cornerstone of the Union's judicial federalism; and this federalism is *cooperative* in nature because the European Court and the national courts collaborate in the adjudication of a single case.

The procedure for preliminary rulings is set out in Article 267 TFEU, which reads:

> [1] The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
> (a) the interpretation of the Treaties;
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
> [2] Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
> [3] Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.[169]

The provision establishes a constitutional nexus between the central and the decentralised adjudication of European law. This section looks at four aspects of the procedure. We start by analysing the jurisdiction of the European Court under the preliminary reference procedure (paragraph 1). We then move to the conditions for a preliminary ruling (paragraph 2). A third step investigates which national courts are obliged to make a reference (paragraph 3). Finally, we shall analyse the nature and effect of preliminary rulings in the Union legal order.

[169] The (omitted) fourth paragraph states: 'If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.' According to Art. 23a of the Court's Statute, there may exist an 'urgent preliminary procedure' (in French: 'procedure préjudicielle d'urgence' or 'PPU') in the area of freedom, security and justice. On the 'PPU', see C. Barnard, 'The PPU: Is It Worth the Candle? An Early Assessment' (2009) 34 *EL Rev.* 281.

a. Paragraph 1: The Jurisdiction of the European Court

The European Court's jurisdiction, set out in paragraph 1, covers all Union law – including international agreements of the Union.[170] It is however limited to *European* law: 'The Court is not entitled, within the framework of Article [267 TFEU] to interpret rules pertaining to national law.'[171] Nor can it theoretically give a ruling on the compatibility of national rules with Union law.

The Court's competence with regard to European law extends to questions pertaining to the 'validity and interpretation' of Unions law. Preliminary references may thus be made in relation to *two* judicial functions. They can concern the *validity* of Union law;[172] and in exercising its judicial review function, the European Court will be confined to providing a ruling on the validity of acts *below* the Treaties. National courts can however equally ask about the *interpretation* of European law. This includes all types of European law – ranging from the deepest constitutional foundations to the loftiest soft law.

The *application* of European law is – theoretically – not within the power of the Court. Article 267 'gives the Court *no jurisdiction to apply the Treat[ies] to a specific case*'.[173] However, the distinction between 'interpretation' and 'application' is sometimes hard to make. The Court has tried to explain it as follows:

> When it gives an interpretation of the Treat[ies] in a specific action pending before a national court, the Court limits itself to deducing the meaning of the [European] rules from the wording and spirit of the Treat[ies], it being left to the national court to apply in the particular case the rules which are thus interpreted.[174]

Theoretically, this should mean that the Court of Justice cannot decide whether a national law, in fact, violates Union law. And yet, the Court has often made this very assessment.[175]

A famous illustration of the blurred line between 'interpretation' and 'application' are the 'Sunday trading cases'.[176] Would the national prohibition on trading on Sundays conflict with the Union's internal market provisions? Preliminary

[170] Case 181/73, *Haegemann* [1974] ECR 449. On the more complex jurisdictional rules with regard to mixed agreements, see P. Koutrakos, 'The Interpretation of Mixed Agreements under the Preliminary Reference Procedure' (2002) 7 *European Foreign Affairs Review* 25.
[171] Case 75/63, *Hoekstra (née Unger)* [1964] ECR 177, para. 3.
[172] On this point, see section 1(d/bb) above.
[173] Case 6/64, *Costa* v. *ENEL* [1964] ECR 585 at 592 (emphasis added).
[174] Joined Cases 28–30/62, *Da Costa et al.* v. *Netherlands Inland Revenue Administration* [1963] ECR 31 at 38.
[175] For two excellent analyses of this category of cases, see G. Davies, 'The Division of Powers between the European Court of Justice and National Courts' *Constitutionalism Web-Papers* 3/2004 (SSRN Network: www.ssrn.com); T. Tridimas, 'Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction' (2011) 9 *International Journal of Constitutional Law* 737.
[176] See M. Jarvis, 'The *Sunday Trading* Episode: In Defence of the Euro-defence' (1995) 44 ICLQ 451.

references had been made by a number of English courts to obtain an interpretation of the EU Treaties' free movement of goods provisions. The Court found that national rules governing opening hours could be justified on public interest grounds, and originally asked the referring national court 'to ascertain whether the effects of such national rules exceed what is necessary to achieve the aim in view'.[177] Yet the decentralised application of this proportionality test led to judicial chaos in the United Kingdom. Simply put, different national courts decided differently! The European Court thus ultimately took matters into its own hands and centrally applied the proportionality test.[178] And, in holding that the British Sunday trading rules were not disproportionate interferences with the internal market, the Court crossed the line between 'interpretation' and 'application' of the Treaties.

b. Paragraph 2: The Conditions for a Preliminary Ruling

Article 267(2) TFEU defines the competence of national courts to refer preliminary questions. The provision allows 'any court or tribunal of a Member State' to ask a European law question that 'is necessary to enable it to give judgment'. Are there conditions on 'who' can refer 'what' question to the European Court? The two aspects have been subject to an extended judicial commentary and will be discussed in turn.

aa. 'Who': National Courts and Tribunals

The formulation 'court or tribunal' in Article 267 only refers to *judicial* authorities. This excludes *administrative* authorities, which have indeed been systematically excluded from the scope of the judicial cooperation procedure.[179]

[177] Case C-145/88, *Torfaen Borough Council* [1989] ECR I-3851, para. 15.

[178] Case C-169/91, *Stoke-on-Trent* v. *B&Q* [1992] ECR I-6635, paras. 12–14: 'As far as that principle is concerned, the Court stated in its judgment in the Torfaen Borough Council case that such rules were not prohibited by Article [34] of the [FEU] Treaty where the restrictive effects on [Union] trade which might result from them did not exceed the effects intrinsic to such rules and that the question whether the effects of those rules actually remained within that limit was a question of fact to be determined by the national court. In its judgments in the Conforama and Marchandise cases, however, the Court found it necessary to make clear, with regard to similar rules, that the restrictive effects on trade which might result from them did not appear to be excessive in relation to the aim pursued. The Court considered that it had all the information necessary for it to rule on the question of the proportionality of such rules and that it had to do so in order to enable national courts to assess their compatibility with [European] law in a uniform manner since such an assessment cannot be allowed to vary according to the findings of fact made by individual courts in particular cases.'

[179] See e.g. Case C-24/92, *Corbiau* [1993] ECR I-1277; Case C-53/03, *Syfait et al.* v. *GlaxoSmithKline* [2005] ECR I-4609.

But what exactly is a 'court or tribunal' that can refer questions to the Court of Justice? The Treaties provide no positive definition. Would the concept therefore fall within the competence of the Member States? Unsurprisingly, the European Court has not accepted this and has provided a European definition of the phrase. Its definition is extremely wide. In *Dorsch Consult*,[180] the Court thus held:

> In order to determine whether a body making a reference is a court or tribunal for the purposes of Article [267] of the Treaty, which is a question governed by [Union] law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent.[181]

The last criterion is often controlling. Therefore, an authority that is not independent from the State's administrative branch is not a court or tribunal in the meaning of European law.[182]

The enormous breadth of this definition is illustrated in *Broekmeulen*.[183] The plaintiff had obtained a medical degree from Belgium and tried to register as a 'General Practitioner' in the Netherlands. The registration was refused on the ground that Dutch professional qualifications were not satisfied. The plaintiff appealed before the 'Appeals Committee for General Medicine'– a professional body set up under private law. This Appeals Committee was not a court or tribunal under Dutch law. But would it nonetheless be a 'court or tribunal' under Article 267 (2); and, as such, be entitled to make a preliminary reference? The European Court found as follows:

> In order to deal with the question of the applicability in the present case of Article [267 TFEU], it should be noted that it is incumbent upon Member States to take the necessary steps to ensure that within their territory the provisions adopted by the [Union] institutions are implemented in their entirety. If, under the legal system of a Member State, the task of implementing such provisions is assigned to a professional body acting under a degree of governmental supervision, and if that body, in

[180] Case C-54/96, *Dorsch Consult Ingenieugesellschaft* v. *Bundesbaugesellschaft Berlin* [1997] ECR I-4961.

[181] *Ibid.*, para. 23.

[182] Case C-53/03, *Syfait et al.* v. *GlaxoSmithKline*. NCAs are consequently not (!) allowed to use the Art. 267 procedure as they are considered to be part of the 'executive branch' – not the judicial branch. If they have a question with regard to EU competition law, they thus cannot ask the European Court of Justice but must, on the contrary, ask the European Commission for guidance. On the general question, whether NCAs should be considered 'courts or tribunals' in the sense of Art. 267, see A. Komninos, 'Article 234 EC and National Competition Authorities in the Era of Decentralisation' (2004) 29 *EL Rev.* 106.

[183] Case 246/80, *Broekmeulen* v. *Huisarts Registratie Commissie* [1981] ECR 2311.

conjunction with the public authorities concerned, creates appeal procedures which may affect the exercise of rights granted by [European] law, it is imperative, in order to ensure the proper functioning of [Union] law, that the Court should have an opportunity of ruling on issues of interpretation and validity arising out of such proceedings. As a result of all the foregoing considerations and in the absence, in practice, of any right of appeal to the ordinary courts, the Appeals Committee, which operates with the consent of the public authorities and with their cooperation, and which, after an adversarial procedure, delivers decisions which are recognised as final, must, in a matter involving the application of [European] law, be considered as a court or tribunal of a Member State within the meaning of Article [267 TFEU].[184]

Can higher national courts limit the power of a lower national court to refer preliminary questions? The European legal order has given short shrift to any attempt to break the cooperative nexus between the European Court and *each level of the national judiciary*. In *Rheinmühlen*,[185] the Court thus held that 'a rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot deprive the inferior courts of their power to refer to the Court questions of interpretation of [Union] law involving such rulings'.[186] For if inferior courts could not refer to the Court of Justice, 'the jurisdiction of the latter to give preliminary rulings and the application of [European] law *at all levels of the judicial systems* of the Member States would be compromised'.[187] Any national court or tribunal, at any level of the national judicial hierarchy, and at any stage of its judicial procedure, is thus entitled to refer a preliminary question to the European Court of Justice.[188] Even national rules allowing for an appeal against the decision of the national court to refer a preliminary question will violate 'the autonomous jurisdiction which Article [267 TFEU] confers on the referring court'.[189]

[184] *Ibid*., paras. 16–17.
[185] Case 166/73, *Rheinmühlen-Düsseldorf* [1974] ECR 33.
[186] *Ibid*., para. 4.
[187] *Ibid*. For a recent confirmation, see Case C-173/09, *Elchinov* v. *Natsionalna zdravnoosiguritelna kasa* [2010] ECR I-889; Case C-416/10, *Križan and others*, EU:C:2013:8.
[188] This European entitlement cannot be transformed into a national obligation; see Case C-555/07, *Kücükdeveci* v. *Swedex* [2010] ECR I-365, para. 54: 'The possibility thus given to the national court by the second paragraph of Article 267 TFEU of asking the Court for a preliminary ruling before disapplying the national provision that is contrary to European Union law cannot, however, be transformed into an obligation because national law does not allow that court to disapply a provision it considers to be contrary to the constitution unless the provision has first been declared unconstitutional by the Constitutional Court. By reason of the principle of the primacy of European Union law, which extends also to the principle of non-discrimination on grounds of age, contrary national legislation which falls within the scope of European Union law must be disapplied.'
[189] Case C-210/06, *Cartesio* [2008] ECR I-9641, para. 95: 'Where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the autonomous jurisdiction which Article [267 TFEU] confers on the referring court to make a reference to the Court would be called into question, if – by varying the order for reference, by setting it aside and by ordering the referring court to resume the proceedings – the appellate court could prevent the referring court from exercising the right, conferred on it by the [FEU] Treaty, to make a reference to the Court.'

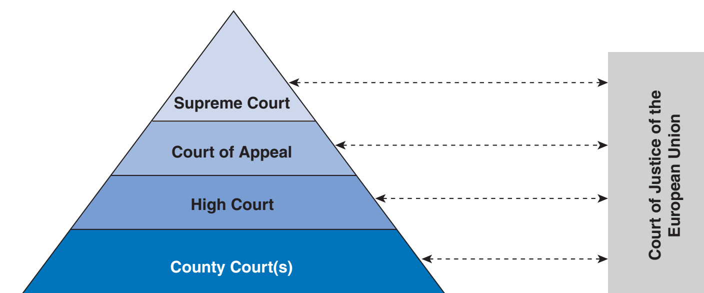


Figure 10.5 Preliminary Rulings under Article 267

For the English judicial hierarchy, the judicial federalism constructed by the European Court thus looks like Figure 10.5.

bb. 'What': Necessary Questions

National courts are entitled to request a preliminary ruling, where – within a pending case – there is a 'question' that they consider 'necessary' to give judgment.[190]

In the past, the European Court has been eager to encourage national courts to ask preliminary questions. For these questions offered the Court formidable opportunities to say what the European constitution 'is'.[191] Thus, even where questions were 'imperfectly formulated', the Court was willing to extract the 'right' ones.[192] Moreover, the Court will generally not 'criticise the grounds and purpose of the request for interpretation'.[193] In the words of a seminal judgment on the issue:

[190] Case 338/85, *Pardini* v. *Ministero del Commercio con l'Estero and Banca Toscana* [1988] ECR 2041, para. 11: 'It follows that a national court or tribunal is not empowered to bring a matter before the Court by way of a reference for a preliminary ruling unless a dispute is pending before it in the context of which it is called upon to give a decision capable of taking into account the preliminary ruling. Conversely, the Court of Justice has no jurisdiction to hear a reference for a preliminary ruling when at the time it is made the procedure before the court making it has already been terminated.'
[191] In the famous phrase by C. E. Hughes (as quoted by E. Corwin, 'Curbing the Court' (1936) 26 *American Labor Legislation Review* 85): 'We are under a Constitution, but the Constitution is what the judges say it is[.]'
[192] Case 6/64, *Costa* v. *ENEL* [1964] ECR 585, 593: '[T]he Court has the power to extract from a question imperfectly formulated by the national court those questions which alone pertain to the interpretation of the Treaty.'
[193] *Ibid*.

> As regards the division of jurisdiction between national courts and the Court of Justice under Article [267] of the [FEU] Treaty the national court, which is alone in having a direct knowledge of the facts of the case and of the arguments put forward by the parties, and which will have to give judgment in the case, is in the best position to appreciate, with full knowledge of the matter before it, the relevance of the questions of law raised by the dispute before it and the necessity for a preliminary ruling so as to enable it to give judgment.[194]

Nonetheless, in very exceptional circumstances the Court will reject a request for a preliminary ruling. This happened in *Foglia* v. *Novello (No. 1)*,[195] where the Court insisted that questions referred to it must be raised in a 'genuine' dispute.[196] Where the parties to the national dispute agreed, in advance, on the desirable outcome, the Court will decline jurisdiction.[197] In a sequel to this case, the Court explained this jurisdictional limitation as follows:

> [T]he duty assigned to the Court by Article [267] is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. It accordingly does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of [European] law which do not correspond to an objective requirement inherent in the resolution of a dispute.[198]

The Court of Justice has consequently imposed *some* jurisdictional control on requests for preliminary rulings. To prevent an abuse of the Article 267 procedure, the European Court will thus 'check, as all courts must, whether it has jurisdiction'.[199] Yet, the Court has been eager to emphasise that it wishes 'not

[194] Case 83/78, *Pigs Marketing Board* v. *Raymond Redmond* [1978] ECR 2347, para. 25.
[195] Case 104/79, *Foglia* v. *Novello* [1980] ECR 745.
[196] G. Bebr, 'The Existence of a Genuine Dispute: An Indispensable Precondition for the Jurisdiction of the Court under Article 177 EEC?' (1980) 17 *CML Rev.* 525.
[197] Case 104/79, *Foglia*, paras. 11–13: 'The duty of the Court of Justice under Article [267] of the [FEU] Treaty is to supply all courts in the [Union] with the information on the interpretation of [European] law which is necessary to enable them to settle *genuine* disputes which are brought before them. A situation in which the Court is obliged by the expedient of arrangements like those described above to give rulings would jeopardise the whole system of legal remedies available to private individuals to enable them to protect themselves against tax provisions which are contrary to the Treaty. This means that the questions asked by the national court, having regard to the circumstances of this case, do not fall within the framework of the duties of the Court of Justice under Article [267] of the Treaty. The Court has accordingly no jurisdiction to give a ruling on the question asked by the national court.'
[198] Case 244/80, *Foglia* v. *Novello (2)* [1981] ECR 3045, para. 18.
[199] *Ibid.*, para. 19.

in any way [to] trespass upon the prerogatives of the national courts';[200] and the Court here pledged to 'place as much reliance as possible upon the assessment by the national court of the extent to which the questions submitted are essential'.[201] The Court will therefore decline jurisdiction only very exceptionally:

> The presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[202]

There exists thus a 'presumption of relevance' that the EU law questions asked will be relevant for the national case at hand.[203]

c. *Paragraph 3: The Obligation to Refer and* 'Acte clair'

While any national court or tribunal 'may' refer a question to the European Court under paragraph 2, Article 267(3) TFEU imposes an obligation:

> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

Certain courts therefore 'must' refer a question to the European Court. These courts are defined in Article 267(3) as courts 'against whose decisions there is no judicial remedy under national law'.

What will this formulation mean? Two theoretical options exist. Under an 'institutional' reading, the formulation refers to the highest judicial *institution* in the country. This would restrict the obligation to refer preliminary questions to a single court in a Member State – in the United Kingdom: the Supreme Court. By contrast, a 'procedural' reading links the definition of the court of last instance to the judicial *procedure* in the particular case. This broadens the obligation to refer to every national court whose decision cannot be appealed in the particular case.

[200] *Ibid.*, para. 18. [201] *Ibid.*, para. 19.
[202] Case C-617/10, *Åklagaren* v. *Fransson* EU:C:2013:105, para. 40. For an illustration, where the Court found a preliminary question to be irrelevant, see e.g. Case C-618/10, *Banco Español de Crédito* EU:C:2012: 349, esp. paras. 78–9.
[203] Case 62/14, *Gauweiler and others* v. *Deutscher Bundestag*, EU:C:2015:400, para. 25. That there may nevertheless be a robust review of the admissibility of the preliminary ruling, see Case C-547/14, *Philip Morris Brands and Others*, EC:C:2016:325, paras. 29–53.

The Court of Justice has – from the very beginning – favoured the second reading.[204] The key concept in Article 267(3) is thereby the '*appealability*' of a judicial decision. What counts is the *ability* of the parties to appeal to a higher court. (The fact that the merits of the appeal are subject to a prior declaration of admissibility by a superior court will thereby not deprive the parties of that ability.)[205] Where an appeal is thus *procedurally* possible, the obligation under Article 267(3) will not apply.

Apart from the question as to what are courts 'against whose decisions there is no judicial remedy under national law', the wording of Article 267(3) appears relatively clear. Yet, this picture is – misleadingly – deceptive. For the European Court has judicially 'amended' the provision in two very significant ways.

The first 'amendment' relates to references on the validity of European law. And despite the restrictive wording of paragraph 3, the European Court has here insisted that *all* national courts – even courts that are not courts of last resort – are under an obligation to refer *when they are in doubt about the validity of a Union act*.[206] This *expansion* of the scope of Article 267(3) follows from the structure of the Union's judicial federalism, which grants the exclusive power to invalidate European law to the Court of Justice alone.[207]

By contrast, a second 'amendment' has limited the obligation to refer preliminary questions. This *limitation* follows from constitutional common sense. For to ask a question implies uncertainty as to the answer. And where the answer is 'clear', there may be no need to raise a question. Yet on its textual face, Article 267(3) treats national courts 'as perpetual children': they are forbidden from interpreting European law – even if the answers are crystal clear.[208] And in order to counter this, the Union legal order has imported a French legal doctrine under the name of *acte clair*.[209] The doctrine simply means that where it is *clear* how to *act*, a national court need not ask a preliminary question.

[204] The procedural theory received support in Case 6/64, *Costa* v. *ENEL* [1964] ECR 585, where the ECJ treated an Italian court of *first* instance as a court against whose decision there was no judicial remedy.

[205] Case C-99/00, *Lyckeskog* [2002] ECR I-4839, para. 16: 'Decisions of a national appellate court which can be challenged by the parties before a supreme court are not decisions of a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law within the meaning of Article [267 TFEU]. The fact that examination of the merits of such appeals is subject to a prior declaration of admissibility by the Supreme Court does not have the effect of depriving the parties of a judicial remedy.' For a recent confirmation, see Case C-3/16, *Aquino* v. *Belgium*, EU:C:2017:209, paras. 35–6.

[206] See Case C-344/04, *The Queen on the application of International Air Transport Association et al.* v. *Department for Transport* [2006] ECR I-403, para. 30.

[207] On this point, see Chapter 11, Introduction.

[208] J. C. Cohen, 'The European Preliminary Reference and US Court Review of State Court Judgments: A Study in Comparative Judicial Federalism' (1996) *American Journal of Comparative Law* 421 at 438.

[209] There are different interpretations of the 'hidden' constitutional reasons behind the European *acte clair* doctrine. Some commentators have seen it in purely negative terms: the European Court finally became resigned to the fact that national supreme courts did not honour their obligation to refer questions under Art. 267(3) TFEU, and the invention of the *acte clair* doctrine 'legalised' a (previously) illegal national practice. A second interpretation sees the doctrine in a positive light: the European Court rejected the idea of considering national supreme courts as less reliable than lower national courts in interpreting European law. The obligation to refer would thus only arise where there was a real European law 'question'. A third interpretation has seen the doctrine of *acte clair* as part of a 'give and take' strategy, according to which the Court gave more power to national courts so as to develop a doctrine of precedent. On the various readings, see H. Rasmussen, 'The European Court's *acte clair* Strategy in *CILFIT*' (1984) 10 *EL Rev.* 242.

The doctrine of *acte clair* began its European career in *Da Costa*.[210] In this case, the Court held:

> [T]he authority of an interpretation under Article [267] already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is *materially identical* with a question which has already been the subject of a preliminary ruling in a similar case.[211]

The Court subsequently clarified that this also covered a second situation. Where the European Court had already given a negative answer to a question relating to the *validity* of a Union act, another national court need not raise the same question again.[212]

But general guidelines on the constitutional scope of the *acte clair* doctrine were only offered in *CILFIT*.[213] The Court here widened the doctrine to situations 'where previous decisions of the Court have already dealt with the *point of law* in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical'.[214] Yet national courts would only be released from their obligation to refer questions under Article 267(3) TFEU, where certain conditions were fulfilled. In the words of the Court:

[210] Cases 28–30/62, *Da Costa*.

[211] *Ibid.*, 38.

[212] Case 66/80, *International Chemical Corporation* [1981] ECR 1191, paras. 12–13: 'When the Court is moved under Article [267] to declare an act of one of the institutions to be void there are particularly imperative requirements concerning legal certainty in addition to those concerning the uniform application of [European] law. It follows from the very nature of such a declaration that a national court may not apply the act declared to be void without once more creating serious uncertainty as to the [European] law applicable. It follows therefrom that although a judgment of the Court given under Article [267] of the Treaty declaring an act of an institution, in particular a Council or Commission regulation, to be void is directly addressed only to the national court which brought the matter before the Court, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give.'

[213] Case 283/81, *CILFIT and others* v. *Ministry of Health* [1982] ECR 3415.

[214] *Ibid.*, para. 14.

> [T]he correct application of [Union] law may be so obvious as to leave no scope for any reasonable doubt as to the matter in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it. However, the existence of such a possibility must be assessed on the basis of the characteristic features of [European] law and the particular difficulties to which its interpretation gives rise.[215]

This is an extremely high threshold, which the Court linked to the fulfilment of a number of very (!) restrictive conditions.[216] These *CILFIT* conditions 'were designed to prevent national courts from abusing the doctrine in order to evade their obligation to seek a preliminary ruling where they are disinclined to adhere to the Court's case-law'.[217]

For a very long time, however, not much was known about the *CILFIT* conditions. In a recent judgment, the Court has helpfully added some clarity. In *Ferreira da Silva e Brito*,[218] the Court clarified that the existence of contradictory decisions of lower national courts was '*not* a conclusive factor capable of triggering the obligation set out in the third paragraph of Article 267 TFEU' because a higher court may still hold a distinct interpretation that it believes to be beyond reasonable doubt.[219] While disagreement *within one national legal* order is thus not a conclusive trigger, the Court of Justice nevertheless held that wherever there exists 'a great deal of uncertainty on the part of *many national courts and tribunals*', '[t]hat uncertainty shows not only that there are difficulties of interpretation, but

[215] *Ibid.*, paras. 16–17.

[216] *Ibid.*, paras. 18–20: 'To begin with, it must be borne in mind that [Union] legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of [European] law thus involves a comparison of the different language versions. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that [European] law uses terminology which is peculiar to it. Furthermore, it must be emphasised that legal concepts do not necessarily have the same meaning in [European] law and in the law of the various Member States. Finally, every provision of [European] law must be placed in its context and interpreted in the light of the provisions of [European] law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.'

[217] K. Lenaerts et al., *EU Procedural Law* (Oxford University Press, 2014), 100.

[218] Case C-160/14, *Ferreira da Silva e Brito and others*.

[219] *Ibid.*, paras. 41–2 (emphasis added). Similarly, in Joined Cases C-72/14 and C-197/14, *X and van Dijk*, EU:C:2015:564, the Court held that the fact that a lower court had made a reference to the ECJ did not in itself mean that the *CILFIT* conditions were fulfilled because 'it is for the national courts alone against whose decision there is no judicial remedy under national law, to take upon themselves independently the responsibility for determining whether the case before them involves an "acte clair"' (*ibid.*, para. 59).

also that there is a risk of divergences in judicial decisions within the European Union'.[220] And, importantly, this was a question that the European Court itself felt very happy to – centrally – decide.[221] Far from indicating 'a considerable relaxation of the conditions of application of the *acte clair* exception' and an 'accrued decentralization in the interpretation of EU law', this recent development may indeed show the Court to police and restrict the CILFIT conditions much more willingly.[222]

d. The Legal Nature of Preliminary Rulings

What is the nature of preliminary rulings from the European Court? Preliminary references are not appeals. They are – principally – discretionary acts of a national court asking for interpretative help from the European Court. The decision to refer to the European Court of Justice thus lies entirely with the national court – not the parties to the dispute.[223] Once the European Court has given a preliminary ruling, this ruling will be binding. But *whom* will it bind – the parties to the national disputes or the national court(s)?

Preliminary rulings cannot bind the parties in the national dispute, since the European Court will not 'decide' their case. It is therefore misleading to even speak of a binding effect *inter partes* in the context of preliminary rulings.[224] The Court's rulings are addressed to the national court requesting the reference; and the Court has clarified that 'that ruling is binding on the national court as to the interpretation of the [Union] provisions and acts in question'.[225] Yet, will the binding effect of a preliminary ruling extend beyond the referring national court? In other words, is a preliminary ruling equivalent to a 'decision' addressed to a single court; or will the European Court's interpretation be generally binding on all national courts? The Court has long clarified that a preliminary ruling

[220] C-160/14, *Ferreira da Silva e Brito and others*, para. 43.

[221] *Ibid.*, para. 44. For the same 'centralised' application of the *CILFIT* criteria, see Case C-379/15, *Association France Nature Environnement* v. *Premier ministre and others*, EU:C:2016:603, esp. paras. 51–3.

[222] For the opposite conclusion, see A. Kornezov, 'The New Format of the *acte clair* Doctrine and Its Consequences' (2016) 53 *CMLR* 1317, esp. 1325 and 1341.

[223] Case C-2/06, *Kempter* v. *Hauptzollamt Hamburg-Jonas* [2008] ECR I-411, para. 41: 'the system established by Article [267 TFEU] with a view to ensuring that [European] law is interpreted uniformly in the Member States instituted direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative by the parties'. And para. 42: 'the system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary'.

[224] Contra: A. Toth, 'The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects' (1984) 4 YEL 1.

[225] Case 52/76, *Benedetti* v. *Munari* [1977] ECR 163, para. 26: 'that ruling is binding on the national court as to the interpretation of the [Union] provisions and acts in question'.

is *not* a 'decision'; indeed, it is not even seen as an (external) act of a Union institution.[226]

What then is the nature of preliminary rulings? The question has been hotly debated in the academic literature. And – again – we may contrast two views competing with each other. According to the common law view, preliminary rulings are legal precedents that generally bind all national courts. Judgments of the European Court are binding *erga omnes*.[227] This view typically links the rise of the doctrine of judicial precedent with the evolution of the doctrine of *acte clair*.[228] It is thereby claimed that the Court of Justice transformed its position vis-à-vis national courts from a *horizontal* and *bilateral* relationship to a *vertical* and *multilateral* one.[229]

The problem with this – masterful yet mistaken – theory is that the European Court subscribes to a second constitutional view: the civil law tradition. Accordingly, its judgments do not create 'new' legal rules but only clarify 'old' ones. In the words of the Court:

> The interpretation which, in the exercise of the jurisdiction conferred upon it by Article [267 TFEU], the Court of Justice gives to a rule of [European] law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force.[230]

The Court of Justice has thus adopted the – (in)famous – 'declaration theory'. Judgments only declare pre-existing positive law, and thus reach back in time to when the positive law was adopted. The vertical and multilateral effects of preliminary rulings are thus mediated through the positive law interpreted – and not, as the common law view asserts, through a doctrine of precedent.[231]

In light of the 'civilian' judicial philosophy of the European Court, its judgments are *not* generally binding.[232] There is no vertical or multilateral effect

[226] Case 69/85 (Order), *Wünsche Handelsgesellschaft* v. *Germany* [1986] ECR 947, para. 16.
[227] See A. Trabucchi, 'L'Effet "*erga omnes*" des décisions préjudicielles rendues par la cour de justice des communautés européennes' (1974) 10 *RTDE* 56.
[228] Rasmussen, 'European Court's *acte clair* Strategy' (n. 209 above).
[229] This view was popularised in P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press, 2007), 461.
[230] Case 61/79, *Amministrazione delle finanze dello Stato* v. *Denkavit* [1980] ECR 1205, para. 16; and somewhat more recently: Case C-453/00, *Kühne & Heitz* v. *Productschap voor Pluimvee en Eieren* [2004] ECR I-837, para. 21.
[231] Against this civilian background, the argument that the Treaty, by providing for the automatic operation of the obligation to refer, 'assumed that the Court's dicta under Article [267] were deprived of authority for any other court than the submitting one' (Rasmussen, 'European Court's *acte clair* Strategy' (n. 209 above) at 249), is flawed. And starting from this false premise, Rasmussen (over)interprets *CILFIT*.
[232] In this sense, see Toth, 'Authority of Judgments' (n. 224 above), 60: 'in the cases under discussion the Court itself has never meant to attribute, as is sometimes suggested, a general binding force to interpretative preliminary rulings'.

of judicial decisions as 'judgments of the European Courts are *not sources* but *authoritative evidences* of [European] law'. '[A]n interpretation given by the Court becomes an integral part of the provision interpreted and cannot fail to affect the legal position of all those who may derive rights and obligations from that provision.'[233]

Are there constitutional problems with the Union's civil law philosophy? Indeed, there are. For the 'declaratory' effect of preliminary rulings often generates 'retroactive' effects.[234] Indeed, in *Kühne & Heitz*,[235] the Court held that a (new) interpretation of European law must be applied 'even to legal relationships which arose or were formed before the Court gave its ruling on the question on interpretation'.[236] The Court has, however, recognised that its civil law philosophy must – occasionally – be tempered by the principles of legal certainty and financial equity.[237] It has therefore – exceptionally – limited the temporal effect of a preliminary ruling to an effect *ex nunc*, that is: an effect from the time of the ruling.[238] However, at the same time, the Court has clarified that legal certainty will not prevent the retrospective application of a (new) interpretation, where the judgment of a court of last instance 'was, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of [European] law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article [267]'.[239]

Conclusion

The Court of Justice of the European Union has never just been 'the mouth of the law'. The Court's judicial powers are extensive – and the Court has extensively used them. Yet while the Court's judicial activism has been subject to heavy criticism,[240] the Court continues to be a 'court'; and as a court its powers are essentially 'passive' powers. This chapter looked at three judicial powers in the context of the Union legal order: the power to annul European law, the

[233] *Ibid*., 70 and 74.
[234] On this point, see G. Bebr, 'Preliminary Rulings of the Court of Justice: Their Authority and Temporal Effect' (1981) 18 *CML Rev.* 475, esp. 491: 'The retroactive effect of a preliminary interpretative ruling is, according to the Court, the general rule.'
[235] Case C-453/00, *Kühne & Heitz*.
[236] *Ibid*., para. 22.
[237] For the former rationale, see Case C-2/06, *Kempter*; for the latter rationale, see Case 43/75, *Defrenne* v. *Sabena* [1976] ECR 455.
[238] For an academic analysis here, see D. Düsterhaus, 'Eppur Si Muove! The Past, Present, and (Possible) Future of Temporal Limitations in the Preliminary Reference Procedure' (2017) 36 YEL 237.
[239] Case C-2/06, *Kempter*, para. 39. For a critical analysis of this case, see A. Ward, 'Do unto Others as You Would Have Them Do unto You: "Willy Kempter" and the Duty to Raise EC Law in National Litigation' (2008) 33 *EL Rev.* 739.
[240] See H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Nijhoff, 1986).

power to remedy illegal acts of the Union, and the power to enforce European law through adjudication, both directly in the European Court and indirectly through the national courts.

The Union is based on the rule of law inasmuch as the European Court is empowered to review the legality of European (secondary) law. The Union legal order has thereby opted for a strong 'rule of law' version. It allows the Court to review the formal and substantive legality of European law. One particularly important aspect of the substantive review of all Union law will be discussed in Chapter 12: judicial review in light of EU fundamental rights.

However, in the past, there existed severe procedural limitations on the right of individual applicants to request judicial review proceedings. Under the Rome Treaty, private parties were originally only entitled to challenge 'decisions' that were of 'direct and individual concern to them'. And while subsequent jurisprudence broadened their standing to the review of any Union act, the *Plaumann* formula restricted the right to judicial review to an exclusive set of private applicants. The Lisbon Treaty has only liberalised this procedural restriction for 'regulatory' acts.

Section 2 looked at the remedial powers of the European Court, while sections 3 and 4 analysed the application of European law through adjudication. With regard to the judicial adjudication of Union law, the Union has chosen a dual enforcement mechanism. First, it allows for the *central* adjudication of European law through actions directly brought before the Court of Justice of the European Union. The Treaties thereby distinguish between infringement actions against the Member States, and proceedings against the Union for a failure to act. However, second, the Union legal order also provides for the decentralised adjudication of European law in the national courts. From a functional perspective, national courts are thus – partly – European courts; and, in order to guarantee a degree of uniformity in the interpretation of European law, the EU Treaties provide for a 'preliminary reference procedure'. This is not an appeal procedure, but allows national courts to ask – if they want to – questions relating to the interpretation of European law. This – voluntary – cooperative arrangement is however replaced by a constitutional obligation for national courts of last resort.

The role of national courts in the exercise of the judicial function in the Union legal order cannot be overestimated. Their powers and procedures in the enforcement of Union law are the subject of the next chapter.

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11

Judicial Powers II

(Decentralised) National Procedures

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Introduction

National courts are the principal judicial enforcers of European law. 'Ever since *Van Gend en Loos* the Court has maintained that it is the task of the national courts to protect the rights of individuals under [Union] law and to give full effect to [Union] law provisions.'[1] Indeed, whenever European law is directly effective, national courts must apply it; and wherever a Union norm comes into conflict with national law, each national court must disapply the latter.[2]

[1] S. Prechal, 'National Courts in EU Judicial Structures' (2006) 25 *YEL* 429.
[2] On the principles of direct effect and supremacy, see Chapters 3 and 4.

The Union legal order thereby insists that nothing within the national judicial system must prevent national courts from exercising their functions as 'guardians' of the European judicial order.[3] In *Simmenthal*,[4] the Court thus held that each national court must be able to disapply national law – even where the national judicial system traditionally reserves that power to a central constitutional court:

> [E]very national court must, in a case within its jurisdiction, apply [Union] law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the [Union] rule. Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of [European] law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent [Union] rules from having full force and effect are incompatible with those requirements which are the very essence of [Union] law.[5]

Functionally, the direct effect (and supremacy) of European law transform every single national court into a 'European' court. This decentralised system differs from the judicial system in the United States in which the application of federal law is principally left to 'federal' courts. Federal courts here apply federal law, while state courts apply state law. The European system, by contrast, is based on a philosophy of cooperative federalism: *all* national courts are entitled and obliged to apply European law to disputes before them. National courts are however not full European courts. Although they must interpret and apply European law, they are not empowered to annul a Union act. Within the Union legal order, this is an *exclusive* competence of the European Court:

> Since Article [263] gives the Court exclusive jurisdiction to declare void an act of a [Union] institution, the coherence of the system requires that where the validity of a [Union] act is challenged before a national court the power to declare that act invalid must also be reserved to the Court of Justice.[6]

[3] *Opinion 1/09* (Draft Agreement on the Creation of European and Community Patent Court) [2011] ECR I-1137, para. 66.
[4] Case 106/77, *Amministrazione delle Finanze dello Stato* v. *Simmenthal* [1978] ECR 629.
[5] *Ibid.*, paras. 21–2. For a recent confirmation, see e.g. Joined Cases C-188–9/10, *Melki & Abdeli* [2010] ECR I-5667, esp. para. 44.
[6] Case 314/85, *Foto-Frost* v. *Hauptzollamt Lübeck-Ost* [1987] ECR 4199, para. 17. See also Case C-461/03, *Schul Douane-expediteur* [2005] ECR I-10513. Under European law, national courts will thereby be entitled, under strict conditions, to grant interim relief (see Case C-466/93, *Atlanta Fruchthandelsgesellschaft mbH and others* v. *Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3799).

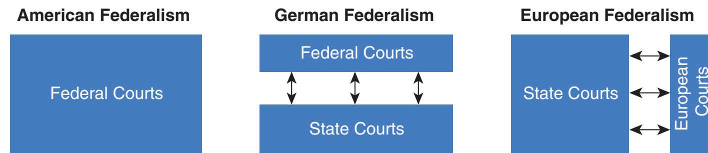

Figure 11.1 Judicial Federalism in Comparative Perspective

In opting for the decentralised judicial enforcement via state courts, the EU judicial system comes close to German judicial federalism; yet unlike the latter, state courts are not hierarchically subordinated. We saw in the previous chapter that there is no formal appeal procedure from the national to the European Courts, as the only procedural nexus here is the preliminary reference procedure. The relationship between national courts and the European Court is thus based on their *voluntary* cooperation. National courts are consequently only functionally – but not institutionally – Union courts (see Figure 11.1).

Has the Union therefore had to take State courts as it finds them? The Union legal order has indeed traditionally recognised the procedural autonomy of the judicial authorities of the Member States in the enforcement of European law:

> Where national authorities are responsible for implementing [European law] it must be recognised that in principle this implementation takes place with due respect for the forms and procedures of national law.[7]

This formulation has become known as the principle of 'national procedural autonomy'.[8] It essentially means that in the judicial enforcement of European law, the Union 'piggybacks' on the national judicial systems.[9] The danger of such 'piggybacking' is however that there may be situations in which there is a *European right* but no *national remedy* to enforce that right. But rights without remedies are like 'pie in the sky': a metaphysical meal. Each right should have its

[7] Case 39/70, *Norddeutsches Vieh- und Fleischkontor GmbH* v. *Hauptzollamt Hamburg-St Annen* [1971] ECR 49, para. 4.

[8] For a criticism of the notion, see C. N. Kakouris, 'Do the Member States Possess Judicial Procedural "Autonomy"?' (1997) 34 *CML Rev.* 1389 (arguing that the Court has never referred to the principle in its case law). However, the Court subsequently, and now regularly, recognised the principle in its case law; see Case C-201/02, *The Queen* v. *Secretary of State for Transport, ex p. Wells* [2004] ECR I-723, para. 67 (emphasis added): 'The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the *principle of procedural autonomy of the Member States*'; and Joined Cases C-392/04 and C-422/04, *i-21 Germany & Arcor* v. *Germany* [2006] ECR I-8559, para. 57: 'principle of the procedural autonomy of the Member States'.

[9] K. Lenaerts et al., *EU Procedural Law* (Oxford University Press, 2014), 107.

remedy(ies);[10] and for that reason, the autonomy of national judicial procedures was never absolute. National procedural powers are thus not exclusive powers of the Member States;[11] and the Union has expressly recognised that it can harmonise national procedural laws where 'they are likely to distort or harm the functioning of the common market'.[12]

But did this mean that, in the absence of positive harmonisation, the Member States were absolutely free to determine how individuals could enforce their European rights in national courts? The Court has answered this question negatively. The core duty governing the decentralised enforcement of European law is thereby rooted in Article 4(3) TEU: the duty of 'sincere cooperation'.[13] This general duty is today complemented by Article 19(1), which states: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

What does this mean? And to what extent does it limit the procedural autonomy of the Member States? This chapter explores these questions. We shall discuss two specific constitutional principles that the Court has derived from the general duty of sincere cooperation: the principle of equivalence and the principle of effectiveness. The classic expression of both can be found in *Rewe*:

> [I]n the absence of [European] rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have derived from the direct effect of [European] law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature … In the absence of such measures of

[10] Remedies might be said to fall into two broad categories. *Ex ante* remedies are to prevent the violation of a right (interim relief, injunctions), while *ex post* remedies are used to 'remedy' a violation that has already occurred (damages liability). On the many (unclear) meanings of 'remedy', see P. Birks, 'Rights, Wrongs, and Remedies' (2000) 20 *Oxford Journal of Legal Studies* 1 at 9ff.

[11] Contra: D. Simon, *Le Système juridique communautaire* (Presses Universitaires de France, 2001), 156: 'les Etats membres ont une competence exclusive pour determiner les organes qui seront chargés d'exécuter le droit communautaire'.

[12] Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG* v. *Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para. 5: 'Where necessary, Articles [114 to 116 and 352 TFEU] enable appropriate measures to be taken to remedy differences between the provisions laid down by law, regulations or administrative action in Member States if they are likely to distort or harm the functioning of the common market. In the absence of such measures of harmonisation the right conferred by [European] law must be exercised before the national courts in accordance with the conditions laid down by national rules.'

[13] Art. 4(3) TEU states: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

> harmonisation the right conferred by [European] law must [thus] be exercised before the national courts in accordance with the conditions laid down by national rules. The position would be different only if the [national rules] made it impossible in practice to exercise the rights which the national courts are obliged to protect.[14]

Even in the absence of European harmonisation, the procedural autonomy of the Member States was thus *relative*. National procedural rules could not make the enforcement of European rights less favourable than the enforcement of similar national rights. This prohibition of procedural discrimination was the principle of equivalence. But national procedural rules – even if not discriminatory – ought also not to make the enforcement of European rights 'impossible in practice'. This would become known as the principle of effectiveness. Both principles have led to a significant *judicial* harmonisation of national procedural laws,[15] and this chapter analyses their evolution in sections 1 and 2 below.

Section 3 turns to a third – famous – incursion into the procedural autonomy of national courts: the liability principle. While the previous two principles relied on the existence of *national* remedies for the enforcement of European law, this principle establishes a *European* remedy for proceedings in national courts. An individual can here, under certain conditions, claim compensatory damages resulting from a breach of European law. Importantly, the remedial competence of national courts is confined to *national* wrongs. They cannot give judgments on the non-contractual liability of the European Union. For the latter power is – like the power to annul Union law – an exclusive power of the Court of Justice of the European Union.[16]

Having analysed the three major constitutional principles governing the decentralised enforcement of European law 'in the absence of harmonisation', section 4 finally explores what happens in areas in which the Union has harmonised the remedial or jurisdictional competences of national courts. The most significant harmonisation here relates to the jurisdictional competences of

[14] Case 33/76, *Rewe*, para. 5. For the modern version, see Case C-312/93, *Peterbroeck, Van Campenhout & Cie* v. *Belgian State* [1995] ECR I-4599; Case C-61/14, *Orizzonte Salute – Studio Infermieristico Associato*, EU:C:2015:655, para. 46.

[15] The Court expressly refers to both principles: see Joined Cases C-392/04 and C-422/04 *i-21 Germany & Arcor* v. *Germany*, para. 57: '[A]ccording to settled case-law, in the absence of relevant [European] rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under [European] law are a matter for the domestic legal order of each Member State, under the principle of the procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the [Union] legal order (principle of effectiveness).'

[16] See Joined Cases 106–20/87, *Asteris and others* [1988] ECR 5515, para. 15: '[T]he Court has exclusive jurisdiction pursuant to Article [268] of the [FEU] Treaty to hear actions for compensation brought against the [Union] under the second paragraph of Article [340] of the [FEU] Treaty.'

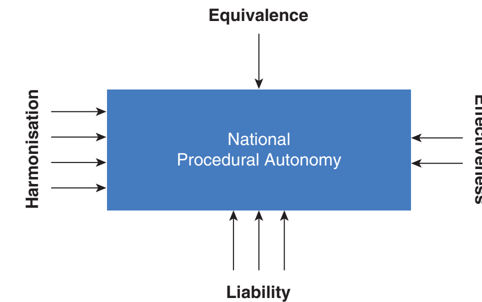

Figure 11.2 Limits on National Procedural Autonomy

national courts. This has allowed the Union to generally give national judgments transnational effects within the Union legal order. When, for example, will a judgment issued by a French or German court bind the judiciary in the United Kingdom? The most important Union harmonisation here relates to civil law but similar moves have been made in the context of criminal law.

1. The Equivalence Principle

The idea behind the principle of equivalence is straightforward: national procedures and remedies for the enforcement of European rights 'cannot be less favourable than those relating to similar actions of a domestic nature'.[17] When applying European law, national courts must act *as if* they were applying national law. National procedures and remedies must not discriminate between national and European rights. The equivalence principle simply demands that similar situations are treated similarly. It will consequently not affect the substance of national remedies. It only requires the *formal* extension of those remedies to 'similar' or 'equivalent' actions under European law. And, as such, the principle of equivalence is not too intrusive in the procedural autonomy of national courts.[18]

a. Non-discrimination: Extending National Remedies

A good example of the non-discrimination logic behind the equivalence principle can be seen in *i-21 Germany & Arcor* v. *Germany*.[19] The two plaintiffs were telecommunication companies that had paid licence fees to Germany. The

[17] Case 33/76, *Rewe*, para. 5.

[18] M. Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart, 2004), 26: 'Principles such as non-discrimination and equivalence implicitly assume that the remedies and procedural rules already provided under the domestic judicial orders are sufficient in scope and character to safeguard the exercise of the citizen's legal rights.'

[19] Joined Cases C-392/04 and C-422/04, *i-21 Germany & Arcor* v. *Germany*.

national fees had been calculated on the anticipated administrative costs of the respective national authority over a period of 30 years and were charged in advance. The companies successfully challenged the national law determining the assessment method before the Federal Administrative Court, which declared it to violate German constitutional law. The plaintiff companies then sought repayment of the fees they had already paid. However, the national court dismissed this second action on the grounds that the actual administrative decision had become final under national law. For under the German Administrative Procedure Act, a final administrative decision could only be challenged where the decision was 'downright intolerable'. For national law, this was not the case. But wondering whether it was required to apply a lower threshold for actions involving European law, the administrative court referred this question to the European Court.

Analysing the equivalence principle within this context, the European Court here held:

> [I]n relation to the principle of equivalence, this requires that all the rules applicable to appeals, including the prescribed timelimits, apply without distinction to appeals on the ground of infringement of [Union] law and to appeals on the ground of disregard of national law. It follows that, if the national rules applicable to appeals impose an obligation to withdraw an administrative act that is unlawful under domestic law, even though that act has become final, where to uphold that act would be 'downright intolerable', the same obligation to withdraw must exist under equivalent conditions in the case of an administrative act … Where, pursuant to rules of national law, the authorities are required to withdraw an administrative decision which has become final if that decision is manifestly incompatible with domestic law, that same obligation must exist if the decision is manifestly incompatible with [Union] law.[20]

In the present case, the question whether the national decision was 'downright intolerable' or 'manifestly incompatible' with European law depended on the degree of clarity of the Union law at issue, and was an interpretative prerogative of the national court.[21] The European Court thus accepted the high *national* threshold for judicial challenges of final administrative acts, and demanded that it be applied, without discrimination, to European actions in national courts.

b. 'Similar' Actions: The Equivalence Test

The logic of non-discrimination requires that similar actions be treated similarly. But what are 'equivalent' or 'similar' actions? The devil always lies in the detail, and much case law on the equivalence principle has concentrated on this devilish question.

[20] *Ibid*., paras. 62–3, 69. [21] *Ibid*., paras. 70–2.

In *Edis*,[22] a company had been required to pay a registration charge. Believing the charge to be contrary to European law, the plaintiff applied for a refund that was rejected by the Italian courts on the grounds that the limitation period for such refunds had expired. However, Italian law recognised various limitation periods – depending on whether the refund was due to be paid by public or private parties. The limitation period for public authorities was shorter than that for private parties. And this posed the following question: was the national court entitled to simply extend the national *public* refund procedure to charges in breach of European law; or was it required to apply the more generous *private* refund procedure? The Court answered as follows:

> Observance of the principle of equivalence implies, for its part, that the procedural rule at issue applies without distinction to actions alleging infringements of [Union] law and to those alleging infringements of national law, with respect to the same kind of charges or dues. *That principle cannot, however, be interpreted as obliging a Member State to extend its most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of [European] law*. Thus, [European] law does not preclude the legislation of a Member State from laying down, alongside a limitation period applicable under the ordinary law to actions between private individuals for the recovery of sums paid but not due, special detailed rules, which are less favourable, governing claims and legal proceedings to challenge the imposition of charges and other levies. The position would be different only if those detailed rules applied solely to actions based on [European] law for the repayment of such charges or levies.[23]

In the present case, the 'equivalent' action was thus to be based on the national remedies that existed for refunds from *public* bodies. The existence of a more favourable limitation period for refunds from private parties was irrelevant, since the equivalence principle only required treating like actions alike. And the 'like' action in this case was the refund procedure applicable to a public body. The national procedural rules thus did not violate the principle of equivalence.[24]

But matters might not be so straightforward. In *Levez*,[25] the Employment Appeal Tribunal in London had asked the Court of Justice about the compatibility

[22] Case C-231/96, *Edilizia Industriale Siderurgica Srl (Edis)* v. *Ministero delle Finanze* [1998] ECR I-4951.

[23] *Ibid*., paras. 36–7 (emphasis added).

[24] For a recent confirmation of this point, see Case C-61/14, *Orizzonte Salute – Studio Infermieristico Associato*, para. 67: '[T]he principle of equivalence requires that actions based on an infringement of national law and similar actions based on an infringement of EU law be treated equally and not that there be equal treatment of national procedural rules applicable to proceedings of a different nature such as civil proceedings, on the one hand, and administrative proceedings, on the other, or applicable to proceedings falling within two different branches of law.'

[25] Case C-326/96, *Levez* v. *Jennings (Harlow Pools) Ltd* [1998] ECR I-7835.

of section 2(5) of the 1970 Equal Pay Act with the equivalence principle. The national law provided that, in proceedings brought in respect of a failure to comply with the equal pay principle, women were not entitled to arrears of remuneration or damages of more than two years. The provision applied irrespective of whether a plaintiff enforced her *national* or *European* right to equal pay. Did this not mean that the equivalence principle was respected?

The European Court did *not* think so, as it questioned the underlying comparative base. As the national legislation was designed to implement the European right to equal pay, the Court held that the national law 'cannot therefore provide an appropriate ground of comparison against which to measure compliance with the principle of equivalence'.[26] Remedies for equal pay rights needed to be compared with national remedies for 'claims similar to those based on the Act', such as remedies for breach of a contract of employment or discrimination on grounds of race.[27] The equivalence principle indeed demanded the application of the more generous national remedies available under these more *general* national actions.

In conclusion, the equivalence principle requires national courts to ask, 'whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics'.[28] This teleological comparability test might require the courts to look beyond the national procedural regime for a specific national or European right.

2. The Effectiveness Principle

From the very beginning, the European Court recognised the heightened tension between the (relative) procedural autonomy of the Member States and the principle of effectiveness. Although the equivalence principle simply required the *formal* extension of the *scope* of national remedies to equivalent European rights, the effectiveness principle appeared to ask national legal systems to provide for a *substantive* minimum *content* that would guarantee the enforcement of European rights in national courts. Thus, even where the equivalence principle would be of no assistance because no similar national remedy existed, the effectiveness principle could still require the strengthening of national remedies.

The power of the effectiveness principle to interfere with the principle of national procedural autonomy was therefore – from the start – much greater. Yet the European Court began to develop the principle from a minimal standard. National remedies would solely be found inefficient, where they 'made it *impossible* in practice to exercise the rights which the national courts are obliged to protect'.[29] This effectiveness standard has developed with time, and in various directions. For the sake of convenience, three historic standards may be

[26] *Ibid.*, para. 48. [27] *Ibid.*, para. 49.

[28] Case C-78/98, *Preston et al.* v. *Wolverhampton Healthcare NHS Trust and others* [2000] ECR I-3201, para. 57: 'the national court must consider whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics'.

[29] Case 33/76, *Rewe*, para. 5.

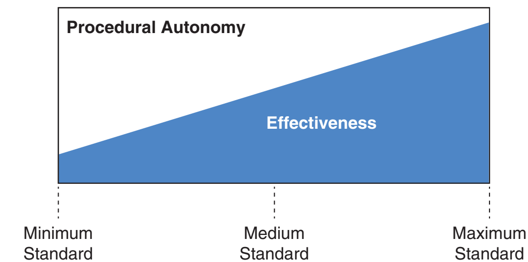

Figure 11.3 Standards of Effectiveness

distinguished. In addition to the minimum standard of practical impossibility, the Court has referred to the medium standard of an 'adequate' remedy,[30] and to the maximum standard guaranteeing the 'full effectiveness' of European law.[31] When and where do these three different standards apply? The Court's jurisprudence on this question has been disastrously unclear. The best way to analyse the cases is to identify general historical periods in addition to a variety of specific thematic lines.[32] This section indeed cannot do justice to the subtlety – or chaos – within this area of European law. We shall confine ourselves to outlining the three broad temporal periods in the general development of the effectiveness principle, and subsequently look inside one specific thematic line within the case law.

a. The Historical Evolution of the Effectiveness Standard

The academic literature on the effectiveness principle typically distinguishes between three – broadly defined – periods of evolution. A first period of *restraint* is replaced by a period of *intervention*, which is in turn replaced by a period of *balance*.[33] The three standards and their (inverse) relationship to the principle of national procedural autonomy can be seen in Figure 11.3.

aa. First Period: Judicial Restraint

In a first period, the European Court showed much restraint and respect towards the procedural autonomy of the Member States. The Court pursued a policy of judicial minimalism.[34] The standard for an 'effective remedy' was low and simply

[30] Case 14/83, *Von Colson*, para. 23.

[31] Case C-213/89, *The Queen* v. *Secretary of State for Transport, ex p. Factortame Ltd and others* [1990] ECR I-2433, para. 21.

[32] For illustrations of this – brilliant and necessary – approach, see Dougan, *National Remedies*, chs. 5–6; (n. 18 above); T. Tridimas, *The General Principles of EU Law* (Oxford University Press, 2006), ch. 9.

[33] A. Arnull, *The European Union and Its Court of Justice* (Oxford University Press, 2006), 268; Dougan, *National Remedies* (n. 18 above), 227; Tridimas, *General Principles* (n. 32 above), 420ff.

[34] A. Ward, *Judicial Review and the Rights of Private Parties in EC Law* (Oxford University Press, 2007), 87.

required that national judicial procedures must not make the enforcement of European rights (virtually) impossible.

This first period is exemplified by *Rewe*.[35] In that case, the plaintiff had applied for a refund of monies that had been charged in contravention of European law. The defendant accepted the illegality of the charges under European law, but counterclaimed that the limitation period for a refund, which existed under national law, had expired. The Court accepted that the existence of a *national* limitation period did not make the enforcement of *European* rights as such impossible and found for the defendant. The judgment was confirmed, in nearly identical terms, on the same day by a second case.[36] The Court's judicial minimalism was thereby premised on the hope of future legislative harmonisation by the Union.[37] And, with the latter not forthcoming,[38] the Court moved into a second phase in the evolution of the principle of effectiveness.

bb. Second Period: Judicial Intervention

In this second period, the Court developed a much more demanding standard of 'effectiveness'. In *Von Colson*,[39] two female job applicants for a warden position in an all-male prison had been rejected. The State prison service had indisputably discriminated against them on the grounds that they were women. Their European right to equal treatment had thus been violated, and the question arose how this violation could be remedied under national law. The remedy under German law exclusively allowed for damages, and these damages were furthermore restricted to the plaintiffs' travel expenses. Was this an effective remedy for the enforcement of their European rights? Or would European law require 'the employer in question to conclude a contract of employment with the candidate who was discriminated' against?[40]

The Court rejected this specific remedy.[41] For the enforcement of European law would 'not require any specific form of sanction for unlawful discrimination'.[42]

[35] Case 33/76, *Rewe*.

[36] Case 45/76, *Comet BV* v. *Produktschap voor Siergewassen*.

[37] Arnull, *European Union* (n. 33 above), 276 – referring to Case 130/79, *Express Dairy Foods Limited* v. *Intervention Board for Agricultural Produce* [1980] ECR 1887, para. 12: 'In the regrettable absence of [Union] provisions harmonising procedure and time-limits the Court finds this situation entails differences in treatment on a [European] scale. It is not for the Court to issue general rules of substance or procedural provisions which only the competent institutions may adopt.'

[38] For an exception to the rule, see Art. 6 of Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39/40. The provision stated: 'Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.'

[39] Case 14/83, *Von Colson*.

[40] This was the first (preliminary) question asked by the German labour law court (*ibid.*, para. 6).

[41] *Ibid.*, para. 19. [42] *Ibid.*, para. 23.

The Court nonetheless clarified that the effectiveness principle required that the national remedy 'be such as to guarantee real and effective judicial protection'.[43] The remedy would need to have 'a real deterrent effect on the employer', and in the context of a compensation claim this meant that the latter 'must in any event be *adequate* in relation to the damage sustained'.[44] Unsurprisingly, the German procedural rule that limited the compensation claim so dramatically did not satisfy this standard of effectiveness.[45]

Instead of a minimum standard, the Court here started to move to a standard that aspired *towards* the full effectiveness of European law. In *Dekker*,[46] the Court thus outlawed national procedural restrictions that 'weakened considerably'[47] the effectiveness of the European right to equal treatment; and in *Marshall II*,[48] it repeated its demand that where financial compensation was chosen to remedy a violation of European law, the compensatory damages 'must be *adequate*, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal *to be made good in full*'.[49]

The most famous intervention in the procedural autonomy of a Member State is however reserved to another English case: *Factortame*.[50] The facts of the case were as follows: the appellant company was incorporated under English law, but most of its shareholders were Spanish nationals. It had registered fishing vessels under the 1894 Merchant Shipping Act – a practice that allowed its Spanish shareholders to benefit from the fishing quota allocated to Great Britain under the Union's common fishing policy. This practice of 'quota hopping' was targeted by the 1988 Merchant Shipping Act. This Act aimed at stopping Britain's quota being 'plundered' by 'vessels flying the British flag but lacking any genuine link with the United Kingdom'.[51] The 1988 Act consequently limited the reregistration of all vessels to vessels that were 'British owned' and controlled from within the United Kingdom. But this nationality requirement violated the non-discrimination principle on which the European internal market is founded, and Factortame challenged the compatibility of the 1988 Act with European law. In order to protect its European rights in the meantime, it applied for interim relief, since it found that it would become insolvent if the national legislation were immediately applied.

The case went to the (then) House of Lords; and the House of Lords did find that the substantive conditions for granting interim relief were in place but famously held that:

[43] *Ibid*. [44] *Ibid*. [45] *Ibid*., para. 24.

[46] Case C-177/88, *Dekker* v. *Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941.

[47] *Ibid.*, para. 24.

[48] Case C-271/91, *Marshall* v. *Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367.

[49] *Ibid.*, para. 26 (emphasis added).

[50] Case C-213/89, *The Queen* v. *Secretary of State for Transport, ex p. Factortame Ltd and others* [1990] ECR I-2433.

[51] *Ibid.*, para. 4.

> [U]nder national law, the English courts had no power to grant interim relief in a case such as the one before it … [as] the grant of such relief was precluded by the old common-law rule that an interim injunction may not be granted against the Crown, that is to say against the government, in conjunction with the presumption that an Act of Parliament is in conformity with [European] law until such time as a decision on its compatibility with that law has been given.[52]

Unsure whether this common law rule itself violated the effectiveness principle under European law, the House of Lords referred the case as a preliminary reference to Luxembourg. The European Court answered as follows:

> [A]ny provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of [European] law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, [European] rules from having full force and effect are incompatible with those requirements, which are the very essence of [European] law. It must be added that the *full effectiveness* of [European] law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by [European] law from granting interim relief in order *to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under [European] law*. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.[53]

While short of creating a new remedy,[54] this came very close to demanding a maximum standard of effectiveness. Yet the Court soon withdrew from this highly interventionist stance and thereby entered into a third period in the evolution of the effectiveness principle.[55]

[52] *Ibid*., para. 13.

[53] *Ibid*., paras. 20–1 (emphasis added).

[54] A. G. Toth, 'Case Commentary' (1990) 27 *CML Rev.* 573 at 586: 'It follows that the judgment does not purport to lay down substantive conditions for the grant of interim protection, nor to define the measures that may be ordered. Still less does it require the national courts to devise interim relief where none exists. What it requires is that national courts should make use of any interim measure that is normally available under national law, in order to protect rights claimed under [European] law.'

[55] This section will *not* discuss the (in)famous *Emmott* judgment (see Case C-208/90, *Emmott* v. *Minister for Social Welfare and Attorney General* [1991] ECR I-4269), as the ruling should best be confined to the special context dealing with the nature of directives (*ibid*., para. 17: 'Whilst the laying down of reasonable time-limits which, if unobserved, bar proceedings, in principle satisfies the two conditions mentioned above [i.e. the equivalence and effectiveness principles], account must nevertheless be taken of the particular nature of directives'). Moreover, the judgment was particularly motivated by a desire for substantive justice that clouded the judgment's formal legal value. The judgment's peculiar and special character was indeed quickly realised by the Court (see Case C-410/92, *Johnson* v. *Chief Adjudication Officer* [1994] ECR I-5483, para. 26), which has, ever since, constructed it restrictively. On the – almost immediate – demise of *Emmott*, see M. Hoskins, 'Tilting the Balance: Supremacy and National Procedural Rules' (1996) 21 *EL Rev.* 365.

cc. Third Period: Judicial Balance

In this third period, the Court tried and – still – tries to find a balance between the minimum and the maximum standard of effectiveness.[56] The retreat from the second period of high intervention can be seen in *Steenhorst-Neerings*,[57] where the Court developed a distinction between national procedural rules whose effect was to totally *preclude* individuals from enforcing European rights and those national rules that merely *restrict* their remedies.[58]

In *Preston*,[59] the Court had again to deal with the 1970 Equal Pay Act whose s. 2(4) barred any claim that was not brought within a period of six months following cessation of employment. And, instead of concentrating on the 'full effectiveness' or 'adequacy' of the national remedy, the Court stated that '[s]uch a limitation period does not render impossible *or excessively difficult* the exercise of rights conferred by the [European] legal order and is not therefore liable to strike at the very essence of those rights'.[60] The Court here had recourse to a – stronger – alternative to the minimal impossibility standard: national procedures that would make the exercise of European rights 'excessively difficult' would fall foul of the principle of effectiveness.[61] This medium standard appeared to lie in between the minimum and the maximum standard.

When would this medium standard of effectiveness be violated? Instead of providing hard and fast rules, the Court has come to prefer a contextual test spelled out for the first time in *Peterbroeck*.[62] In order to discover whether a national procedural rule makes the enforcement of European rights 'excessively difficult', the Court analyses each case 'by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before

[56] F. G. Jacobs, 'Enforcing Community Rights and Obligations in National Courts: Striking the Balance', in A. Biondi and J. Lonbay (eds.), *Remedies for Breach of EC Law* (Wiley, 1996). See also Dougan, *National Remedies* (n. 18 above), 29: 'There has been a definite retreat back towards the orthodox presumption of national autonomy in the provision of judicial protection. But the contemporary principle of effectiveness surely remains more intrusive than the case law of the 1970s and early 1980s.'

[57] Case C-338/91, *Steenhorst-Neerings* v. *Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1993] ECR I-5475.

[58] On the distinction, see Ward, *Judicial Review* (n. 34 above), 131. The distinction was elaborated in Case C-31/90, *Johnson* v. *Chief Adjudication Officer* [1991] ECR I-3723.

[59] Case C-78/98, *Preston et al*. v. *Wolverhampton Healthcare NHS Trust and others* [2000] ECR I-3201.

[60] *Ibid*., para. 34 (emphasis added).

[61] For a recent confirmation of this 'excessively difficult' standard, see Case C-61/14, *Orizzonte Salute – Studio Infermieristico Associato*, para. 46; Case C-377/14, *Radlinger & Radlingerová* v. *Finway*, EU:C:2016:283, para. 50.

[62] Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS* v. *Belgian State* [1995] ECR I-4599.

the various national instances'.[63] It would thereby take into account 'the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure'.[64] The results of this contextual test will be hard to predict as the Court emphasises the case-by-case nature of its analysis. Instead of hard rules, the Court's test is here based on a balancing act between different procedural interests – not dissimilar to a proportionality analysis.

May this balanced approach sometimes require national courts to create 'new remedies' for the enforcement of European rights? The obligation to create new remedies had been expressly rejected in the first historical phase of the effectiveness principle.[65] However, the Court appears to have confirmed this possibility within its third historical phase.

In *Unibet*,[66] the plaintiff sought a declaration by the Swedish courts that Swedish legislation violated the EU Treaties' free movement provisions. However, there existed no Swedish court procedure that allowed for an *abstract* review of national legislation in light of European law. An individual who wished to challenge a national rule would have to break national law first and then challenge it in national proceedings brought against him. Did the non-existence of a freestanding European review procedure violate the principle that there must be an effective remedy in national law?[67]

Synthesising the two previous periods of its case law, the Court emphasised that the Treaties were 'not intended to create new remedies in the national courts to ensure the observance of [European] law other than those already laid down by national law', *unless* 'it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under [European] law'.[68] Using its *Peterbroeck* test,[69] the Court found that there existed various indirect ways that did not make it 'excessively difficult' to challenge the compatibility of Swedish legislation with European law.[70] The request for a freestanding action was consequently denied. Yet, the Court had expressly accepted – for the first time – that the creation of new national remedies might exceptionally be required by the effectiveness principle.

Has the Lisbon Treaty changed the balance between the principle of national procedural autonomy and the effectiveness principle once more? The argument

[63] *Ibid*., para. 14.
[64] *Ibid*. For a confirmation of this contextual test, see Case C-2/08, *Fallimento Olimpiclub*, EU:C:2009:506, esp. para. 27; Case C-377/14, *Radlinger & Radlingerová* v. *Finway*, para. 50.
[65] Case 158/80, *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen* v. *Hauptzollamt Kiel (Butter-Cruises)* [1981] ECR 1805.
[66] Case C-432/05, *Unibet* v. *Justitiekanslern* [2007] ECR I-2271. But see also Case C-253/00, *Muñoz & Superior Fruiticola* v. *Frumar & Redbridge Produce Marketing* [2002] ECR I-7289.
[67] This was the first preliminary question in Case C-432/05, *Unibet*, para. 36.
[68] *Ibid*., paras. 40 and 41 (with reference to Case 158/80, *Rewe (Butter-Cruises)*).
[69] Case 432/05, *Unibet*, para. 54 (with reference to Case C-312/93, *Peterbroeck*, para. 14).
[70] Case 432/05, *Unibet*, para. 64.

could be made in light of the newly introduced Article 19(1) TEU and its insistence that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. However, the Court has recently confirmed the *Unibet* status quo.[71]

Constitutional continuity has also been confirmed with regard to the – after 2009 – binding EU Charter of Fundamental Rights. Although Article 47 EU Charter now expressly states that '[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal', this right already existed prior to the Lisbon Treaty. And, while national courts are indeed bound by the provision when enforcing Union law,[72] the fundamental right to an effective remedy will only set an absolute minimum floor to national procedural systems.[73]

b. Procedural Limits to the Invocability of European Law

Having looked at the general evolution of the effectiveness standard in the previous section, this section will concentrate on a special thematic line within the latest historical period of the principle. This jurisprudential line concerns national procedural regimes governing the invocation of European law in national proceedings.

In many national legal orders, civil procedures are based on the principle that private parties are free to determine the content of their case.[74] The rationale behind this principle is private party autonomy. Unless a legal rule is seen as mandatorily applicable on grounds of public policy, a court may only apply those legal rules privately invoked. But even in administrative proceedings, a private party might sometimes be required to invoke its rights at the correct judicial stage. And where a party has failed to invoke a favourable right at first instance, but discovers its existence on appeal, legal certainty might prevent it from invoking it subsequently.

How have these principles been applied to the invocation of European law in national proceedings?[75] Will the effectiveness principle require national courts

[71] Case C-583/11 P, *Inuit* v. *Parliament and Council*, EU:C:2013:625, paras. 103–4.
[72] We shall see below that while EU fundamental rights are principally addressed to the Union institutions, national courts are also bound when implementing EU law. On this point, see Chapter 12, section 4.
[73] See in particular Case C-279/09, *DEB* v. *Germany* [2010] ECR I-13849. For an excellent analysis of the (non-)relationship and differences between the principle of effectiveness and the principle of judicial protection in the EU Charter, see: J. Krommendijk, 'Is There Light on the Horizon? The Distinction between "*Rewe* effectiveness" and the Principle of Effective Judicial Protection in Article 47 of the Charter after *Orizzonte*' (2016) 53 *CML Rev.* 1395, esp. 1404ff.
[74] On the distinction between 'adversarial' and 'inquisitorial' procedural systems, see M. Glendon et al., *Comparative Legal Traditions* (Thomson, 2007).
[75] This *procedural* problem is distinct from the *structural* problem whether national courts might be prevented altogether from applying European law. For this structural problem within Europe's judicial federalism, see Chapter 10, section 4(b/aa).

to apply European law as a matter of public policy? Or has the European legal order followed a balanced approach according to which the national procedures apply unless they make the enforcement of European law excessively difficult?

These complex procedural questions were tackled in *Peterbroeck*.[76] The plaintiff claimed that a Belgian law violated its free movement rights. Unfortunately, the plea had not been raised in the first-instance proceedings; nor had it been invoked in the possible time limit prior to the appeal proceedings. Belgian procedural law consequently prevented the appeal court from considering the European law question; yet, thinking that this procedural limitation might itself violate European law, the national court referred a preliminary question to the Court of Justice.

In its answer, the European Court developed its contextual test to discover whether the application of national procedures rendered the application of European law 'excessively difficult'.[77] And the Court held that this was the case in the present context. Finding that the first-instance court had been unable to make a preliminary reference as it was not a 'court or tribunal' in the sense of Article 267 TFEU,[78] the time limit for raising new pleas prior to appeals was considered excessively short. The obligation not to raise points of European law of its own motion thus did 'not appear to be reasonably justifiable by principles such as the requirement of legal certainty or the proper conduct of procedure'.[79]

But did this mean that national courts were positively required, as a matter of general principle, to invoke European law *ex officio?* In a judgment delivered on the very same day, the Court answered this question in the negative. In *Van Schijndel*,[80] the Court added an important caveat to the effectiveness principle. The Court held:

> [T]he domestic law principle that in civil proceedings a court must or may raise points of its own motion is limited by its obligation to keep to the subject-matter of the dispute and to base its decision on the facts put before it. That limitation is justified by the principle that, in a civil suit, it is for the parties to take the initiative, the court being able to act of its own motion only in exceptional cases where the public interest requires its intervention. That principle reflects conceptions prevailing in most of the Member States as to the relations between the State and the individual; it safeguards the rights of the defence; and it ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in the examination of new pleas.[81]

[76] Case C-312/93, *Peterbroeck*.
[77] On this point, see *ibid*.
[78] *Ibid*., para. 17. [79] *Ibid*., para. 20.
[80] Joined Cases C-430/93 and C-431/93, *Van Schijndel and Johannes Nicolaas Cornelis van Veen* v. *Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705.
[81] *Ibid*., paras. 20–1. See also Case C-126/97, *Eco Swiss China Time Ltd* v. *Benetton International NV* [1999] ECR I-3055, para. 46: 'Moreover, domestic procedural rules which, upon the expiry of that period, restrict the possibility of applying for annulment of a subsequent arbitration award proceeding upon an interim arbitration award which is in the nature of a final award, because it has become res judicata, are justified by the basic principles of the national judicial system, such as the principle of legal certainty and acceptance of res judicata, which is an expression of that principle.'

This suggests that while the equivalence principle may oblige national courts to raise European law of their own motion,[82] the effectiveness principle hardly ever will. The Court will here only challenge national procedural rules that make the enforcement of European rights 'virtually impossible or excessively difficult'.[83]

This medium standard of effectiveness was subsequently confirmed and refined.[84] And we find a good clarification and classification of the case law within this jurisprudential line in *Van der Weerd*.[85] The Court here expressly distinguished *Peterbroeck* as a special case 'by reasons of circumstances peculiar to the dispute which led to the applicant in the main proceedings being deprived of the opportunity to rely effectively on the incompatibility of a domestic provision with [European] law'.[86] But more importantly: the Court identified two key factors in determining when it considers the effectiveness principle to demand the *ex officio* application of European law. First, it emphasised that it would be hesitant to interfere with the procedural autonomy of the national court, where the parties had 'a genuine opportunity to raise a plea based on [Union] law'.[87] National courts will therefore generally not be asked to forsake their passive role in private law actions. However, second, the question whether an *ex officio* application of EU law was constitutionally required was dependent on the importance of the respective European law at issue.

This second factor explains why the Court has been much more demanding in cases involving consumer protection.[88] For the Court treats this area of

[82] Joined Cases C-430/93 and C-431/93, *Van Schijndel*, para. 13: 'Where, by virtue of domestic law, courts or tribunals must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding [European] rules are concerned.'
[83] Case C-40/08, *Asturcom Telecomunicaciones* v. *Rodríguez Nogueira* [2009] ECR I-9579, para. 46.
[84] See Case C-126/97, *Eco Swiss China Time*; Case C-240/98, *Océano Grupo Editorial* v. *Rocío Murciano Quintero* [2000] ECR I-4941; Joined Cases C-397/98 and C-410/98, *Metallgesellschaft et al*. v. *Commissioners of Inland Revenue et al*. [2001] ECR I-1727; Case C-2/06, *Kempter* v. *Hauptzollamt Hamburg-Jonas* [2008] ECR I-411.
[85] Case C-222/05, *Van der Weerd et al*. v. *Minister van Landbouw, Natuur en Voedselkwaliteit* [2007] ECR I-4233.
[86] *Ibid*., para. 40.
[87] *Ibid*., para. 41.
[88] See Case C-243/08, *Pannon* v. *Erzsébet Sustikné Győrfi* [2009] ECR I-4713. The judgment was subsequently confirmed in Case C-618/10, *Banco Espanol de Crédito* EU:C:2012:349. In Case C-377/14, *Radlinger & Radlingerová* v. *Finway*, the Court has even referred to the obligation to assess of its own motion EU consumer law as 'settled case-law of the Court' and held that 'the imbalance which exists between the consumer and the seller or supplier may be corrected by the court hearing such disputes only by positive action unconnected with the actual parties to the contract' (*ibid*., paras. 52–3). The exact constitutional principles within this area are not too clear however. For an overview of the relevant case law, see M. Ebers, 'From *Océano* to *Asturcom:* Mandatory Consumer Law, *ex officio* Application

European law as an expression of 'European public policy'. The same approach seems to apply to EU competition law, which the Court considers 'a matter of public policy which must be automatically applied by national courts'.[89]

3. The Liability Principle

The original European Treaties appeared to exclusively accept national remedies when it came to the decentralised enforcement of European law. For the EU Treaties were apparently 'not intended to create new remedies in the national courts to ensure the observance of [Union] law other than those already laid down by national law'.[90] This apparent competence limit was to protect the procedural autonomy of the Member States. For even if the Court had pushed for a degree of (judicial) harmonisation in the decentralised enforcement of European law via the principles of equivalence and effectiveness, it would be *national* remedies whose scope or substance was extended.

But what would happen if no national remedy existed at all? Would the non-existence of such a national remedy not be an absolute barrier to the enforcement of a European right? Theoretically, this should indeed be the end of the story; yet in what was perceived as a dramatic turn of events, the European Court renounced its earlier position and proclaimed a *European* remedy for breaches of European law in *Francovich*.[91] The Court now insisted that in certain situations individuals must always be able to sue, where the State was liable for losses caused by its violation of European law.[92]

What are the conditions for State liability in the European Union? Will every breach trigger the liability principle? We shall look at these questions first, before analysing whether the principle only applies against the State or also captures private party actions. The Court indeed appears to have extended the liability principle from violations of European law by public authorities to breaches of European law by private parties.

a. *State Liability: The* Francovich *Doctrine*

Under the principle of effectiveness, national remedies must not make the enforcement of European law excessively difficult. But this did not mean that *States* would have to compensate all damage resulting from their breaches of

of European Union Law and *res judicata*' (2010) *European Review of Private Law* 823; H.-W. Micklitz and N. Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Terms Directive (UTD)' (2014) 51 *CML Rev.* 771 at 780ff.

[89] Case C-295/04, *Manfredi* v. *Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619, para. 31.

[90] Case 158/80, *Rewe (Butter-Cruises)*. We saw above that the Court appears to have recently changed its view with regard to the principle of effectiveness.

[91] Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci et al.* v. *Italy* [1991] ECR I-5357.

[92] This European remedy contrasts favourably with the absence of such a remedy in the US legal order. In the United States, the doctrine of 'sovereign immunity' offers the Member States a shield against liability actions for damages resulting from a violation of Union law.

European law. The essential question for a long time therefore was 'whether [European] law requires the national courts to acknowledge a right to damages vested in the victims of the violation of [European] law and to order public authorities, found to have infringed [European] law, to pay compensation to such persons, and if so, in which circumstances and according to which criteria'.[93]

For a long time, the Court had been ambivalent towards this question. While in one case it had positively found that a State's violation of European law required it '*to make reparation* for any unlawful consequences which may have ensued',[94] in another case it held that if 'damage has been caused through an infringement of [European] law the State is liable to the injured party of the consequences *in the context of the provisions of national law on the liability of the State*'.[95] Did this mean that the liability of the State depended on the existence of such a remedy in *national* law?[96] Or, did the Court have an independent *European* remedy in mind? This question was long undecided – even if for a clairvoyant observer there was 'little doubt that one future day the European Court will be asked to say, straightforwardly, whether [European] law requires a remedy in damages to be made available in the national courts'.[97]

This day came on 8 January 1990. On that day, the Court received a series of preliminary questions in *Francovich and others* v. *Italy*.[98] The facts of the case are memorably sad.[99] Italy had flagrantly flouted its obligations under the EU Treaties by failing to implement a European directive designed to protect employees in the event of their employer's insolvency.[100] The directive had required Member States to pass national legislation guaranteeing the payment of outstanding wages. Francovich had been employed by an Italian company, but had hardly received any wages. Having brought proceedings against his employer, the latter had gone insolvent. For that reason he brought a separate action against the Italian State to cover his losses. In the course of these second proceedings, the national court asked the European Court whether the State itself would be obliged to cover the losses of the employees. The European Court found that the directive had left the Member States a 'broad discretion with regard to the organisation, operation and

[93] A. Barav, 'Damages in the Domestic Courts for Breach of Community Law by National Public Authorities', in H. G. Schermers et al. (eds.), *Non-contractual Liability of the European Communities* (Nijhoff, 1988), 149.

[94] Case 6/60, *Humblet* v. *Belgium* [1960] ECR (English Special Edition) 559 at 569 (emphasis added).

[95] Case 60/75, *Russo* v. *Azienda di Stato per gli interventi sul mercato agricolo* [1976] ECR 45, para. 9 (emphasis added).

[96] For an (outdated) overview of the damages provisions in national law, see N. Green and A. Barav, 'Damages in the National Courts for Breach of Community Law' (1986) 6 *YEL* 55.

[97] Barav, 'Damages in the Domestic Courts' (n. 93 above), 165.

[98] Joined Cases C-6/90 and C-9/90, *Francovich*.

[99] Opinion of Advocate General Mischo (*ibid.*, para. 1): 'Rarely has the Court been called upon to decide a case in which the adverse consequences for the individuals concerned of failure to implement a directive were as shocking as in the case now before us.'

[100] The Court had already expressly condemned this failure in Case 22/87, *Commission* v. *Italian Republic* [1989] ECR 143.

financing of the guarantee institutions', and it therefore lacked direct effect.[101] It followed that 'the persons concerned cannot enforce those rights against the State before the national courts where no implementing measures are adopted within the prescribed period'.[102]

But this was not the end of the story! The Court – unhappy with the negative result flowing from the lack of direct effect – continued:

> [T]he principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of [European] law for which the State can be held responsible is inherent in the system of the Treaty. A further basis for the obligation of Member States to make good such loss and damage is to be found in Article [4(3)] of the Treaty [on European Union], under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under [European] law. Among these is the obligation to nullify the unlawful consequences of a breach of [European] law. It follows from all the foregoing that it is a principle of [European] law that the Member States are obliged to make good loss and damage caused to individuals by breaches of [European] law for which they can be held responsible.[103]

The European Court here took a qualitative leap in the context of remedies. Up to this point, it could still be argued that the principle of national procedural autonomy precluded the creation of new – European – remedies, as the principles of equivalence and effectiveness solely required the extension of *national* remedies to violations of European law. With *Francovich* the Court clarified that the right to reparation for such violations was 'a right founded directly on [European] law'.[104] The action for State liability was thus a *European* remedy that had to be made available in the national courts.[105]

How did the Court justify this 'revolutionary' result? It had recourse to the usual constitutional suspects: the special nature of the European Treaties and the general duty under Article 4(3) TEU. A more sophisticated justification was added by a later judgment. In *Brasserie du Pêcheur*,[106] the Court thus found:

> Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of [European] law by Member States, it is for the Court, in pursuance of the task conferred on it by Article [19] of the [EU] Treaty of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the [Union] legal

[101] Joined Cases C-6/90 and C-9/90, *Francovich*, para. 25.
[102] *Ibid.*, para. 27. [103] *Ibid.*, paras. 33–7. [104] *Ibid.*, para. 41.
[105] On the application of this new principle in the United Kingdom, see J. Convery, 'State Liability in the United Kingdom after *Brasserie du Pêcheur*' (1997) 34 *CML Rev.* 603.
[106] Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA* v. *Bundesrepublik Deutschland and the Queen* v. *Secretary of State for Transport, ex p. Factortame Ltd and others* [1996] ECR I-1029.

> system and, where necessary, general principles common to the legal systems of the Member States. Indeed, it is to the general principles common to the laws of the Member States that the second paragraph of Article [340] of the [FEU] Treaty refers as the basis of the non-contractual liability of the [Union] for damage caused by its institutions or by its servants in the performance of their duties. The principle of the non-contractual liability of the [Union] expressly laid down in Article [340] of the [FEU] Treaty is simply an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused. That provision also reflects the obligation on public authorities to make good damage caused in the performance of their duties.[107]

The principle of State liability was thus rooted in the constitutional traditions common to the Member States and was equally recognised in the principle of *Union* liability for breaches of European law.[108] There was consequently a parallel between *State* liability and *Union* liability for tortious acts of public authorities; and this parallelism would have a decisive effect on the conditions for State liability for breaches of European law.

aa. The Three Conditions for State Liability

Having created the liability principle for State actions, the *Francovich* Court nonetheless made the principle dependent on the fulfilment of three conditions:

> The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties. Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on [European] law.[109]

The original liability test was thus as follows: European law must have been intended to grant individual rights, and these rights would – despite their potential lack of direct effect – have to be identifiable.[110] If this was the case, and

[107] *Ibid.*, paras. 27–9.
[108] On this point, see Chapter 10, section 2.
[109] Joined Cases C-6/90 and C-9/90, *Francovich*, paras. 40–1.
[110] For an analysis of this criterion, see Dougan, *National Remedies* (n. 18 above), 238ff. For a case in which the European Court found that a directive did not grant rights, see Case C-222/02, *Paul et al.* v. *Germany* [2004] ECR I-9425, para. 51: 'Under those conditions, and for the same reasons as those underlying the answers given above, the directives cannot be regarded as conferring on individuals, in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities, rights capable of giving rise to liability on the part of the State on the basis of [European] law.'

if European law was breached by a Member State not guaranteeing these rights, any loss that was caused by that breach could be reclaimed by the individual.[111] On its face, this test appeared to be complete and therefore one of *strict* liability: any breach of an identifiable European right would lead to State liability. But the Court subsequently clarified that this was *not* the case. The *Francovich* test was confined to the specific context of a flagrant non-implementation of a European directive.

Drawing on its jurisprudence on *Union* liability, the Court indeed introduced a much more restrictive principle of State liability in *Brasserie du Pêcheur*.[112] For the Court here clarified that State liability was to be confined to 'sufficiently serious' breaches. To cover up the fact that it had implicitly added a 'fourth' condition to its *Francovich* test, the Court replaced the new condition with the second criterion of its 'old' test. The new liability test could thus continue to insist on three – necessary and sufficient – conditions. However, it now read as follows:

> [European] law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.[113]

The Court justified its limitation of State liability to 'sufficiently serious' breaches by reference to the wide discretion that Member States might enjoy, especially when exercising legislative powers. The 'limited liability' of the legislature is indeed a common constitutional tradition of the Member States and equally applies to the Union legislature. Where legislative functions are concerned, Member States 'must not be hindered by the prospect of actions for damages'.[114] The special democratic legitimacy attached to parliamentary legislation here provides an argument against public liability for breaches of private rights, 'unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers'.[115] And in analysing whether a breach was sufficiently serious in the sense of a 'manifest … and grave … disregard …',

[111] For an analysis of this criterion, see Tridimas, *General Principles* (n. 32 above), 529–33. See particularly: Case C-319/96, *Brinkmann Tabakfabriken GmbH* v. *Skatteministeriet* [1998] ECR I-5255.

[112] Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, para. 42: 'The protection of the rights which individuals derive from [European] law cannot vary depending on whether a national authority or a [Union] authority is responsible for the damage.'

[113] *Ibid*., para. 51.

[114] *Ibid*., para. 45.

[115] *Ibid*. See also Case C-392/93, *The Queen* v. *HM Treasury, ex p. British Telecommunications* [1996] ECR I-10631, para. 42.

the Court would balance a number of diverse factors,[116] such as the degree of discretion enjoyed by the Member States as well as the clarity of the Union norm breached.

Unfortunately, there are very few hard and fast rules to determine when a breach is sufficiently serious. Indeed, the second criterion of the *Brasserie* test has been subject to much uncertainty. Would the manifest and grave disregard test only apply to the legislative function? The Court appears to have answered this question in *Hedley Lomas*,[117] when dealing with the failure of the national *executive* to correctly apply European law. The Court here found:

> [W]here, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of [European] law may be sufficient to establish the existence of a sufficiently serious breach.[118]

This confirmed the potential liability of the executive branch and clarified that the less the discretion enjoyed by the latter, the more likely would be the liability of a State.[119] The Court here indeed seemed to acknowledge two alternatives within the second *Brasserie* condition – depending whether the State violated European law via its legislative or executive branch. The existence of these two alternatives would be confirmed in *Larsy*,[120] where the Court found:

> [A] breach of [European] law is sufficiently serious where a Member State, in the exercise of its legislative powers, has manifestly and gravely disregarded the limits on its powers and, secondly, that where, at the time when it committed the infringement, the Member State in question had only considerably reduced, or even no, discretion, the mere infringement of [European] law may be sufficient to establish the existence of a sufficiently serious breach.[121]

[116] Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, para. 56: 'The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or [Union] authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a [Union] institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to [European] law.'

[117] Case C-5/94, *The Queen* v. *Ministry of Agriculture, Fisheries and Food, ex p. Hedley Lomas* [1996] ECR I-2553.

[118] *Ibid*., para. 28.

[119] Case C-424/97, *Haim* v. *Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123, para. 38. See also Case C-470/03, *A. G. M.-COS.MET et al*. v. *Suomen Valtio et al*. [2007] ECR I-2749.

[120] Case C-118/00, *Larsy* v. *Institut national d'assurances sociales pour travailleurs indépendants* [2001] ECR I-5063.

[121] *Ibid*., para. 38.

With regard to executive breaches, the threshold for establishing state liability is thus much lower than the liability threshold for legislative actions. While the incorrect *application* of a clear European norm by the national executive will incur strict liability, the incorrect *implementation* of a directive by the national legislature may not.[122] However, the European Court strictly distinguishes the *incorrect* implementation of a directive from its *non*-implementation. The use of a stricter liability regime for legislative non-action makes much sense, for the failure of the State cannot be excused by reference to the *exercise* of legislative discretion. The Court has consequently held that the non-implementation of a directive could *per se* constitute a sufficiently serious breach.[123]

What about the third branch of government? Was the extension of State liability to national courts 'unthinkable'?[124] And, if it were not, would the Court extend its ordinary constitutional principles to judicial breaches of European law? The unthinkable thought deserves a special section.

bb. State Liability for Judicial Breaches of European Law

Common-sense intuition identifies the 'State' with its legislative and executive branches. The 'State' generally acts through its Parliament and its government or administration. Yet there exists of course a third power within the State: the judiciary. The benign neglect of the 'least dangerous branch' stems from two reductionist perceptions. First, the judiciary is reduced to a passive organ that merely represents the 'mouth of the law'.[125] Second, its independence from the legislature and executive is mistaken as an independence from the State. Both perceptions are of course misleading: for in adjudicating disputes between private parties and in controlling the other State branches, the judiciary exercises *State* functions. And, like the national executive, the national judiciary may breach European law by misapplying it in the national legal order. This misapplication could – theoretically – constitute a violation that triggers State liability under EU law.

[122] Joined Cases C-283 and C-291–2/94, *Denkavit et al.* v. *Bundesamt für Finanzen* [1996] ECR I-4845.

[123] Case C-178/94, *Dillenkofer* v. *Germany* [1996] ECR I-4845, para. 29: 'failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes per se a serious breach of [European] law and consequently gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State's obligation and the loss and damage suffered'. Interestingly, as Tridimas points out, this may not necessarily be the case as a Member State may believe that its existing laws already fulfil the requirements of a directive (*General Principles* (n. 32 above), 506).

[124] H. Toner, 'Thinking the Unthinkable? State Liability for Judicial Acts after *Factortame* (III)' (1997) 17 YEL 165.

[125] Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* (translated and edited by T. Nugent, and revised by J. Prichard) (Bell, 1914); available at: www.constitution.org/cm/sol.htm), Book XI, ch. 6.

This theoretical possibility had implicitly been recognised by the *Brasserie* Court.[126] And the practical possibility was confirmed in *Köbler*.[127] Austrian legislation had granted a special length-of-service increment to professors having taught for 15 years at Austrian universities, without taking into account any service spent at universities of other Member States. The plaintiff – a university professor having taught abroad – brought an action before the Austrian Supreme Administrative Court, claiming that his free movement rights had been violated. Despite being a court 'against whose decision there is no judicial remedy under national law', the Supreme Administrative Court did not request a preliminary ruling from the Court of Justice as it – wrongly – believed the answer to the preliminary question to be clear.[128] As a consequence, it – wrongly – decided that the Austrian norm did not violate the plaintiff's directly effective free movement rights.

Not being able to appeal against the final decision, Köbler brought a new action for damages in a (lower) civil court. In the course of these civil proceedings, the national court asked the European Court of Justice whether the principle of State liability for breaches of European law extended to (wrong) judicial decisions. And the positive response was as follows:

> In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from [European] rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of [European] law attributable to a decision of a court of a Member State adjudicating at last instance. It must be stressed, in that context, that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by [European] law. Since an infringement of those rights by a final decision of such a court cannot thereafter normally be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights.[129]

The liability for damages would thereby not undermine the independence of the judiciary. For the principle of State liability 'concerns not the personal

[126] The Court had here clarified that the principle of State liability 'holds good for any case in which a Member State breaches [European] law, *whatever the organ of the State* whose act or omission was responsible for the breach' (Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, para. 32, emphasis added).

[127] Case C-224/01, *Köbler* v. *Austria* [2003] ECR I-10239. The facts of the case were slightly more complex than presented here. For a fuller discussion of the case, see M. Breuer, 'State Liability for Judicial Wrongs and Community Law: The Case of *Gerhard Köbler* v. *Austria*' (2004) 29 *EL Rev.* 243.

[128] On the obligation to refer preliminary questions for courts of last resort under Art. 267(3) TFEU and the *acte clair* doctrine, see Chapter 10, section 4(c).

[129] Case C-224/01, *Köbler*, paras. 33–4.

liability of the judge but that of the State'.[130] Nor would the idea of State liability for wrong judicial decisions call into question the constitutional principle of *res judicata*. After all, the *Francovich* remedy would not revise the judicial decision of a court, but provide damages for the wrong – final – judgment. The principle of State liability meant 'reparation, but not revision of the judicial decision which was responsible for the damage'.[131] But what if revision through an appeal was still possible in the national legal order? Will State liability for judicial acts of lower courts provide a complementary remedy? In line with the general character of State liability as a remedy of last resort,[132] this should be denied. The *Köbler* Court indeed appeared to confine the liability principle to national courts against whose decision there was no appeal.[133]

Having thus confirmed the possibility of *Francovich* liability for final courts,[134] would the substantive conditions for this liability differ from the ordinary criteria established in *Brasserie du Pêcheur?* The Court found that this was not the case: State liability for judicial decisions would be 'governed by the same conditions'.[135] What did this mean for the second prong of the *Brasserie* test requiring a 'sufficiently serious' breach of European law? For the Court this meant that State liability for a judicial decision would only arise 'in the *exceptional* case where the court has manifestly infringed the applicable law'.[136] And this depended on, *inter alia*, 'the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable'.[137] The Court thus aligned its test for judicial acts with the test for (discretionary) legislative acts. For unlike (non-discretionary) executive acts, liability for judicial behaviour could not simply be established by a misapplication of European law. Liability was limited to exceptional circumstances, where a *manifest* infringement of European law had occurred; and this was in particular the case, where the national court had disregarded the settled jurisprudence of the ECJ.[138]

130 *Ibid.*, para. 42. 131 *Ibid.*, para. 39.

132 On this point, see Conclusion below.

133 Case C-224/01, *Köbler*, para. 53 (emphasis added): 'State liability for an infringement of [European] law by a decision of a national court adjudicating *at last instance* can be incurred only in the exceptional case where the court has manifestly infringed the applicable law.'

134 *Köbler* itself was subsequently confirmed in Case C-173/03, *Traghetti del Mediterraneo* v. *Italy* [2006] ECR I-5177.

135 Case C-224/01, *Köbler*, para. 52. And the Court clarified in Case C-173/03, *Traghetti del Mediterraneo* that 'under no circumstances may such criteria impose requirements stricter than that of a manifest infringement of the applicable law, as set out in paragraphs 53 to 56 of the *Köbler* judgment' (*ibid.*, para. 44), and that European law thus 'precludes national legislation which limits such liability solely to cases of intentional fault' (*ibid.*, para. 46). For a discussion of this decision, see B. Beutler, 'State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle?' (2009) 46 *CML Rev.* 773.

136 Case C-224/01, *Köbler*, para. 53.

137 *Ibid.*, para. 55. 138 *Ibid.*, para. 56.

In the present case, these conditions were not met. For although the Supreme Administrative Court had wrongly interpreted European law, its incorrect application of the Treaty was not 'manifest in nature' and thus did not constitute a sufficiently serious breach of European law.[139]

b. Private Liability: The Courage Doctrine

The idea of 'State liability' applies – it almost goes without saying – where the *State* is liable for a breach of European law. This *vertical* dimension of the liability principle has long been established, but what about the principle's *horizontal* dimension? While the principles of equivalence and effectiveness may require that breaches of European law by private parties be adequately compensated under *national* remedial law, will there be a *European* remedy according to which individuals are liable to pay damages for the losses suffered by other private parties?[140] From the very beginning, the Union legal order envisaged that European law could directly impose obligations on individuals.[141] But did this imply that a failure to fulfil these obligations could trigger the secondary obligation to make good the damage suffered by others?

The Court has given an ambivalent answer to this question in *Courage* v. *Crehan*.[142] The case concerned European competition law, which directly imposes obligations on private parties not to conclude anticompetitive agreements under Article 101 TFEU.[143] The plaintiff had brought an action against a public house tenant for the recovery of unpaid deliveries of beer. The tenant attacked the underlying beer-supply agreement by arguing that it was void as an anticompetitive restriction, and counterclaimed damages that resulted from the illegal agreement. However, under English law a party to an illegal agreement was not entitled to claim damages; and so the Court of Appeal raised the question whether this absolute bar to compensation itself violated European law. The European Court considered the issue as follows:

139 *Ibid.*, paras. 120–4. For a similar result, see more recently Case C-168/15, *Tomášová* v. *Slovenská republika – Ministerstvo spravodlivosti SR*, EU:C:2016:602.

140 In favour of this proposition, see Opinion of Advocate General van Gerven in Case C-128/92, *H. J. Banks & Co. Ltd* v. *British Coal Corporation* [1994] ECR I-1209, paras. 40–1: '[T]he question arises whether the value of the *Francovich* judgment as a precedent extends to action by an individual (or undertaking) against another individual (or undertaking) for damages in respect of breach by the latter of a Treaty provision which also has direct effect in relations between individuals … In my view, that question must be answered in the affirmative[.]'

141 On this point, see Chapter 3, Introduction.

142 Case C-453/99, *Courage* v. *Crehan* [2001] ECR I-6297.

143 Art. 101(1) TFEU states: 'The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market[.]'

> The full effectiveness of Article [101] of the [FEU] Treaty and, in particular, the practical effect of the prohibition laid down in Article [101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the [European] competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the [Union]. There should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules.[144]

The Court here insisted on damages for losses suffered by a breach of European competition law by a private party. But was this a *national* or a *European* remedy? The original ambivalence surrounding the principle of State liability now embraced the principle of private liability.[145]

Did *Courage* represent a horizontal extension of the liability principle? On a minimal reading, the ruling could be regarded as a simple application of the principle of effectiveness.[146] After all, the last sentence of the above passage seemed to outlaw a restriction to a *national* remedy. And the Court did not place its reasoning inside the *Brasserie* test. On a maximal reading, by contrast, *Courage* could be seen as a new constitutional doctrine that establishes a European remedy against private parties violating European law.[147] The constitutional language and spirit of the ruling indeed pointed towards a new and independent source of liability.[148] And the Court did not place its reasoning into the analytical framework governing the effectiveness principle.

[144] Case C-453/99, *Courage*, paras. 26–7.

[145] For an early expression of this ambivalence, see O. Odudu and J. Edelman, 'Compensatory Damages for Breach of Article 81' (2002) 27 *EL Rev.* 327 at 336: 'Though, on its face, *Courage* does not suggest that a new remedy should be created to protect [European] rights, simply that existing national remedies should not be denied, *Courage* can be read as supporting the idea that compensatory damages must generally be provided for breach of Article [101], and must be available to all those who have suffered from the breach.'

[146] Dougan, *National Remedies* (n. 18 above), 379 (pointing to the absolute bar on one party seeking compensation).

[147] N. Reich, "The "Courage" Doctrine: Encouraging or Discouraging Compensation for Antitrust Injuries?' (2005) 42 *CML Rev.* 35 at 38; A. Komninos, 'Civil Antitrust Remedies between Community and National Law', in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Law* (Hart, 2009), 363 at 383: 'The enunciation of a [European] right in damages and, by implication, of a principle of civil liability of individuals for breaches of [European] law, is a logical consequence of the Court's abundant case law on state liability, and reflects a more general principle of [European] law that, everyone is bound to make good loss or damage arising as a result of his conduct in breach of a legal duty.'

[148] Case C-453/99, *Courage*, para. 19.

If we accept the wider reading of *Courage*, what conditions should the Court apply to private party violations of European law? If *Courage* was the private *Francovich*, then *Manfredi* is the private *Brasserie*. In *Manfredi*,[149] Italian consumers had brought an action against their insurance companies. They claimed that those companies had engaged in anticompetitive behaviour; and, as a result of this breach of the European competition rules, their car insurance was on average 20 per cent higher than the normal price would have been. Could they ask for damages?

The Court here repeated that 'the practical effect of Article [101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition'; and concluded that therefore 'any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article [101 TFEU]'.[150] This sounded like a strict liability test, for there was no express reference to a sufficiently serious breach. Had the Court thus dropped the second *Brasserie* criterion, because the European competition rules were unconditional and sufficiently clear so that 'the mere infringement of [European] law may be sufficient to establish the existence of a sufficiently serious breach'?[151] The Court has remained ambivalent on this issue. Indeed, it has generally left the detailed procedural framework to national law.[152]

The existence of a general liability test for public and private violations of European law is thus in doubt. But even if *Courage* is eventually integrated into a unified liability test, it is important to underline that the private liability doctrine should be confined to breaches of obligations directly addressed to individuals.[153] Only where European law directly regulates private party actions should the *Courage* doctrine apply. Private liability ought thus never to originate in breaches of obligations addressed to public authorities – even if they have horizontal direct effect.[154] Not horizontal direct effect, but the narrower criterion of whether a European norm addresses private party actions should constitute the unwritten premise of private party liability. The *Courage* doctrine should thus be confined to breaches of a – very – qualified part of European law.

[149] Joined Cases C-295/04 to C-298/04, *Manfredi et al.* v. *Lloyd Adriatico Assicurazioni et al.* [2006] ECR I-6619.

[150] *Ibid.*, para. 61. For a more recent conformation of this approach, see Case C-557/12, *Kone and others* v. *ÖBB Infrastrukur*, EU:C:2014:1317.

[151] Case C-5/94, *Hedley Lomas*, para. 28.

[152] Joined Cases C-295/04 to C-298/04, *Manfredi*, para. 62. On this point with regard to *Francovich* liability more generally, see n. 197ff. below.

[153] Similarly: S. Drake, 'Scope of *Courage* and the Principle of "Individual Liability' for Damages: Further Development of the Principle of Effective Judicial Protection by the Court of Justice' (2006) 31 *EL Rev.* 841 at 861.

[154] On the distinction between horizontal direct effect and private party actions, see Chapter 3, section 1(b).

4. European Harmonisation: Judicial Cooperation

Let us recall the core principle governing the decentralised enforcement of European law by national courts:

> [I]n the absence of [European] rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have derived from the direct effect of [European] law … In the absence of such measures of harmonisation the right conferred by [European] law must [thus] be exercised before the national courts in accordance with the conditions laid down by national rules.[155]

We saw above that this national procedural autonomy was however only relative; and the first three sections of this chapter explored three constitutional principles that have come to limit the procedural autonomy of national courts. Importantly: these three principles – the principles of equivalence, effectiveness and liability – generally come to operate *in the absence of any European harmonisation*. Whenever European harmonisation has taken place, on the other hand, our three constitutional principles may be replaced by more specific EU legislative rules.

The process of procedural harmonisation has however been slow and piecemeal. In the past decades, the Union has only managed to harmonise national procedural laws in a small number of substantive areas[156] while also only providing a small number of general 'EU remedies' in civil (and criminal) proceedings.[157]

The primary focus of the Union's harmonisation effort has thereby been on the jurisdictional coordination of national courts. What is the problem here? According to the idea of national sovereignty, national courts

[155] Case 33/76, *Rewe*, para. 5.

[156] One of the more advanced areas here is EU competition law, see Directive 2014/104 on certain rules governing actions for damages under national law for infringement of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1. For an analysis of the directive, see N. Dunne, '*Courage* and Compromise: The Directive on Antitrust Damages' (2015) 40 *EL Rev*. 581; and more generally: M. Bergström et al. (eds.), *Harmonising EU Competition Litigation: The New Directive and Beyond* (Hart, 2016). Apart from EU competition law, there are also other substantive areas in which the Union has specifically tried to harmonise national procedural laws, yet even here, 'the most common approach was – and indeed remains – to include at most only a limited number of enforcement-related provisions in acts that primarily deal with substantive matters' (F. G. Wilman, 'The End of the Absence? The Growing Body of EU Legislation on Private Enforcement and the Main Remedies It provides for' (2016) 53 *CML Rev.* 887 at 893).

[157] With regard to civil law 'EU remedies', see E. Storskrubb, *Civil Procedure and EU Law: A Policy Area Uncovered* (Oxford University Press, 2008). For an overview of EU legislation in criminal proceedings, see V. Mitsilegas, *EU Criminal Law after Lisbon* (Hart, 2016), chs. 6–7.

may – theoretically – claim 'universal' jurisdiction for all legal problems in the world.[158] In the context of the European Union, does that means that an EU citizen could go to any national court when enforcing her EU rights? Imagine the following scenario: a German consumer, living in the United Kingdom, has bought a product from a French business that has violated the EU competition rules: can she go to an English court to ask for damages? Or is she obliged to seek redress in a French or a German court?

This question concerns the horizontal division of jurisdictional competences between national courts; and EU harmonisation has here been adopted to 'federally' coordinate them so as to prevent 'parallel proceedings' on the same subject matter. EU harmonisation in this context is not concerned with the question of whether a national legal order offers efficient remedies for the enforcement of EU law. It rather concerns the preliminary question *which* national legal order will have jurisdiction; and this question is, in turn, important because the Union legal order has tied this jurisdictional question to the idea of judicial cooperation and the mutual recognition of national judgments in the Union.

a. Cooperation and Mutual Recognition in Civil Matters

The Union competence with regard to judicial cooperation in civil matters can be found in Article 81 TFEU.[159] It states:

> 1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

[158] Many national legal orders have nevertheless recognised self-imposed restrictions especially with regard to civil law. These limits are laid down in a State's 'private international law' legislation. For an analysis of the English 'private international law', see P. Torremans et al. (eds.), *Cheshire, North & Fawcett on Private International Law* (Oxford University Press, 2017).

[159] The provision constitutes, on its own, Ch. 3 ('Judicial Cooperation in Civil Matters') of Title V ('Area of Freedom, Security and Justice') of the TFEU. Importantly, all acts adopted within Title V will generally not bind the United Kingdom and Ireland (see: Protocol No. 21 on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice). Despite this general opt-out, the Protocol has allowed the UK and Ireland to 'opt in' to individual measures (*ibid.*, Arts. 3 and 4), and the two States have indeed, with very few exceptions, made use of this for the legislation adopted under Art. 81 TFEU. A more complex situation, applies to Denmark, which also benefits from a general opt-out (see Protocol No. 22 on the Position of Denmark). Yet instead of generally opting back into EU secondary law, Denmark has preferred to generally stay out. The major exception here is an international agreement concluded with the EU on 'jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' ([2005] OJ L 299/62). This Agreement extends, de facto, the Brussels I Regulation to Denmark.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:
   (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases …
   (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction …
3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament …

The provision constitutes the modern fountain of 'EU private international law'.[160] It explicitly deals with 'civil' law matters and therefore excludes all public law, including administrative and criminal law. Article 81 thereby expressly distinguishes between general civil law in paragraph 2 and the special case of family law in paragraph 3; and with regard to both, the Union has further distinguished between the *jurisdictional* question of 'mutual recognition and enforcement', on the one hand, and the *substantive* question as to which national law applies ('conflicts of laws'), on the other.

This two-times-two division is today reflected in four famous regulations that constitute the legislative core within this area of European law. These four Regulations derive their names from two important and beautiful European cities: Brussels and Rome; with the two 'Brussels Regulations' dealing with jurisdiction, and the two 'Rome Regulations' dealing with the substantive question which national (civil) law applies (see Table 11.1).

The following section concentrates on the general principles governing civil and commercial law under the Brussels I Regulation.

aa. Dividing Competences between National Courts

The Brussels I Regulation generally deals with 'civil and commercial matters';[161] and its central aim is expressed as follows:

[160] The historical evolution of EU private international law is fairly complex. For general treatments here, see M. Bogdan, *Concise Introduction to EU Private International Law* (Europa Law, 2015); and P. Stone, *EU Private International Law* (Elgar, 2014). Importantly, EU private international law is not confined to dealing with the enforcement of substantive European law in national courts. It more generally determines whether a national court has jurisdiction and which national law applies in a specific case.

[161] Certain civil and commercial matters are expressly excluded from the scope of the Regulation, see Art. 1 (2). The provision principally excludes family law matters (subparas. a and e), insolvency proceedings (subpara. b), arbitration (subpara. d) and succession (subpara. f).

In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending.[162]

In order to achieve this aim, the Regulation lays down a number of (default) rules.[163] Where the parties have not contractually settled on a specific court, the Regulation holds 'that jurisdiction is generally based on the defendant's domicile'.[164] Article 4 of the Regulation confirms that 'persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member States'.[165]

This general rule means two things. First, it clarifies that it is not 'nationality' but 'domicile' that is important; and, second, it gives clear preference to the

Table 11.1 EU Private International Law (Selection)

Brussels I Regulation	Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)
Brussels II Regulation	Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility
Rome I Regulation	Regulation 593/2008 on the law applicable to contractual obligations
Rome II Regulation	Regulation 864/2007 on the law applicable to non-contractual obligations
Other Regulations	Regulation 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III)
	Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement

[162] Brussels I Regulation, recital 21.

[163] The Brussels I Regulation is – like much private law – only default legislation in that the private parties can specifically decide to conclude a special contract that determines which court they would like to give jurisdiction to (*ibid*., Art. 25). For an academic treatment of these 'choice-of-court' agreements, see T. Hartley, *Choice-of-Court Agreements under the European and International Instruments* (Oxford University Press, 2013).

[164] Brussels I Regulation, recital 15.

[165] *Ibid*., Art. 4. The question of what counts as being 'domiciled' in a Member State is generally left to each Member State (*ibid*., Art. 62: 'In order to determine whether a party is domiciled in the Member State whose courts are seized of the matter, the court shall apply its internal law'); yet with regard to legal persons, Art. 63 contains a number of EU specific rules.

defendant as opposed to the *plaintiff* by generally forcing the latter to go to the courts of the Member State of his opponent.

And yet there are two major exceptions to this rule. For a number of areas, such as contract and tort claims,[166] insurance contracts,[167] consumer contracts[168] and employment contracts,[169] the Union grants a parallel competence to other national courts. With regard to consumer contacts, for example, the Regulation states that, if certain conditions are fulfilled,[170] the consumer has a choice:

> A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.[171]

But more importantly still: for some matters, the Brussels I Regulation designates a jurisdiction as exclusively competent that is not related to the domicile of either the defendant or the plaintiff. These heads of 'exclusive jurisdiction' are set out in Article 24 of the Regulation,[172] and whenever they apply, the general or special jurisdictions discussed above are suspended. For example: with regard to immovable property, it will always be the national courts in which that property is located that enjoy exclusive jurisdiction within the Union.

How does the Regulation deal with jurisdictional conflicts where two or more national courts claim jurisdiction simultaneously? For matters falling within an exclusive jurisdictional competence, the Regulation unequivocally states:

[166] *Ibid.*, s. 2, esp. Art. 7. [167] *Ibid.*, s. 3 (Arts. 10–16).
[168] *Ibid.*, s. 4 (Arts. 17–19). [169] *Ibid.*, s. 5 (Arts. 20–3).
[170] The conditions for consumer contracts are set out in Art. 17 of the Regulation, and the most important condition here is the situation described in Art. 17(1)(c). The consumer's 'home' courts will thus only have (parallel) jurisdiction, where the seller either has a commercial presence in that State, or where s/he has been specifically 'directing' her commercial activities to that State. On the notion of 'directing', see Joined Cases C-585/08 and C-144/09, *Pammer* v. *Reederei Schlüter* and *Hotel Alpenhof* v. *Heller* [2010] ECR I-12527.
[171] Brussels I Regulation, Art. 18(1).
[172] The provision states: 'The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties: (1) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated … (2) in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons … (3) in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept; (4) in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered … (5) in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.'

> Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 24, it shall declare of its own motion that it has no jurisdiction.[173]

With regard to non-exclusive parallel competences, on the other hand, the Regulation establishes the following rule (*lis pendens*):

> [W]here proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established … Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.[174]

The Regulation here establishes a first-seized-first-jurisdiction rule. Whichever court is first seized must first determine whether it is competent under the Brussels I Regulation. Any other – second – court must wait until that first court has made that determination; and only after the first court has itself rejected its jurisdiction, may it resume jurisdiction under the Regulation. This first-come-first-jurisdiction rule is open to abuse;[175] yet the European Court has clarified that a second-seized court cannot issue anti-suit injunctions to stop a parallel trial abroad,[176] nor can it under any circumstances review the jurisdiction of a court in another Member State.[177]

The jurisdictional autonomy of each and every national court has been justified in *Gasser* as follows:

> [T]he Brussels [Regulation] is necessarily based on the trust which the [Member States] accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which

[173] *Ibid.*, Art. 27. [174] *Ibid.*, Art. 29(1) and (3).
[175] Where a dispute between two private parties arises, one party might be tempted to start proceedings, out of the blue, in a Member States that has no link whatsoever to the civil dispute with the sole aim of delaying the proceedings. Due to the legendary slowness of the Italian legal system, this strategic move has been called the 'Italian torpedo'. A party here commences proceedings in an Italian court which might take years to find that it is ultimately not competent.
[176] Case 159/02, *Turner* v. *Grovit* [2004] ECR I-3565, esp. para 28: 'In so far as the conduct for which the defendant is criticized consists in recourse to the jurisdiction of the court of another Member State, the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court of another Member State. Such an assessment runs counter to the principle of mutual trust[.]'
[177] Brussels I Regulation, Art. 45(3): '[T]he jurisdiction of the court of origin may not be reviewed'.

> all the courts within the purview of the [Regulation] are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments.[178]

bb. Mutual Recognition of National Judgments

The Brussels I Regulation is a 'double instrument'. It regulates not only the jurisdiction of national courts within the European Union but also the recognition and enforcement of their judgments.[179] Indeed: the rationale behind centrally determining the horizontal division of powers between national courts has always been to facilitate the mutual recognition and enforcement of their judgments. The simple rules within the Brussels Regulation here are these:

> A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.[180]

And:

> A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.[181]

A national judgment given in one Member State will thus generally enjoy the force of *res judicata* in all other Member States of the Union; and '[u]nder no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed'.[182] This mutual juridical recognition is however not absolute. For the Brussels I Regulation recognises a number of (limited) exceptions – the most important of which are a violation of the jurisdictional rules of the Brussels Regulation and overriding public policy considerations.[183] Yet absent such specific grounds, a judgment given by a French or German court will be 'binding' and 'enforceable' in all other Member States. The mutual recognition of civil law judgments indeed constitutes one of the cornerstones of the judicial federalism established by the Union. It finds a – weaker – expression in criminal law to which we must now turn.

[178] Case C-116/02, *Gasser* v. *MISAT* [2003] ECR I-14694, para. 72.
[179] Bogdan, *EU Private International Law* (n. 160 above), 33.
[180] Brussels I Regulation, Art. 36 (1).
[181] *Ibid.*, Art. 39. [182] *Ibid.*, Art. 52.
[183] The various grounds are listed in Art. 45 of the Regulation. For an extensive discussion here, see Stone, *EU Private International Law* (n. 160 above), 230–45.

b. Cooperation and Mutual Recognition in Criminal Matters

The Union competence(s) with regard to judicial cooperation in criminal matters are found in Articles 82–6 TFEU.[184] The central provision here states:

> Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.
>
> The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:
>
> (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
> (b) prevent and settle conflicts of jurisdiction between Member States …
> (d) Facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.[185]

The provision deals, among other things, with the jurisdiction of national courts and the mutual recognition of their judgments in the context of criminal law. Like in the area of civil law, there may again be a number of situations where more than one Member State claims jurisdiction for a particular criminal act; and this is particularly problematic in criminal law because most legal orders accept the principle that a crime cannot be judged twice (in Latin: *ne bis in idem*).

The Union has nevertheless not been very successful in removing conflicts of criminal law jurisdiction.[186] It has perhaps been slightly more successful with regard to the 'mutual recognition' of national judgments; yet this success has not been through Union legislation adopted on the basis of Articles 82–3 TFEU but – anachronistically – through an international agreement between the Member States.[187] The latter here states:

> A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.[188]

[184] The provisions constitute Ch. 4 ('Judicial Cooperation in Criminal Matters') of Title V ('Area of Freedom, Security and Justice') of the TFEU. Importantly, Protocol No. 21 On the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice and Protocol No. 22 On the Position of Denmark (see n. 159 above for both) will of course apply here too.
[185] Art. 82 (1) TFEU.
[186] For a critical analysis of the EU efforts here, see S. Peers, *EU Justice and Home Affairs: Volume II: EU Criminal Law, Policing, and Civil Law* (Oxford University Press, 2016), 228ff.
[187] This international agreement is the Schengen Convention Implementing the Schengen Agreement [2000] OJ L 239/19.
[188] Schengen Implementing Convention, Art. 54.

In interpreting this provision, the European Court has clarified that its main purpose is 'that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement'.[189] This European *ne bis in idem* principle thereby applies regardless of whether or not there has been any prior harmonisation of national criminal law;[190] and while the precise contours of the *ne bis in idem* principle continue to be litigated,[191] its 'constitutional' core is nevertheless clear: a judgment given by one national court must, in principle, be recognised by all other Member States.

This principle of mutual recognition can also be found in relation to the preparation and execution of a judgment. And the Union has here adopted its most controversial criminal law measure: the European Arrest Warrant (EAW).[192] The EWA is 'a *judicial* decision issued by a Member State with a view to the arrest and surrender by another Member Sate of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order'.[193] The EWA has consequently a pre-trial and post-trial function; and its controversial heart lies in the idea that a Member State must surrender any person – even one of its nationals – where that person has been charged or judged with a crime that may not be punishable in the surrendering State.[194] The EWA however allows for a range of mandatory and optional exceptions that permit non-execution;[195] but the Court has held that this list of exceptions is exhaustive. The Court justifies this result again by reference to the idea of 'mutual trust' on which the principle of mutual recognition in general, and the EAW in particular, is based.[196]

Conclusion

Functionally, national courts are Union courts; yet the decentralised adjudication of European law by national courts means that the procedural regime for the enforcement of European rights is principally left to the Member States.

[189] Joined cases C-187/01 and C-385/01, *Gözütok and Brügge* [2003] ECR I-1345, para. 38.
[190] *Ibid*., para. 32.
[191] For an analysis of the past jurisprudence here, see C. Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press, 2013), 132–65. For a recent case, see Case C-486/14, *Kossowski*, EU:C:2016:483.
[192] Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States (2002) OJ L 190/1. The EWA was adopted prior to the Lisbon Treaty and it was therefore adopted by means of a legal instrument that was only known in the former 'third pillar' of the pre-Lisbon European Union. For an academic analysis of the EWA, see E. Herlin-Karnell, 'From Mutual Trust to the Full Effectiveness of EU Law: 10 Years of the European Arrest Warrant' (2013) 38 *EL Rev.* 79.
[193] Framework Decision 2002/584 (EAW), Art. 1(1) (emphasis added).
[194] The abolition of the requirement of 'double criminality' can be found in *ibid*., Art. 2(2). It expands to the 32 most dangerous crimes.
[195] *Ibid*., Arts. 3–4a.
[196] See Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru* v. *Generalstaatsanwaltschaft Bremen*, EU:C:2016:198, esp. paras. 77–8.

This rule of 'national procedural autonomy' is however qualified by four principles. First, in the presence of European harmonisation, national courts must of course apply the procedural arrangements offered by European law. But even in the absence of European harmonisation, the European legal order has asked national courts to provide national remedies to prevent or discourage breaches of European law. The two key constitutional principles judicially developed by the Court of Justice here are the equivalence and the effectiveness principles. The former requests national courts to extend existing national remedies to similar European actions. The latter demands that these national remedies must not make the enforcement of European law 'excessively difficult'. Finally, there is a last limitation: the liability principle. The *Francovich* doctrine obliges national courts to provide for damages that compensate for losses resulting from (sufficiently serious) breaches of European law by a Member State. *Courage* may be seen as the horizontal extension of this principle, but the jury on this point is still out.

What is the relationship between national remedies and the *Francovich* remedy? The Court seems to treat the latter as a remedy of last resort.[197] We saw a specific expression of this relation in the *Köbler* rule that the availability of appeal procedures under national law precludes State liability for judicial breaches of European law. However, this will not mean that national and European remedies do not complement each other. Indeed, the specific procedural regime for the EU remedy of State liability is governed by national rules. The enforcement of the *Francovich* 'remedy' in the national courts will thus itself be subject to the principles of equivalence and effectiveness.[198]

Let us look at one last point: what is the relationship between *Francovich* liability and direct effect? From the early days of this remedy, the Court has been clear that an individual may have a right to damages even for violations of directly effective norms of European law.[199] Thus, the fact that an action can be brought

[197] See Case C-91/92, *Faccini Dori* v. *Recreb* [1994] ECR I-3325, para. 27: 'If the result prescribed by the directive cannot be achieved by way of interpretation, it should also be borne in mind that, in terms of the judgment in Joined Cases C-6/90 and C-9/90, *Francovich and others* v. *Italy* [1991] ECR I-5357, paragraph 39, [European] law requires the Member States to make good damage caused to individuals through failure to transpose a directive, provided that three conditions are fulfilled.'
[198] On the *Francovich* remedy being put into a national procedural context, see Case C-168/15, *Tomášová*, para. 38: '[W]here the conditions for a State to incur liability are satisfied, a matter which it is for the national courts to determine, it is on the basis of national law that the State must make reparation for the consequences of the loss or damage caused, provided that the conditions laid down by national law in respect of reparation of loss or damage are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not so framed as to make it, in practice, impossible or excessively difficult to obtain reparation (principle of effectiveness).'
[199] Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, paras. 20 and 22: 'The Court has consistently held that the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in

to force a national administration to apply European law is no barrier for the availability of this secondary remedy.[200] This makes profound sense as the application of European law may only operate prospectively, whereas the compensation for past misapplications of European law works retrospectively. However, there can – of course – be liability without direct effect; and the State obligation to make good any damage caused by a serious breach of European law will often be the only option for an individual who cannot rely on the – vertical or horizontal – direct effect of European law.

The final section of this chapter explored to what extent the EU has coordinated national jurisdictions. The Brussels I Regulation here determines, with regard to cross-border disputes in civil matters, which national court should have competence; and once this is done, a judgment rendered by that national court must in general be recognised and enforced in all other Member States. Within the context of criminal law, similar principles have been established – yet, as we shall see below, they have generated a range of human rights issues in the Union legal order.

FURTHER READING

Books

M. Bogdan, *Concise Introduction to EU Private International Law* (Europa Law, 2015)
M. Claes, *The National Courts' Mandate in the European Constitution* (Hart, 2005)
M. Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart, 2004),
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itself to ensure the full and complete implementation of the Treaty … It is all the more so in the event of an infringement of a right directly conferred by a [European] provision upon which individuals are entitled to rely before the national courts. In that event the right to reparation is the necessary corollary of the direct effect of the [European] provisions whose breach caused the damage sustained.'

[200] See also Case C-150/99, *Sweden* v. *Stockhold Lindöpark* [2001] ECR I-493, para. 35.

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12

Judicial Powers III

EU Fundamental Rights

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Introduction

The protection of human rights is a central task of many judiciaries.[1] Judicial review in light of fundamental human rights may here be limited to the review of the executive;[2] yet in its expansive form, it includes the judicial review of legislative acts.[3] The European Union follows this second tradition. Fundamental rights set substantive – judicial – limits to all governmental powers and processes within the Union. They indeed constitute one of the most popular grounds of judicial review in actions challenging the validity of European Union law.

What are the sources of human rights in the Union legal order? Despite the absence of a 'bill of rights' in the original Treaties,[4] three sources for EU fundamental rights were subsequently developed. The European Court first began distilling fundamental rights from the constitutional traditions of the Member States. This *unwritten* bill of rights was inspired and informed by a second bill of rights: the European Convention on Human Rights. This *external* bill of rights was subsequently matched by a – third – *written* bill of rights specifically drafted for the European Union: the EU Charter of Fundamental Rights.

These three sources of EU fundamental rights are now expressly referred to – in reverse order – in Article 6 of the Treaty on European Union. The provision reads:

> 1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties …
> 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
> 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

This chapter investigates each of the Union's three bills of rights and the constitutional principles that govern them. Section 1 starts with the discovery of an 'unwritten' bill of rights in the form of general principles of European

[1] On human rights as constitutional rights, see A. Sajó, *Limiting Government* (Central European University Press, 1999), ch. 8; and on the role of the judiciary in this context, see M. Cappelletti, *Judicial Review in the Contemporary World* (Bobbs-Merrill, 1971).

[2] For the classic doctrine of parliamentary sovereignty in the United Kingdom, see A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982).

[3] On the idea of human rights as 'outside' majoritarian (democratic) politics, see Sajó, *Limiting Government* (n. 1 above), ch. 2, 5ff.

[4] P. Pescatore, 'Les Droits de l'homme et l'intégration européenne' (1968) 4 *Cahiers du droit européen* 629.

law. Section 2 then moves to an analysis of the Union's 'written' bill of rights: the EU Charter of Fundamental Rights, which was adopted to codify existing human rights in the Union legal order. Section 3 investigates the formal relationship between the Union and the European Convention on Human Rights. Finally, section 4 explores the relationship between all three bills of rights and the Member States. It will be seen that *each* of the three Union bills applies, at least to some extent, also to the Member States. *National* courts may thus be obliged to review the legality of *national* law also in light of EU fundamental rights.

1. The 'Unwritten' Bill of Rights: Human Rights as 'General Principles'

Neither the 1951 Paris Treaty nor the 1957 Rome Treaty contained any express references to human rights.[5] The silence of the former could be explained by its limited scope. The silence of the latter, by contrast, could have its origin in the cautious climate following the failure of the 'European Political Community'.[6] With political union having failed, the 'grander' project of a human rights bill was replaced by the 'smaller' project of economic integration.[7]

Be that as it may, the European Court would – within the first two decades – develop an (unwritten) bill of rights for the European Union.[8] These fundamental rights would be *European* rights, that is: rights that were *independent* from national constitutions. The discovery of human rights as general principles of European law will be discussed first. Thereafter, this section discusses possible structural limits to EU human rights in the form of international obligations flowing from the United Nations Charter.

[5] For speculations on the historical reasons for this absence, see P. Pescatore, 'The Context and Significance of Fundamental Rights in the Law of the European Communities' (1981) 2 *Human Rights Journal* 295. For a new look at the historical material, see G. de Búrca, 'The Evolution of EU Human Rights Law', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press, 2011), 465.

[6] On the European Political Community, see Chapter 1, section 1(b). This grand project had asked the (proposed) Community 'to contribute towards the protection of human rights and fundamental freedoms in the Member States' (Art. 2), and would have integrated the European Convention on Human Rights into the Community legal order (Art. 3).

[7] Pescatore, 'Context and Significance' (n. 5 above), 296.

[8] The judicial motifs of the European Court in developing human rights are controversially discussed in the literature. It seems accepted that the Court discovered human rights as general principles – at least partly – in defence to national Supreme Courts challenging the absolute supremacy of European law (see Chapter 4, section 2). Apart from this 'defensive' use, the Court has been accused of an 'offensive use' in the sense of 'employ[ing] fundamental rights instrumentally' by 'clearly subordinat[ing] human rights to the end of closer economic integration in the [Union]' (see J. Coppel and A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 *CML Rev.* 669, 670 and 692). This 'offensive' thesis has – rightly – been refuted (see J. H. H. Weiler and N. Lockhart, '"Taking Rights Seriously" Seriously: The European Court and Its Fundamental Rights Jurisprudence' (1995) 32 *CML Rev.* 51 (pt. I) and 579 (pt. II)).

a. The Birth of EU Fundamental Rights

The birth of EU fundamental rights did not happen overnight. The Court had been invited – as long ago as 1958 – to judicially review a Union act in light of fundamental rights.

In *Stork*,[9] the applicant had challenged a European decision on the grounds that the Commission had infringed *German* fundamental rights. In the absence of a European bill of rights, this claim drew on the so-called 'mortgage theory'. According to this theory, the powers conferred on the European Union were tied to a human rights 'mortgage'. *National* fundamental rights would bind the *European* Union, since the Member States could not have created an organisation with more powers than themselves.[10] When they thus transferred powers to the Union, the very transfer was subject to the respective 'constitutional tradition' of each Member State. This argument was however – correctly[11] – rejected by the Court. The task of the Union institutions was to apply European laws 'without regard for their validity under national law'.[12] National fundamental rights could thus be *no direct* source of EU fundamental rights.

This position of the European Union towards *national* fundamental rights indeed never changed. However, the Court's view has significantly evolved with regard to the existence of implied *European* fundamental rights. Having originally found that European law did 'not contain any general principle, *express or otherwise*, guaranteeing the maintenance of vested rights',[13] the Court subsequently discovered 'fundamental human rights enshrined in the general principles of [European] law'.[14] This new position was spelled out in *Internationale Handelsgesellschaft*.[15] The Court here – again – rejected the applicability of national fundamental rights to European law, as this would challenge the supremacy of European over national law; yet the judgment now also confirmed the existence of an 'analogous guarantee' in European Union law. To quote the famous passage in full:

[9] Case 1/58, *Stork & Cie* v. *High Authority of the European Coal and Steel Community* [1958] ECR (English Special Edition) 17.

[10] As the Latin legal proverb makes clear: '*Nemo dat quod non habet*'.

[11] For a criticism of the 'mortgage theory', see H. G. Schermers, 'The European Communities Bound by Fundamental Rights' (1990) 27 *CML Rev.* 249, 251.

[12] Case 1/58, *Stork* v. *High Authority*, 26: 'Under Article 8 of the [ECSC] Treaty the [Commission] is only required to apply Community law. It is not competent to apply the national law of the Member States. Similarly, under Article 31 the Court is only required to ensure that in the interpretation and application of the Treaty, and of rules laid down for implementation thereof, the law is observed. It is not normally required to rule on provisions of national law. Consequently, the [Commission] is not empowered to examine a ground of complaint which maintains that, when it adopted its decision, it infringed principles of German constitutional law (in particular Articles 2 and 12 of the Basic Law).'

[13] Joined Cases 36–8/59 and 40/59, *Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG* v. *High Authority of the European Coal and Steel Community* [1959] ECR (English Special Edition) 423, 439 (emphasis added).

[14] Case 29/69, *Stauder* v. *City of Ulm* [1969] ECR 419, para. 7.

[15] Case 11/70, *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1979] ECR 1125.

> [T]he law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as [Union] law and without the legal basis of the [Union] itself being called in question. Therefore the validity of a [Union] measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure. However, an examination should be made as to whether or not any analogous guarantee inherent in [Union] law has been disregarded. *In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the [Union].*[16]

From this moment, fundamental rights were seen as an integral part of the general principles of European Union law. They were '*inspired* by the constitutional traditions *common* to the Member States', with the latter representing an *indirect* source for the Union's fundamental rights.

But what was the exact nature of this indirect relationship between national human rights and European human rights? And how would the former influence the latter? A constitutional clarification was offered in *Nold*.[17] Drawing on its previous jurisprudence, the Court held:

> [F]undamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw *inspiration* from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply *guidelines* which should be followed within the framework of [European] law.[18]

In searching for fundamental rights inside the general principles of European law, the Court would thus draw 'inspiration' from the common constitutional traditions of the Member States. One – ingenious – way of identifying an 'agreement' between the various national constitutional traditions was to use international *agreements* of the Member States. And one such international agreement in place then was the European Convention on Human Rights. Having been

[16] *Ibid*., paras. 3–4 (emphasis added).
[17] Case 4/73, *Nold* v. *Commission* [1974] ECR 491.
[18] *Ibid*., para. 13 (emphasis added).

ratified by all Member States and dealing specially with human rights,[19] the Convention would soon assume a 'particular significance' in identifying fundamental rights for the European Union.[20] And yet, none of this conclusively characterised the legal relationship between European human rights, national human rights and the European Convention on Human Rights.

Let us therefore look at the question of the Union human rights standard first, before analysing the judicial doctrines governing limits to EU human rights.

aa. The European Standard – An 'Autonomous' Standard

Human rights express the fundamental values of a society. Each society may wish to protect distinct values and give them a distinct level of protection.[21] Not all societies may thus choose to protect a constitutional 'right to work',[22] while most liberal societies will protect 'liberty'; yet, the level at which liberty is protected might vary.[23]

Which fundamental rights exist in the European Union, and what is their level of protection? From the very beginning, the Court of Justice felt not completely free to invent an unwritten bill of rights. Instead, and in the words of the famous *Nold* passage, the Court was '*bound to* draw inspiration from constitutional traditions common to the Member States'.[24] But how binding would that inspiration be? Could the Court discover human rights that not all Member States recognise as a national human right? And would the Court consider itself under an obligation to use a particular standard for a human right?

[19] When the E(E)C Treaty entered into force on 1 January 1958, five of its Member States were already parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. Ever since France joined the Convention system in 1974, all EU Member States have also been members of the European Convention legal order. For an early reference to the Convention in the jurisprudence of the Court, see Case 36/75, *Rutili* v. *Ministre de l'intérieur* [1975] ECR 1219, para. 32.
[20] See Joined Cases 46/87 and 227/88, *Höchst* v. *Commission* [1989] ECR 2859, para. 13: 'The Court has consistently held that fundamental rights are an integral part of the general principles of law the observance of which the Court ensures, in accordance with constitutional traditions common to the Member States, and the international treaties on which the Member States have collaborated or of which they are signatories. The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter referred to as "the European Convention on Human Rights") is of particular significance in that regard.'
[21] 'Constitutions are not mere copies of a universalist ideal, they also reflect the idiosyncratic choices and preferences of the constituents and are the highest legal expression of the country's value system.' See B. de Witte, 'Community Law and National Constitutional Values' (1991–2) 2 *Legal Issues of Economic Integration* 1 at 7.
[22] Art. 4 of the Italian Constitution states: 'The Republic recognises the right of all citizens to work and promotes those conditions which render this right effective.'
[23] To illustrate this point with a famous joke: 'In Germany everything is forbidden, unless something is specifically allowed, whereas in Britain everything which is not specifically forbidden, is allowed.' (The joke goes on to claim that: 'In France everything is allowed, even if it is forbidden; and in Italy everything is allowed, especially when it is forbidden.')
[24] Case 4/73, *Nold*, para. 13 (emphasis added).

The relationship between the Union standard and the various national standards is not an easy one. Would the obligation to draw inspiration from the constitutional traditions *common* to the States not imply a common *minimum* standard? Serious practical problems follow from this view. For, if the European Union consistently adopted the lowest common human rights denominator to assess the legality of its acts, this would inevitably lead to charges that the European Court refuses to take human rights seriously.[25] Should the Union thus favour the *maximum* standard among the Member States,[26] as 'the most liberal interpretation must prevail'?[27] This time, there are serious theoretical problems with this view. For the maximalist approach assumes that courts always balance private rights against public interests. But this is not necessarily the case;[28] and, in any event, the maximum standard is subject to a 'communitarian critique' that insists that the public interest should also be taken seriously.[29] The Court has consequently rejected both approaches.

What about the European Convention on Human Rights (ECHR) as a – common – Union standard? What indeed is the status of the Convention in the Union legal order? The relationship between the European Union and the European Convention has remained ambivalent. The Court of Justice has not found the ECHR to be formally binding on the Union;[30] and it has never considered itself materially bound by the interpretation given to the Convention by the European Court of Human Rights. This interpretative freedom has created the possibility of a distinct *Union* standard for fundamental rights; yet it equally entails the danger of diverging interpretations of the European Convention in Strasbourg and Luxembourg.[31]

[25] For an early (implicit) rejection of the minimalist approach, see Case 44/79, *Hauer* v. *Land Rheinland-Pfalz* [1979] ECR 3727, para. 32 (emphasis added) – suggesting that a fundamental right only needs to be protected in '*several* Member States'.
[26] In favour of a maximalist approach, see L. Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union' (1998) 35 *CML Rev.* 629.
[27] This 'Dworkinian' language comes from Case 29/69, *Stauder*, para. 4.
[28] The Court of Justice was faced with such a right–right conflict in Case C-159/90, *Society for the Protection of Unborn Children Ireland Ltd* v. *Stephen Grogan and others* [1991] ECR I-4685, but (in)famously refused to decide the case for lack of jurisdiction.
[29] J. Weiler, 'Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights', in N. Neuwahl and A. Rosas (eds.), *The European Union and Human Rights* (Brill, 1995), 51 at 61: 'If the ECJ were to adopt a maximalist approach this would simply mean that for the [Union] in each and every area the balance would be most restrictive on the public and general interest. A maximalist approach to human rights would result in a minimalist approach to [Union] government.'
[30] See Case 4/73, *Nold*. On the idea that Member State treaties are binding on the Union, see Chapter 8, section 3(b/dd).
[31] See Joined Cases 46/87 and 227/88, *Höchst AG* v. *Commission* [1989] ECR 2859. For an excellent analysis, see R. Lawson, 'Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg', in R. Lawson and M. de Blois (eds.), *The Dynamics of the Protection of Human Rights in Europe*, 3 vols. (Martinus Nijhoff, 1994), III, 219 esp. 234–50.

Has the Lisbon Treaty changed this ambivalent relationship overnight? Today, there are strong textual reasons for claiming that the European Convention is *materially* binding on the Union.[32] For according to the (new) Article 6(3) TEU, fundamental rights as guaranteed by the Convention '*shall constitute general principles of the Union's law*'.[33] Will this formulation not mean that all Convention rights *are* general principles of Union law? If so, the Convention standard would henceforth provide a direct standard for the Union (see Figure 12.1). But if this route were chosen, the Convention standard would – presumably – only provide a *minimum* standard for the Union's general principles.[34]

In conclusion, the Union standard for the protection of fundamental rights is an *autonomous* standard. While drawing inspiration from the constitutional traditions common to the Member States and the European Convention on Human Rights, the Court of Justice has – so far – not considered itself directly bound by a particular national or international standard. The Court has therefore remained free to distil and protect what it sees as the shared values among the majority of people(s) within the Union and thereby assisted – dialectically – in the establishment of a shared identity for the people(s) of Europe.[35]

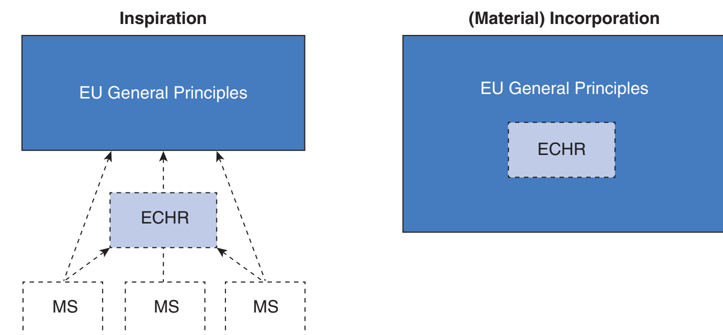

Figure 12.1 Inspiration Theory versus Incorporation Theory

[32] In Case C-617/10, *Åklagaren* v. *Fransson* EU: C: 2013: 105, the Court has however confirmed that the ECHR would – even after Lisbon – not be formally (!) binding on the Union (*ibid.*, para. 44): '[I]t is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law.'
[33] Art. 6(3) TEU (emphasis added).
[34] This is the solution that appears to have been chosen for the Charter, see section 2 below.
[35] T. Tridimas, 'Judicial Federalism and the European Court of Justice', in J. Fedtke and B. S. Markesinis (eds.), *Patterns of Federalism and Regionalism: Lessons for the UK* (Hart, 2006), 149 at 150 – referring to the contribution of the judicial process 'to the emergence of a European *demos*'.

bb. Limitations, and 'Limitations on Limitations'

Within the European constitutional tradition, some rights are absolute rights. They cannot – under any circumstances – be legitimately limited.[36] However, most fundamental rights are *relative* rights that may be limited in accordance with a public interest. Private property may thus be taxed, and individual freedom be restricted – *if* such actions are justified by the common good.

Has the European legal order recognised such limits to human rights? From the very beginning, the Court indeed clarified that human rights are 'far from constituting unfettered prerogatives',[37] and that they may thus be subject 'to limitations laid down in accordance with the public interest'.[38] Nonetheless, liberal societies would cease to be liberal if they permitted unlimited limitations to human rights. Many legal orders therefore recognise limitations on public interest limitations. These 'limitations on limitations' to fundamental rights restrictions can be relative or absolute in nature (see Figure 12.2).

According to the principle of proportionality, each restriction of a fundamental right must always be 'proportionate' in relation to the public interest pursued.[39] The principle of proportionality is thus a *relative* principle. It balances interests: the greater the public interest protected, the greater the right restrictions permitted. In order to limit this relativist logic, a second principle may come into play.

According to the 'essential core' doctrine any limitation of human rights – even proportionate ones – must never undermine the 'very substance' of a

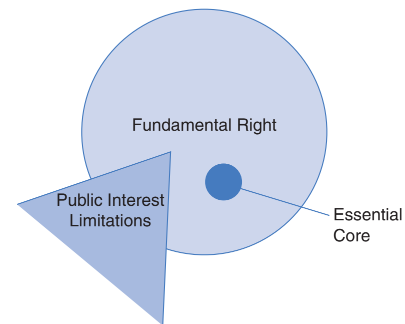

Figure 12.2 Rights Limitations: Relative and Absolute

[36] The European Court of Justice followed this tradition and recognised the existence of absolute rights in Case C-112/00, *Schmidberger* [2003] ECR I-5659, para. 80: 'the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction'.

[37] Case 4/73, *Nold* v. *Commission*, para. 14.

[38] *Ibid*.

[39] Case 44/79, *Hauer*, para. 23.

fundamental right. This sets an *absolute* limit to all governmental actions by identifying an 'untouchable' core within a fundamental right. Yet while the principle of proportionality is almost omnipresent in the jurisprudence of the Court,[40] the existence of an 'essential core' doctrine is still unclear.[41]

The Court appears to have finally confirmed the existence of an 'essential core' doctrine in *Zambrano*.[42] Two Columbian parents challenged the rejection of their Belgian residency permits on the grounds that their children had been born in Belgium and thereby assumed Belgian and thus European citizenship.[43] And since minor children would inevitably have to follow their parents, the question arose whether the latter's deportation would violate their children's fundamental status as European citizens. The Court here held that the Belgian measures violated the Treaties, as they would 'have the effect of depriving citizens of the Union of the genuine enjoyment of the *substance of the rights* conferred by virtue of their status of citizens of the Union'.[44] The recognition of an untouchable 'substance' of a fundamental right here functioned like the essential core doctrine. In subsequent jurisprudence, the Court has however clarified that it will give a narrow construction of what constitutes the 'substance' of Union citizenship. The expulsion of a third-country husband will thus not as such constitute an unjustifiable limitation on the right to family life, where it does not force the Union citizen herself to leave the Union territory.[45]

[40] On the proportionality principle, see also Chapter 10, section 1(b/bb).

[41] The European Courts appear to implicitly accept the doctrine; see Case 4/73, *Nold*, 14: 'Within the [Union] legal order it likewise seems legitimate that these rights should, of necessity, be subject to certain limits justified by the overall objectives pursued by the [Union], on condition that the substance of these rights is left untouched'.

[42] Case C-34/09, *Zambrano* v. *Office national de l'emploi* [2011] ECR I-1177. Admittedly, there are many questions that this – excessively – short case raises (see 'Editorial: Seven Questions for Seven Paragraphs' (2011) *EL Rev.* 161).

[43] According to Art. 20(1) TFEU: 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.'

[44] Case C-34/09, *Zambrano*, para. 42 (emphasis added); and see also para. 44: 'In those circumstances, those citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.' See also Case C-86/12, *Alokpa & Moudoulou* v. *Ministre du Travail, de l'Emploi et de l'Immigration*, EU:C:2013:645.

[45] See Case C-434/09, *McCarthy* v. *Secretary of State for the Home Department* [2011] ECR I-3375; Case C-256/11, *Dereci* v. *Bundesministerium für Inneres* [2011] ECR I-11315. For an analysis of these cases, see S. Adam and P. van Elsuwege, 'Citizenship and the Federal Balance between the European Union and Its Member States: Comment on *Dereci*' (2012) 37 *EL Rev.* 176. For more recent case law, see Case C-165/14, *Rendón Marín* v. *Administración del Estado*, EU:C:2016:675; Case C-304/14, *Secretary of State for the Home Department* v. *CS*, EU:C:2016:674. The last judgment is especially problematic, as it seems to suggest that the essential core of a right can somehow be limited if that limitation is proportionate (*ibid*., para. 50).

b. United Nations Law: External Limits to European Human Rights?

The European legal order is a constitutional order based on the rule of law.[46] This implies that an individual, where legitimately concerned,[47] must be able to challenge the legality of a European act on the basis that his human rights have been violated. Should there be exceptions to this rule, especially in the context of foreign affairs? This question is controversially debated in comparative constitutionalism; and it has, in the context of the European Union, received much attention in a special form: will *European* fundamental rights be limited by *international* obligations flowing from the United Nations Charter?

The classic answer to this question was offered by *Bosphorus*.[48] The case dealt with a European regulation implementing the United Nations embargo against the Federal Republic of Yugoslavia.[49] Protesting that its fundamental right to property was violated, the plaintiff judicially challenged the European act; and the Court had no qualms in judicially reviewing the European legislation – even if a lower review standard was applied.[50] The constitutional message behind the classic approach was clear: where the Member States decided to fulfil their international obligations under the United Nations qua European law, they would have to comply with the constitutional principles of the Union legal order and, in particular: European human rights.

This classic approach was however challenged by the General Court in 2005 by *Kadi*.[51] The applicant was a presumed Taliban terrorist, whose financial assets had been frozen as a result of European legislation that reproduced UN Security Council Resolutions.[52] Kadi claimed that his fundamental

[46] Case 294/83, *Parti Écologiste 'Les Verts'* v. *European Parliament* [1986] ECR 1339.

[47] On the judicial standing of private parties in the Union legal order, see Chapter 10, section 1(c).

[48] Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS* v. *Minister for Transport, Energy and Communications and others* [1996] ECR I-3953.

[49] Council Regulation 990/93 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) [1993] OJ L 102, 14) was based on UN Security Council Resolution 820 (1993).

[50] For a critique of the standard of review, see I. Canor, '"Can Two Walk Together, Except They Be Agreed?" The Relationship between International Law and European Law: The Incorporation of United Nations Sanctions against Yugoslavia into European Community Law through the Perspective of the European Court of Justice' (1998) 35 *CML Rev.* 137–87.

[51] Case T-315/01, *Kadi* v. *Council and Commission* [2005] ECR II-3649.

[52] The legal challenge principally concerned Council Regulation 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Regulation 467/2001 [2002] OJ L 139/9. The Regulation aimed to implement UN Security Council Resolution 1390 (2002) laying down the measures to be directed against Usama bin Laden, members of the Al-Qaida network and the Taliban and other associated individuals, groups, undertakings and entities.

rights of due process and property had been violated. The Union organs intervened in the proceedings and argued – to the surprise of many – that '*the Charter of the United Nations prevail[s] over every other obligation of international, [European] or domestic law*' to the effect that European human rights should be inoperative.[53]

To the even greater surprise – if not shock – of European constitutional scholars,[54] the General Court accepted this argument. How did the Court come to this conclusion? It had recourse to a version of the 'succession doctrine', according to which the Union may be bound by the international obligations of its Member States.[55] While this conclusion was in itself highly controversial, the dangerous part of the judgment related to the consequences of that conclusion. For the General Court recognised 'structural limits, imposed by general international law' on the judicial review powers of the European Court.[56] In the words of the Court:

> Any review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of [European] law relating to the protection of fundamental rights, would therefore imply that the Court is to consider, indirectly, the lawfulness of those [United Nations] resolutions. In that hypothetical situation, in fact, the origin of the illegality alleged by the applicant would have to be sought, not in the adoption of the contested regulation but in the resolutions of the Security Council which imposed the sanctions. In particular, if the Court were to annul the contested regulation, as the applicant claims it should, although that regulation seems to be imposed by international law, on the ground that that act infringes his fundamental rights which are protected by the [Union] legal order, such annulment would indirectly mean that the resolutions of the Security Council concerned themselves infringe those fundamental rights.[57]

The General Court thus declined jurisdiction to directly review European legislation *because it would entail an indirect review of the United Nations resolutions*. The justification for this self-abdication was that United Nations law was binding on all Union institutions, including the European Courts.

[53] Case T-315/01, *Kadi*, paras. 156 and 177 (emphasis added).

[54] P. Eeckhout, *Does Europe's Constitution Stop at the Water's Edge: Law and Policy in the EU's External Relations* (Europa Law, 2005); and R. Schütze, 'On "Middle Ground": The European Community and Public International Law', EUI Working Paper 2007/13.

[55] Case T-315/01, *Kadi*, paras. 193ff. On the doctrine, see Chapter 8, section 3(b/dd).

[56] Case T-315/01, *Kadi*, para. 212.

[57] *Ibid.*, paras. 215–16 (references omitted).

From a constitutional perspective, this reasoning was prisoner to a number of serious mistakes.[58] And in its appeal judgment,[59] the Court of Justice remedied these constitutional blunders and safely returned to the traditional *Bosphorus* approach. The Court held:

> [T]he obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the [European Treaties], which include the principle that all [Union] 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 Treat[ies].[60]

The United Nations Charter, while having 'special importance' within the European legal order,[61] would thus not be different from other international agreements.[62] Like 'ordinary' international agreements, the United Nations Charter might – if materially binding – have primacy over European legislation but '[t]hat primacy at the level of [European] law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part'.[63] European human rights would thus *not* find an external structural limit in the international obligations stemming from the United Nations.[64] The Union was firmly based on the rule of law, and this meant that all European legislation – regardless of its 'domestic' or international origin – would be limited by the respect for fundamental human rights.

[58] First, even if one assumes that the Union succeeded the Member States and was thus bound by United Nations law, the hierarchical status of international agreements is *below* the European Treaties. It would thus be European human rights that limit international agreements – not the other way around. The Court's position was equally based on a second mistake: the General Court believed the United Nations Charter prevails over every international and domestic obligation (*ibid*., para. 181). But this is simply wrong with regard to the 'domestic law' part. The United Nations has never claimed 'supremacy' within domestic legal orders, and after the constitutionalisation of the European Union legal order, the latter now constitutes such a 'domestic' legal order vis-à-vis international law.

[59] Case C-402/05P, *Kadi and Al Barakaat International Foundation* v. *Council and Commission* [2008] ECR I-6351.

[60] *Ibid*., para. 285.

[61] *Ibid*., para. 294.

[62] *Ibid*., para. 300: '[I]mmunity from jurisdiction for a [Union] measure like the contested regulation, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of the Charter, cannot find a basis in the [European Treaties].'

[63] *Ibid*., para. 308.

[64] *Ibid*., para. 327.

2. The 'Written' Bill of Rights: The Charter of Fundamental Rights

The desire for a *written* bill of rights for the European Union first expressed itself, by the end of the 1970s, in arguments favouring accession to the European Convention on Human Rights.[65] Yet an alternative strategy became prominent in the late twentieth century: the Union's own bill of rights.

The initiative for a 'Charter of Fundamental Rights' came from the European Council, which transferred the drafting mandate to a 'European Convention'.[66] The idea behind an internal Union codification was to strengthen the protection of fundamental rights in Europe 'by making those rights more visible in a Charter'.[67] The Charter was proclaimed in 2000, but it was then *not* legally binding. Its status was similar to the European Convention on Human Rights: it provided an informal *inspiration* but imposed no formal obligation on the European Union.[68] This ambivalent status was immediately perceived as a constitutional problem.[69] But it took almost a decade before the Lisbon Treaty recognised the Charter as having 'the same legal value as the Treaties'.

This second section looks at the structure and content of the Charter, before investigating its relationship with the European Treaties. The relationship is complex, since Article 6(1) TEU 'appends' the – amended[70] – Charter to the European Treaties. Not unlike the US 'Bill of Rights',[71] the Charter is thus placed *outside* the Union's general constitutional structure.

a. The Charter: Structure and Content

The Charter 'reaffirms' the rights that result 'in particular' from the constitutional traditions common to the Member States, the European Convention on

[65] Commission, 'Memorandum on the Accession of the European Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms' (1979) *Bulletin of the European Communities* – Supplement 2/79, esp. 11ff.

[66] On the drafting process, see G. de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 26 *EL Rev.* 126.

[67] Charter, preamble 4. For a criticism of the idea of codification, see J. Weiler, 'Does the European Union Truly Need a Charter of Rights' (2000) 6 ELJ 95 at 96: '[B]y drafting a list, we will be jettisoning one of the truly original features of the current constitutional architecture in the field of human rights – the ability to use the legal system of each of the Member States as an organic and living laboratory of human rights protection which then, case by case, can be adapted and adopted for the needs of the Union by the European Court in dialogue with its national counterparts.' The argument however – wrongly – assumed that the EU Charter would replace the Court's general principles jurisprudence.

[68] See Case C-540/03, *Parliament* v. *Council* [2006] ECR I-5769, para. 38: 'the Charter is not a legally binding instrument'.

[69] The Charter was announced at the Nice European Council, and its status was one of the questions in the 2000 Nice 'Declaration on the Future of the Union'.

[70] The 'Convention' drafting the 'Constitutional Treaty' amended the Charter. The amended version was first published in [2007] OJ C 303/1 and can now be found in [2010] OJ C 83/389.

[71] The US 'Bill of Rights' is the name given to the first ten amendments to the 1787 US Constitution.

Human Rights and the general principles of European law.[72] This formulation suggests two things. First, the Charter aims to codify existing fundamental rights and was thus not intended to create 'new' ones. And, second, it codifies European rights from *various* sources – and thus not solely the general principles found in the European Treaties. To help identify the source(s) behind individual Charter articles, the Member States decided to give the Charter its own commentary: the 'Explanations'.[73] These 'Explanations' are not strictly legally binding, but they must be given 'due regard' in the interpretation of the Charter.[74]

The structure of the Charter is shown in Table 12.1. The Charter divides the Union's fundamental rights into six classes. The classic liberal rights are covered by Titles I to III as well as Title VI. The controversial Title IV codifies the rights of workers; yet, provision is here also made for the protection of the family and the right to healthcare.[75] Title V deals with 'citizens' rights', that is: rights that a

Table 12.1 Structure of the EU Charter

EU Charter of Fundamental Rights
Preamble
Title I – Dignity
Title II – Freedoms
Title III – Equality
Title IV – Solidarity
Title V – Citizens' Rights
Title VI – Justice
Title VII – General Provisions Article 51 – Field of Application Article 52 – Scope and Interpretation of Rights and Principles Article 53 – Level of Protection Article 54 – Prohibition of Abuse of Rights
Protocol No. 30 on Poland & the United Kingdom
Explanations

[72] Charter, preamble 5.
[73] Art. 6(1) TEU – second indent. These so-called 'Explanations' are published in [2007] OJ C 303/17.
[74] Art. 6(1) TEU and Art. 52(7) Charter: 'The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.'
[75] See, respectively: Arts. 33 and 35 of the Charter.

polity provides exclusively to its members.[76] This includes the right to vote and to stand as a candidate in elections.[77]

The general principles on the interpretation and application of the Charter are finally set out in Title VII. These general provisions establish four fundamental principles. First, the Charter is addressed to the Union and will only exceptionally apply to the Member States.[78] Second, not all provisions within the Charter are 'rights', that is: directly effective entitlements for individuals. Third, the rights within the Charter can, within limits, be restricted by Union legislation.[79] Fourth, the Charter tries to establish harmonious relations with the European Treaties and the European Convention, as well as the constitutional traditions common to the Member States.[80] In the context of the present section, principles two, three and four warrant special attention.[81]

aa. (Hard) Rights and (Soft) Principles

It is important to note that the Charter makes a distinction between 'rights' and 'principles'. The Charter indeed expressly recognises the separate existence of 'principles' in Title VII.[82]

The distinction between rights and principles seems to contradict the jurisprudence of the Court with regard to fundamental *rights* as general *principles* in the context of the European Treaties. Yet what the Charter here means is that only those provisions that have direct effect will be 'rights' in that they can be invoked before a court. Not all provisions within the Charter are rights in this strict sense. Indeed, the Court has found that Charter provisions that are not unconditional and sufficiently precise would require (legislative) concretisation before they can become effective.[83]

What are these principles in the Charter, and what is their effect? The 'Explanations' offer a number of illustrations, for example: Article 37 of the Charter dealing with 'Environmental Protection'. The provision reads: 'A high

[76] Not all rights in this title appear to be citizens' rights. For example, Art. 41 of the Charter protecting the 'right to good administration' states (emphasis added): '*Every person* has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.'
[77] Art. 39 Charter.
[78] *Ibid*., Art. 51.
[79] *Ibid*., Art. 52(1).
[80] *Ibid*., Art. 52(2)–(4) and (6).
[81] Principle one will be discussed in section 4(b) below.
[82] Arts. 51(1) and 52(5) of the Charter. For a good discussion of these provisions, and the case law here, see J. Krommendijk, 'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the European Court of Justice' (2015) 11 *European Constitutional Law Review* 321.
[83] See e.g. Case C-176/12, *Association de médiation sociale* v. *Union locale des syndicats CGT and others*, EU:C:2014:2, paras. 45 and 48: 'It is therefore clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law … Accordingly, Article 27 of the Charter cannot, as such, be invoked in a dispute, such as that in the main proceedings[.]'

level of environmental protection and the improvement of the quality of the environment *must be integrated into the policies of the Union* and ensured in accordance with the principle of sustainable development.'[84] This wording contrasts strikingly with that of a classic right provision. For it constitutes less a *limit* to governmental action than an *aim* for governmental action. Principles indeed come close to orienting objectives, which 'do not however give rise to direct claims for positive action by the Union institutions'.[85] They are not subjective rights, but objective guidelines that need to be observed.[86] Thus:

> The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions … They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.[87]

The difference between rights and principles is thus one between a hard and a soft judicial claim. An individual will not have an (individual) right to a high level of environmental protection, but in line with the classic task of legal principles,[88] the courts must generally draw 'inspiration' from the Union principles when interpreting European law.

How is one to distinguish between 'rights' and 'principles'? Sadly, the Charter offers no catalogue of principles. Nor are its principles neatly grouped into a section within each substantive title. And even the wording of a particular article will not conclusively reveal whether it contains a right or a principle. But most confusingly, even a single article 'may contain both elements of a right and of a principle'.[89] How is this possible? The best way to make sense of this is to see rights and principles not as mutually exclusive concepts, but as distinct yet overlapping legal constructs.[90] 'Rights' are situational crystallisations of principles, and therefore derive from principles. A good illustration may be offered by Article 33 of the Charter on the status of the family and its relation to professional life as pictured by Figure 12.3.

bb. Limitations, and 'Limitations on Limitations'

Every legal order protecting fundamental rights recognises that some rights can be limited to safeguard the general interest. For written bills of rights, these limitations are often specifically recognised for each constitutional right. While

[84] Emphasis added.
[85] 'Explanations' (n. 73 above), 35.
[86] Art. 51(1) of the Charter: 'respect the rights, observe the principles'.
[87] *Ibid*., Art. 52(5).
[88] See R. Dworkin, *Taking Rights Seriously* (Duckworth, 1996).
[89] 'Explanations' (n. 73 above), 35.
[90] In this sense, see R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002), 47 – using the Wittgensteinian concept of 'family resemblance' to describe the relationship between 'rights' and 'principles'.

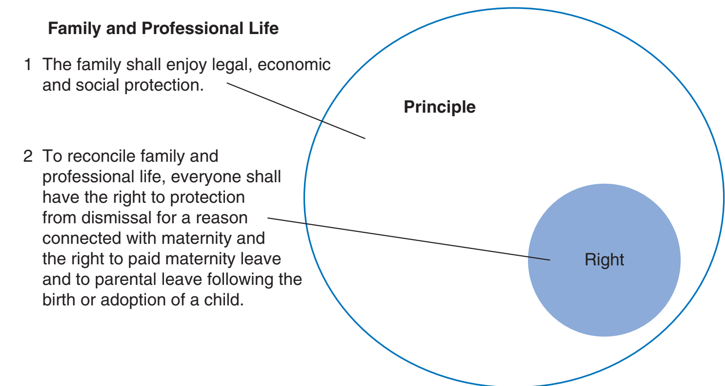

Figure 12.3 Principles and Rights within the Charter

the Charter follows this technique for some articles,[91] it also contains a provision that establishes general rules for limitations to all fundamental rights.

These general rules are set out in Article 52 of the Charter. The provision states:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be *provided for by law* and *respect the essence of those rights and freedoms*. Subject to the principle of *proportionality*, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.[92]

The provision subjects all limitations to EU Charter rights to three constitutional principles.

First, any limitation of fundamental rights must be provided for 'by law'. This (new Lisbon) requirement seems to prohibit, out of hand, human rights violations that are the result of individual acts based on *autonomous* executive powers.[93] The Court has confirmed this in *Knauf Gips* v. *Commission*.[94]

The problem is still this: will a limitation of someone's fundamental rights require the (democratic) legitimacy behind *formal* legislation? Put differently:

[91] See Art. 17 (Right to Property) of the Charter, which states in para. 1: 'No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.'
[92] *Ibid*., Art. 52(1) (emphasis added).
[93] On autonomous executive acts, see Chapter 9, section 2.
[94] Case C-407/08P, *Knauf Gips* v. *Commission* [2010] ECR I-6371, esp. paras. 91–2.

must every 'law' limiting a fundamental right be adopted under a 'legislative procedure'?[95] This view would significantly affect the balance between fundamental rights and the (democratic) pursuit of the common good. For if Article 52 outlaws all limitations of fundamental rights that are the result of *delegated* executive acts, much of the governmental machinery of the Union would come to a halt.

In order to prevent such a 'petrification' of the executive branch, the Court has rejected a formal concept of 'law'. Its material reading of the phrase 'provided for by law' was confirmed in *Schecke & Eifert*.[96] The case concerned two farmers who had received money under the Union's Common Agricultural Policy (CAP). One of the conditions for the receipt of money was the requirement to consent to the publication of information on the beneficiaries of the aid. This requirement had been established by a Union regulation adopted by the Council (!), which was subsequently implemented by a Commission (!) regulation. The two farmers claimed, *inter alia*, that their fundamental right to the protection of personal data under Article 8 of the Charter had been infringed;[97] and the question arose whether the publication of their names was 'provided for by law'. The Court indeed held that this was the case by simply pointing to the Commission (!) regulation requiring such publication.[98]

In light of this judgment, the best reading of the first requirement in Article 52 EU Charter is therefore this: the requirement that each limitation of a fundamental right be 'provided for by law' does not require direct *democratic* legitimation of all fundamental right interferences.[99] The provision rather insists on the *liberal* demand that all such interferences are rooted in a generally applicable norm. The generality of the norm is here a guarantee against arbitrary interferences that violate the central pillar of modern liberalism: equality before the law.

[95] In favour of this view, see D. Triantafyllou, 'The European Charter of Fundamental Rights and the "Rule of Law": Restricting Fundamental Rights by Reference' (2002) 39 *CML Rev.* 53–64 at 61: 'Accordingly, references to "law" made by the Charter should ideally require a co-deciding participation of the European Parliament'.

[96] Joined Cases C-92–3/09, *Schecke & Eifert* v. *Land Hessen* [2010] ECR I-11063.

[97] Art. 8(1) EU Charter states: 'Everyone has the right to the protection of personal data concerning him or her.'

[98] Joined Cases C-92–3/09, *Schecke & Eifert*, para. 66: 'First, it is common ground that the interference arising from the publication on a website of data by name relating to the beneficiaries concerned must be regarded as "provided for by law" within the meaning of Article 52(1) of the Charter. Articles 1(1) and 2 of Regulation No. 259/2008 expressly provide for such publication.'

[99] In this sense, see also Case C-130/10, *Parliament* v. *Council*, EU:C:2012:472, esp, para. 83: 'So far as concerns the Parliament's argument that it would be contrary to Union law for it to be possible for measures to be adopted that impinge directly on the fundamental rights of individuals and groups by means of a procedure excluding the Parliament's participation, it is to be noted that the duty to respect fundamental rights is imposed, in accordance with Article 51(1) of the Charter of Fundamental Rights of the European Union, on all the institutions and bodies of the Union.' The Court has now also expressly confirmed that an international agreement may constitute a 'law' for the purposes of Art. 52 of the EU Charter, see: *Opinion 1/15*, EU:C:2017:592, esp. paras. 145–6. The reasoning here comes nevertheless suspiciously close to requiring a formal legislative act – at least for the internal sphere.

Be that as it may, Article 52(1) of the Charter mentions, of course, two additional limitations on limitations. Most importantly: Article 52 has confirmed the independent existence of an absolute limit to public interferences into fundamental rights by insisting that each limitation must always 'respect the essence' of the right in question. The codification of the 'essential core' doctrine is to be welcomed; and its independence from the principle of proportionality has been consistently confirmed.[100]

Finally, and according to the principle of proportionality, each restriction of fundamental rights must be necessary in light of the general interest of the Union or the rights of others. This imposes an obligation on the Union to balance the various rights and interests at stake. In *Digital Rights Ireland*, for example, the Court found that Union Directive 2006/24 on data retention could not be justified on public security grounds. In the words of the Court:

> As regards the necessity for the retention of data required by Directive 2006/24, it must be held that the fight against serious crime, in particular against organised crime and terrorism, is indeed of the utmost importance in order to ensure public security and its effectiveness may depend to a great extent on the use of modern investigation techniques … In this respect, it must be noted, first, that Directive 2006/24 covers, in a generalised manner, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime … It follows from the above that Directive 2006/24 does not lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. It must therefore be held that Directive 2006/24 entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary … Having regard to all the foregoing considerations, it must be held that, by adopting Directive 2006/24, the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter.[101]

The Court consequently annulled the relevant Union legislation because it constituted a disproportionate interference with EU fundamental rights.

[100] Case C-293/12, *Digital Rights Ireland Ltd* v. *Minister for Communications, Marine and Natural Resources*. The Court here clearly distinguished between a violation of the essential core doctrine (*ibid.*, paras. 39–40) and a breach of the principle of proportionality (*ibid.*, paras. 45–69). For more recent confirmation, see Case C-547/14, *Philip Morris and others* v. *Secretary of State for Health*, EC:C:2016:325, esp. para. 151.

[101] Case C-293/12, *Digital Rights Ireland Ltd*, paras. 51–69. Arts. 7 and 8 of the Charter deal, respectively, with the respect for private and family life and the protection of personal data.

b. Relations with the European Treaties (and the European Convention)

aa. Harmonious Relations with the European Treaties

The EU Charter has come to be the focal point for all judicial analysis of fundamental rights violations in the Union legal order. Instead of referring back to the older (unwritten) general principles, the Court now prefers to start with the Charter. The Charter is however not 'inside' the Treaties but 'outside' them. The question therefore arises as to its relationship with the European Treaties. According to Article 6(1) TEU, the Charter has the same legal value as the Treaties and its relationship to them is governed by Title VII of the Charter. Article 52(2) here specifically governs the relationship between the Charter and the Treaties. It states:

> Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

The Charter thus adopts the Latin rule of *lex specialis derogat lex generalis*: the more specific – constitutional – law controls the more general law. Where the Charter codifies a fundamental right or freedom from the Treaties, the EU Treaties will have precedence and the Court is likely to confine its analysis to the provision(s) in the Treaties only.[102]

But this elegant theoretical solution suffers from practical uncertainties. How are we to identify the rights the Charter 'recognises' as (unwritten) fundamental rights within the European Treaties? The 'Explanations' are not of much assistance. A question to be resolved in future jurisprudence will thus be this: has the Charter recognised rights from the constitutional traditions of the Member States *outside* those recognised as general principles within the European Treaties?[103] If that was the case, those Charter rights would not be subject to the conditions and limits defined by the Treaties. And even where a Charter right does correspond to a general principle in the Treaties, the latter could have a narrower scope than the corresponding right in the Charter. In such cases, the question

[102] Case C-233/12, *Gardella* v. *INPS*, EU:C:2013:449, esp. paras. 39 and 41: 'In that vein, Article 15(2) of the Charter reiterates *inter alia* the free movement of workers guaranteed by Article 45 TFEU, as confirmed by the explanations relating to that provision … Consequently, in order to answer the questions referred, an analysis of Articles 45 TFEU and 48 TFEU is sufficient.'

[103] Art. 52(4) of the Charter states: 'In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.' The 'Explanations' (n. 73 above), 34, tell us that Art. 52(4) has been based on the wording of Art. 6(3) TEU and demands that 'rather than following a rigid approach of "a lowest common denominator", the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions'.

arises whether the entire Charter right is subject to the limitations established by the Treaties for the general principle.[104]

bb. Harmonious Relations with the European Convention

The Charter's relation to the European Convention is even more puzzling. The Charter seemingly offers a simple solution in its Article 52(3):

> In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

The provision appears to *materially* incorporate the European Convention on Human Rights into the Charter. On its surface, the first sentence of the provision thereby extends the *lex specialis* rule established in the previous paragraph for the European Treaties. It thus seems that for those Charter rights that correspond to Convention rights, the conditions and limits of the latter will apply.[105] But the logic of Convention precedence is contradicted by the second sentence. For if we allow Charter rights to adopt a higher standard of protection than that established in the European Convention,[106] it must be the Charter that constitutes the *lex specialis* for the European Union.

The wording of Article 52(3) is thus – highly – ambivalent. The best way to resolve the textual contradiction is to interpret the provision to simply mean that

[104] This excellent point is made by K. Lenaerts and E. de Smijter, 'A "Bill of Rights" for the European Union' (2001) 38 *CML Rev.* 273, 282–4. The authors compare the scope of the respective non-discrimination rights of the Charter (Art. 21 of the Charter) with that of the Treaties (Art. 19 TFEU). The scope of the former seems thereby broader than the scope of the latter. The question therefore arises whether the Court will subject the 'additional' scope of Art. 21 of the Charter to the conditions set out in the TFEU. The same question potentially arises in the context of the freedom to conduct a business within the Charter (Art. 16 of the Charter) and its relationship to the free movement provisions within the TFEU.

[105] The 'Explanations' (n. 73 above), 33, contain a list of rights that 'at the present stage' must be regarded as corresponding to rights in the ECHR. For a recent case on the first sentence of Art. 52(3) Charter, see Case C-279/09, *Deutsche Energiehandels- und Beratungsgesellschaft mbH*.

[106] It has been argued that this contradiction would dissolve if 'Union law' is understood as referring to the European Treaties or European legislation – and not to the Charter (T. Schmitz, 'Die Grundrechtscharta als Teil der Verfassung der Europäischen Union' [2004] *Europarecht* 691 at 710). But there are serious textual, historical and teleological arguments against this view. First, why should Art. 52(3) of the Charter not deal with the relationship between the Charter and the ECHR? Put differently, if the second sentence were confined to the higher standard established by the European Treaties, why was this not clarified in Art. 6(2) TEU or Art. 6(3) TEU? Second, historically, the European Convention Working Group had expressly argued for a higher standard within the Charter (see Working Group II (Final Report) (2002) CONV 354/02, 7: 'The second sentence of

'the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR'.[107] Convention rights will thus offer a baseline – a minimum standard – for Charter rights.

3. The 'External' Bill of Rights: The European Convention on Human Rights

The discovery of an unwritten bill of rights and the creation of a written bill of rights for the Union have been 'internal' achievements. They did 'not result in any form of external supervision being exercised over the Union's institutions'.[108] Indeed, until recently, the Union was not a party to a single international human rights treaty.[109] And, by preferring *its* internal human rights over any external international standard, the Court has been accused of a 'chauvinist' and 'parochial' attitude.[110]

This bleak picture *is* distorted – at the very least, when it comes to one international human rights treaty that has always provided an external standard to the European Union: the European Convention on Human Rights. From the very beginning, the Court of Justice took the Convention very seriously,[111]

Article 52 §3 of the Charter serves to clarify that this article does not prevent more extensive protection already achieved or which may subsequently be provided for (i) in Union legislation and (ii) in some articles of the Charter which, although based on the ECHR, go beyond the ECHR because Union law acquis had already reached a higher level of protection (e.g. Article 47 on effective judicial protection, or Article 50 on the right not to be punished twice for the same offence). Thus, the guaranteed rights in the Charter reflect higher levels of protection in existing Union law'). Third, there are good teleological arguments for allowing a higher Charter standard (see D. Chalmers et al., *European Union Law* (Cambridge University Press, 2010), 244: 'The ECHR covers forty-six states. It is committed to a less intense form of political integration and governs a more diverse array of situations than the European Union. It is not clear that the judgments of a court such as the European Court of Human Rights, operating in that context, should be accepted almost unquestioningly').

107 'Explanations' (n. 73 above), 33. The 'Explanations' subsequently distinguish between a list of Charter rights 'where both the meaning and the scope are the same as the corresponding Articles of the ECHR', and those Charter rights 'where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider' (*ibid.*, 33–4).

108 I. de Jesús Butler and O. de Schutter, 'Binding the EU to International Human Rights Law' (2008) 27 YEL 277 at 278. This statement is correct only if limited to *direct* external supervision.

109 *Ibid.*, 298. The Union has now acceded to the United Nations Convention on the Rights of Persons with Disabilities, see [2010] OJ L 23/35. On the negotiating history of the Convention, see G. de Búrca, 'The European Union in the Negotiation of the UN Disability Convention' (2010) 35 *EL Rev.* 174.

110 G. de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2010) 51 *Harvard International Law Journal* 1. In a later publication, Professor de Búrca softens her charge that the European Union ignores or snubs international or regional human rights law, see de Búrca, 'Evolution' (n. 5 above), 489.

111 See S. Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 *CML Rev.* 629. And in the words of a distinguished judge of the Court: '[C]ontrary to what sometimes seems to be assumed in the

sometimes even too seriously.[112] The Union has for a long time indeed acted *as if* it was bound by the ECHR,[113] and even the ECHR has developed some form of external review of Union acts. Nonetheless, there *are* still many complexities and shortcomings in the Union's relations to the European Convention as long as the Union is not formally bound by it. In the words of the Court:

> [I]t is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, *the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law*.[114]

This third section explores the external Convention standard before and after Union accession in a first step. Thereafter, we shall quickly look at the accession (pre)conditions imposed by the Union legal order.

a. The European Convention Standard for Union Acts

aa. Before Accession: (Limited) Indirect Review

The Union is not a formal party to the European Convention. And the European Convention system has not found the European Union to have 'succeeded' its Member States.[115] Could the Member States thus escape their international obligations under the Convention by transferring decision-making powers to the European Union? In order to avoid a normative vacuum, the European

legal literature, I am not aware of a single case where the ECJ has gone clearly against an interpretation advanced by the European Court of Human Rights.' See A. Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' (2007) 1 *European Journal of Legal Studies* 1 at 10.

112 See Case C-145/04, *Spain* v. *United Kingdom* [2006] ECR I-7917. In that case, Spain had – rightly – argued that the extension of the right to vote in elections to the European Parliament to persons who are not citizens of a Member State violates Art. 20 TFEU. Yet the Court, expressing '[a]t the outset' (*Ibid.*, para. 60) its wish to comply with the judgment of the European Court of Human Rights in *Matthews* v. *United Kingdom* [1999] 28 EHRR 361, misinterpreted the federal foundations of the European Union to pursue this aim to the end (paras. 94–5).

113 There however seems to be a decline in the material use of the ECHR as a point of reference after the adoption of the EU Charter (see G. de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human rights Adjudicator?' (2013) 20 *Maastricht Journal of European and Comparative Law* 168).

114 For this pertinent reminder, see Case C-617/10, *Åklagaren* v. *Hans Åkerberg Fransson*, EU:C:2013:105, para. 44 (emphasis added).

115 *Confédération Française Démocratique du Travail* v. *European Communities (alternatively, their Member States)* [1978] 13 DR 231, 240: 'In so far as the application is directed against the European [Union] as such the Commission points out that the European [Union] [is]

Convention system has developed a form of *indirect* judicial review of Union acts.

This indirect review is based on the doctrine of (limited) State responsibility for acts of the Union. This complex construction draws on the idea of a human rights mortgage: the ECHR Member States cannot transfer powers to the EU without being bound – at least to some extent – by the European Convention to which they are formal parties. In *M & Co.* v. *Germany*,[116] the European Commission of Human Rights thus found that, whereas 'the Convention does not prohibit a Member State from transferring powers to international organisations', '*a transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers*'.[117] This would however not mean that the State was to be held responsible for all actions of the Union, because: 'it would be contrary to the very idea of transferring powers to an international organisation to hold the Member States responsible … in each individual case'.[118] And consistent with its chosen emphasis on *State* responsibility, the Convention system would therefore not concentrate on a concrete Union act, but on the States' decision to transfer powers to the Union. This transfer of powers was thereby deemed 'not incompatible with the Convention provided that within that organisation fundamental rights will receive *an equivalent protection*'.[119]

In *Bosphorus*,[120] the European Court of Human Rights justified this 'middle ground' position as follows:

> The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue co-operation in certain fields of activity. Moreover, even as the holder of such transferred sovereign power, that organisation is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party. On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's 'jurisdiction' from scrutiny under the Convention.
>
> *In reconciling both these positions and thereby establishing the extent to which a State's action can be justified by its compliance with obligations flowing from its*

not a Contracting Party to the European Convention on Human Rights (Art 66 of the Convention). To this extent the consideration of the applicant's complaint lies outside the Commission's jurisdiction ratione personae.'

[116] *M& Co.* v. *Federal Republic of Germany* (1990) 64 DR 138.

[117] *Ibid.*, 145 (emphasis added).

[118] *Ibid.*, 146.

[119] *Ibid.*, 145 (emphasis added).

[120] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi* v. *Ireland* [2006] 42 EHRR 1.

> *membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention … In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides*. By 'equivalent' the Court means 'comparable'; any requirement that the organisation's protection be 'identical' could run counter to the interest of international co-operation pursued.[121]

In its indirect review of Union acts (via its Member States), the Convention Court would thus not apply its 'normal' standard.[122] Because the Union protected human rights in an 'equivalent' manner to that of the Convention, the European Court of Human Rights would operate a 'presumption' that the States had not violated the Convention by transferring powers to the European Union. This presumption translates into a lower review standard for acts adopted by the European Union,[123] since the presumption of equivalent protection will only be rebutted where the actual treatment of human rights within the Union was 'manifestly deficient'.[124]

This lower review standard represents a compromise between two extremes: no control (as the Union is not a Convention member) and full control; and this compromise has been said to be 'the price for Strasbourg achieving a level of control over the EU, while respecting its autonomy as a separate legal order'.[125]

[121] *Ibid.*, paras. 152–5 (emphasis added).

[122] For a criticism of this point, see Joint Concurring Opinion of Judges Rozakis et al. (*ibid*. paras. 3–4): 'The right of individual application is one of the basic obligations assumed by the States on ratifying the Convention. It is therefore difficult to accept that they should have been able to reduce the effectiveness of this right for persons within their jurisdiction on the ground that they have transferred certain powers to the European [Union]. For the Court to leave to the [Union's] judicial system the task of ensuring "equivalent protection" without retaining a means of verifying on a case-by-case basis that that protection is indeed "equivalent", would be tantamount to consenting tacitly to substitution, in the field of [European] law, of Convention standards by a [Union] standard which might be inspired by Convention standards but whose equivalence with the latter would no longer be subject to authorised scrutiny … In spite of its relatively undefined nature, the criterion "manifestly deficient" appears to establish a relatively low threshold, which is in marked contrast to the supervision generally carried out under the European Convention on Human Rights.'

[123] J. Callewaert, 'The European Convention on Human Rights and European Union Law: A Long Way to Harmony' [2009] *European Human Rights Law Review* 768, 773: 'through the *Bosphorus*-presumption and its tolerance as regards "non manifest" deficiencies, the protection of fundamental rights under [European] law is policed with less strictness than under the Convention'.

[124] *Bosphorus* (n. 120 above), paras. 156–7.

[125] Douglas-Scott, 'Tale of Two Courts' (n. 111 above), 639.

Under the European Convention, Member States are consequently not responsible for every European Union act that – theoretically – violates the European Convention.

When can a Member State benefit from the *Bosphorus* presumption, and when not? The Convention system has introduced an important distinction in this context: where a Member State executes compulsory or non-discretionary Union acts, it would benefit from limited review; whereas voluntary or discretionary State acts would be subject to a full review. For all EU primary law, the Member States will thus be directly and fully responsible because European primary law is freely 'authored' by the Member States – not the European Union.[126] European secondary law, by contrast, is always 'authored' by the Union; yet the *Bosphorus* presumption will here only apply to 'fully determined' European Union acts, that is: acts that do not involve any discretionary implementation by the Member States. Where Union secondary law offers Member States a choice on how to implement Union law, these discretionary national acts are national acts – not Union acts – and therefore subject to a full Convention review.[127]

bb. After Accession: (Full) Direct Review

The present Strasbourg jurispsrudence privileges the Union in not subjecting it to the full external review by the European Court of Human Rights. This privilege is not the result of the Union being a 'model' member. Instead it results from the Union *not* being a formal member of the European Convention system.

Will the presumption that the Union – in principle – complies with the European Convention disappear with accession? It seems compelling that the *Bosphorus* presumption will cease once the Union accedes to the Convention. For '[b]y acceding to the Convention, the European Union will have agreed to have its legal system measured by the human rights standards of the ECHR', and will 'therefore no longer deserve special treatment'.[128] The replacement of an *indirect* review by a *direct* review should therefore – at least in theory – lead to the replacement of the *limited* review by a *full* review. Yet the life of law is not always logical, and the Strasbourg Court may well decide to cherish past experiences by applying a lower review standard to the (acceded) European Union.

[126] On the European law principles governing the authorship of an act, see R. Schütze, 'The Morphology of Legislative Powers in the European Community: Legal Instruments and the Federal Division of Powers' (2006) 25 YEL 91, 98ff.

[127] *Bosphorus* (n. 120 above), paras. 148 and 157.

[128] T. Lock, 'EU Accession to the ECHR: Implications for Judicial Review in Strasbourg' (2010) 35 *EL Rev.* 777 at 798. See also O. de Schutter, '*Bosphorus* Post-Accession: Redefining the Relationship between the European Court of Human Rights and the Parties to the Convention', in V. Kosta et al. (eds.), *The EU Accession to the ECHR* (Hart, 2014), 177: 'This chapter argues that there will be no argument to justify the survival of the doctrine in its current form following the accession of the EU to the ECHR[.]'

What seems however certain is that accession will widen the scope of application of the European Convention to all Union actions. As we saw above, the external review of Union acts prior to accession depended on the Member States implementing Union acts; and this, by definition, required that a *Member State* had acted in some way and thereby exercised 'its' authority (even if this national authority was confined to non-discretionary choices). By contrast, in situations where the Union institutions had acted directly upon an individual without any mediating Member State measure, this Union act could not – even indirectly – be reviewed.[129] For in the absence of a connecting factor to one of the signatory States, the Union act was outside the Convention's jurisdiction.[130] This should definitely change once the Union accedes to the Convention. Henceforth all Union actions that directly enforce European law would fall within the jurisdiction of the Strasbourg Court.

b. Union Accession to the European Convention: Preconditions

The EU Commission has, long ago, suggested that an accession to the Convention should be pursued.[131] But under the original Treaties, the European Union lacked the express power to conclude human rights treaties. The Commission had thus proposed using the Union's general competence: Article 352 TFEU; yet – famously – the Court rejected this strategy in *Opinion 2/94*.[132] Since accession by the Union would have '*fundamental institutional implications*' for the Union and its Member States, it would go beyond the scope of Article 352 TFEU.[133] Only a subsequent Treaty amendment could provide the Union with the power of accession.

This power has now been granted by the Lisbon amendment. According to Article 6(2) TEU, the European Union 'shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'. The 'shall' formulation indicates that the Union is even constitutionally obliged to become a member of this organisation.[134] However, membership must not 'affect the Union's competences as defined in the Treaties';[135] and, even more importantly, Union accession to the European Convention needs to pay due regard to the 'specific characteristics of the Union and Union law'.[136] These constitutional

[129] See *Connolly* v. *Fifteen Member States of the European Union* (Application No. 73274/01).

[130] Art. 1 of the ECHR states: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'

[131] Commission, 'Memorandum' (n. 65 above).

[132] *Opinion 2/94* (Accession to ECHR) [1996] ECR I-1759.

[133] *Ibid.*, paras. 35–6 (emphasis added). On this point, see: Chapter 7, section 1(b/bb).

[134] Membership of the European Convention is now open to the European Union. For a long time, accession to the European Convention was confined to States (see Art. 4 of the Statute of the Council of Europe). This has recently changed with the amendment to Art. 59 of the Convention, para. 2 of which now states: 'The European Union may accede to this Convention.'

[135] Art. 6(2) TEU.

[136] Protocol No. 8 relating to Art. 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and

preconditions have recently been given a controversial interpretation in *Opinion 2/13* (Accession to the ECHR II).

aa. Union Accession I: Constitutional Preconditions

No Opinion by the Court has generated more – negative – commentary in recent years than *Opinion 2/13*.[137] The Court had been asked to preview the constitutionality of an agreement negotiated between the Union and the ECHR Member States that would have affected the accession of the Union. And, infamously, the Court gave a resounding 'no'. This 'no' went against the three principal Union institutions as well as the absolute majority of Member States,[138] and yet: the Court was, with regard to its overall result, correct to find that the (draft) accession agreement violated the 'specific characteristics of the Union and Union law'.[139]

What was the main problem for the Court? The Court recalled that the Union is not a State; and that its legal order was a 'new kind of legal order' that was neither international nor national in nature.[140] The special characteristics of the Union were thereby partly manifested in the horizontal relations between the Member States and found particular expression in the principle of mutual

Fundamental Freedoms, Art. 1. According to the provision, this duty includes in particular: '(a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention'; and, '(b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate'. According to Art. 2: 'The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.'

137 For a selection of the numerous academic discussions, see Editorial, 'The EU's Accession to ECHR – a "NO" from ECJ!' (2015) 52 *CML Rev.* 1; P. Gragl, 'The Reasonableness of Jealousy: *Opinion 2/13* and EU Accession to the ECHR' (2015) 15 *European Yearbook on Human Rights* 27; T. Lock, 'The Future of the European Union's Accession to the European Convention of Human Rights after *Opinion 2/13*: Is It Still Possible and Is It Still Desirable?' (2015) 11 *European Constitutional Law Review* 239; B. de Witte and S. Imamovic, '*Opinion 2/13* on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) 40 *EL Rev* 683.

138 The Commission, the Parliament, the Council as well as 24(!) Member States had all intervened and pleaded in favour of accession.

139 This does not mean that one must agree with all aspects, formal or substantive, of the Opinion. Especially the discussions with regard to Art. 53 of the EU Charter (*ibid*., paras. 179–90) and the preliminary ruling mechanism (*ibid*., paras. 196–200) are, in my view, weak. By contrast, the Court's arguments with regard to the CFSP are, in my view, rather convincing. For as long as the Member States are unwilling to grant the ECJ jurisdiction on CFSP matters, it would be incongruous to confer such jurisdiction 'exclusively on an international court which is outside the institutional and judicial framework of the EU' (*ibid*., para. 256).

140 *Ibid*., paras. 156–8.

trust and mutual recognition.[141] These – federal – principles constitute, as we saw in Chapter 11, a key founding stone of the Union legal order. The principle of mutual recognition demands that Member States must generally accept the decisions of other Member States *as if they had adopted these decisions themselves*. For example: Germany cannot, in principle, refuse to recognise a decision of a French court because it believes that the decision of the latter violates fundamental human rights; and, according to the ECJ, this logic would have been undermined by the draft accession agreement:

> [W]hen implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.
>
> The approach adopted in the agreement envisaged, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law. *In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law*.[142]

The passage is problematic because the Court was wrong to insinuate that the problem with the accession agreement lay in the fact that it 'treat[ed] the EU as a State and to give it a role identical in every respect to that of any other Contracting Party'. Indeed, the opposite was the case. For the true problem with the agreement was treating the Member States (!) like any third contracting party – without due regard to their being *Member* States of the European Union. While a third State may thus need to check compliance with the ECHR standard when it extradites one of its nationals, within a federal Union – which

141 *Ibid*., para. 168 (emphasis added): 'This legal structure is based on the fundamental premise that each Member State shares with all the other Member States, *and recognises that they share with it*, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, *that the law of the EU that implements them will be respected*.'

142 *Ibid*., paras. 192–4 (emphasis added).

is itself (eventually) bound by the ECHR – this obligation undermines the principle of mutual recognition and trust. And in the eyes of the Court it was this lack of federal sensitivity towards the Member States as *States within the European Union* that was 'liable adversely to affect the specific characteristics of EU law and its autonomy'.[143]

If that reading is accepted, the problem with the accession agreement was not that it treated the EU like a State but rather that it treated it too much like an international organisation of 'sovereign' contracting parties. That is, instead of allowing Member States to mutually trust each other within a federal Union of States and blame the Union for failures in the principle of mutual trust, the accession agreement overemphasised the independent contracting status of each State. For many a human rights lawyer, this view has been hard to swallow.[144] And it is difficult to see how a new accession agreement would soon emerge on the horizon.

bb. Union Accession II: Procedural Conditions

How would a – future – negotiated accession agreement be concluded? On the Union side, accession will principally depend on the Member States of the Union:

> The Council shall … act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member states in accordance with their respective constitutional requirements.[145]

The Council will thus have to agree unanimously, having previously obtained the consent of the European Parliament,[146] and unlike ordinary international agreements of the Union, the Union decision concluding the accession agreement will – like a mixed agreement – only come into force once each and every Member State has ratified it. The Member States will therefore be able to block Union accession twice: once in the Council and once outside it. And while they technically are under a constitutional obligation to consent to accession as members of the Council, this is not the case for the second consent. For the duty to accede to the Convention expressed in Article 6(2) TEU will only bind the Union – and its institutions – but not the Member States.

[143] *Ibid*., para. 200.
[144] For a good overview of some of the – truly exaggerated – claims, and in particular the accusation that the ECJ was a 'danger to human rights protection' (see Gragl, 'Reasonableness of Jealousy' (n. 137 above)).
[145] Art. 218(8) TFEU – second indent.
[146] *Ibid*., Art. 218(6)(a)(ii).

4. The 'Incorporation Doctrine': EU Fundamental Rights and National Law

European fundamental rights are of course binding on the *European* Union to which they are addressed.[147] Yet will they also bind the Member States?

Two options here exist. According to a 'separation model', European fundamental rights exclusively apply to the Union, while national fundamental rights exclusively apply to the Member States.[148] By contrast, according to an 'incorporation model', European fundamental rights are 'incorporated' into the national legal orders and thus apply to European as well as national authorities by virtue of the fact that they always concern *Union* rights that must be guaranteed regardless of who interferes with them.

The European Union has, like the United States today,[149] chosen a solution in between these two extremes. While rejecting 'total' incorporation, it has developed a doctrine of 'selective' incorporation whereby EU fundamental rights may – in certain situations – directly apply to the Member States.[150] This fourth – and final – section analyses those situations in which the Union's three bills of rights have been found to apply to national authorities.

a. Incorporation and General Principles: Implementation and Derogation

The incorporation doctrine started out in the context of the Union's general principles jurisprudence. The need for such a doctrine in this context could have been doubtful in light of the fact that EU fundamental rights here are a product of the common constitutional traditions of the Member States. How can there be a need for incorporation? The answer lies in the Union's autonomous human rights standard that may be higher than a particular national

[147] Fundamental rights can of course be invoked against the Union legislature as well as the Union executive; and as regards the latter, the Court has recently held that EU fundamental rights will even bind the Union institutions when acting 'outside the EU legal framework' (see Joined Cases C-8/15P to C-10/15P, *Ledra and others* v. *Commission and European Central Bank*, EU:C:2016:701, para. 67). The Court here held that whenever the Commission acts – even outside EU law – it would be bound by EU fundamental rights.
[148] This separation model originally applied in US constitutionalism, because the federal Bill of Rights was here seen to be exclusively addressed to the Union; and it therefore could not bind the States, see *Barron* v. *Mayor of Baltimore*, 32 US (7 Pet) 243 (1833).
[149] With the rise of the doctrine of incorporation in the early twentieth century, the US (federal) Bill of Rights started to be considered to also apply to the States. See *Gitlow* v. *New York* 268 US 652 (1925). For a comparison between the US and the European incorporation doctrines, see R. Schütze, 'European Fundamental Rights and the Member States: From "Selective" to "Total" Incorporation?' (2011–12) 14 *CYELS* 337.
[150] The question of incorporation is distinct from the question of direct effect. The doctrine of direct effect concerns the question whether provisions are sufficiently clear and precise. If they are, fundamental rights (like any ordinary European law) will need to be applied by the executive and judicial branches. By contrast, the doctrine of incorporation concerns the addressee, that is the question *against whom* they can be applied, in this case: whether European human rights may – exceptionally – also be addressed to the Member States.

standard.[151] National legislation may thus respect national human rights, and yet violate the (higher) European standard. The Court has thus indeed invented an 'incorporation doctrine' for the general principles of the Union legal order. However, this European incorporation doctrine is 'selective' in that it only applies in two situations. The first situation concerns the implementation of European law (implementation situation). The second situation concerns derogations from European law (derogation situation).

The Court expressly confirmed that EU human rights bind national authorities when implementing European law in *Wachauf*.[152] European fundamental rights would be 'binding on the Member States when they *implement* [European] rules'.[153] What is the constitutional rationale behind this? Incorporation has here been justified on the grounds that the Member States functionally act as the Union's decentralised executive branch.[154] It would be – black – magic, so the argument goes, if the Union could escape its human rights control by leaving the implementation of controversial European policies to the Member States. Individuals will thus be entitled to challenge national acts executing European law if they violate fundamental European rights. But while this is a reasonable rationale in situations in which the Member States strictly execute European law to the letter, should it also extend to situations where the Member States are left with autonomous discretion? This tricky question appears, in principle, to be answered in the positive.[155]

[151] On this point, see section 1(a/aa) above.

[152] Case 5/88, *Wachauf* v. *Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609. The idea had been implicit in the (earlier) *Rutili* ruling.

[153] Case 5/88, *Wachauf*, para. 19 (emphasis added).

[154] On the Member States acting as the Union executive, see Chapter 9, section 4.

[155] Three cases support this point. In Case 5/88, *Wachauf*, the Court expressly referred to the margin of appreciation left to the Member States in the implementation of European law (para. 22): 'The [Union] regulations in question accordingly leave the competent national authorities a sufficiently wide margin of appreciation to enable them to apply those rules in a manner consistent with the requirements of the protection of fundamental rights, either by giving the lessee the opportunity of keeping all or part of the reference quantity if he intends to continue milk production, or by compensating him if he undertakes to abandon such production definitively.' Second, in Case C-2/92, *The Queen* v. *Ministry of Agriculture, Fisheries and Food, ex p. Dennis Clifford Bostock* [1994] ECR I-955), the plaintiff brought proceedings against the British Ministry of Agriculture, arguing that the United Kingdom had violated his property rights by failing to implement a compensation scheme for outgoing tenants and thus wrongly implementing European agricultural legislation. While finding that the European legislation did not require such a compensation scheme, the Court nonetheless examined whether European fundamental rights had been violated by the national legislation. This was confirmed in Case C-275/06, *Promusicae* v. *Telefónica de España* [2008] ECR I-271. The case will be discussed in section 4(b/aa) below. However, there are also judicial authorities against extending the implementing situation to cases where the Member States go beyond minimum harmonisation; see Case C-2/97, *Società italiana petroli SpA (IP)* v. *Borsana* [1998] ECR I-8597, esp. para. 40: 'Since the legislation at issue is a more stringent measure for the protection of working conditions compatible with the Treaty and results from the exercise by a Member State of the powers it has retained pursuant to Article [153] of the [FEU] Treaty, it is not for the Court to rule on whether such legislation and the penalties imposed therein are compatible with the principle of proportionality'; Case C-6/03, *Deponiezweckverband Eiterköpfe* v. *Land Rheinland-Pfalz* [2005] ECR I-2753.

The Court has also come to accept a second situation in which European human rights are 'incorporated'. This is the case when Member States 'derogate' from European law. This 'derogation situation' was first accepted in *ERT*.[156] The plaintiff had been granted an exclusive licence under Greek law to broadcast television programmes, which had been violated by a local television station. In the course of national proceedings, the defendant claimed that the Greek law restricted its freedom to provide services protected under the European Treaties and also violated its fundamental right to freedom of expression. In a preliminary ruling, the European Court held that where a Member State relied on European law 'in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided by [Union] law, must be interpreted in the light of the general principles of law *and in particular fundamental rights*'.[157] In this *derogating* situation, national rules would be subject to European fundamental rights, in this case: freedom of expression.

The Court's judgment in *ERT* was a silent revolution, since it implicitly overruled an earlier decision to the contrary.[158] The constitutional rationale behind the derogation situation however remains contested.[159] Moreover, the *ERT* judgment was – as many revolutions are – ambivalent about its ambit. Would European human rights apply to national measures even outside the 'derogation situation'? A wider rationale had indeed been suggested in one part of the *ERT* judgment that simply spoke of national rules falling within the scope of European law.[160]

And while it is clear that a national law must first fall within the scope of European law,[161] the relationship between the derogation rationale and the wider

[156] Case C-260/89, *Elliniki Radiophonia Tiléorassi (ERT) et al.* v. *Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas et al.* [1991] ECR I-2925.

[157] *Ibid.*, para. 43 (emphasis added).

[158] In Cases 60 and 61/84, *Cinéthèque SA and others* v. *Fédération nationale des cinémas français* [1985] ECR 2605.

[159] See in particular F. Jacobs, 'Human Rights in the European Union: The Role of the Court of Justice' [2001] *EL Rev.* 331 at 336–7; P. M. Huber, 'The Unitary Effect of the Community's Fundamental Rights: The *ERT*-Doctrine Needs to Be Revisited' (2008) 14 *European Public Law* 323 at 328: 'Though this concept is approved from various sides, it is neither methodologically nor dogmatically convincing.'

[160] Case C-260/89, *ERT*, para. 42: '[W]here such rules do fall within the scope of [European] law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights.' In the subsequent paragraph the Court then refers to the derogation rationale as a 'particular' expression of this wider rationale.

[161] See Case C-159/90, *Grogan*, in which the Court declared that the defendants could not invoke their European fundamental right to freedom of expression against Irish legislation

scope rationale has never been conclusively resolved.[162] And even if the wider rationale is the right one, the question remains what exactly is meant by the phrase 'the scope of European law'. Various meanings here compete with each other. First, the Court may identify the scope of European law with the scope of existing European *legislation*.[163] Second, the formulation could refer to the Union's *legislative competences*.[164] (This would broaden the applicability of incorporation to areas in which the Union has not yet adopted positive legislation.) Finally, the Court might wish to include all situations that fall within the scope of the Treaties, *period*.

b. Incorporation and the Charter of Fundamental Rights

aa. General Rules for All Member States

Will the 'Charter of Fundamental Rights *of the European Union*' be binding on the Member States? The Charter answers this question in Article 51 establishing its field of application:

prohibiting activities assisting abortion. According to the European Court, the defendants had not distributed information on abortion clinics on behalf of those clinics and it *thus followed that* 'the link between the activity of the students' associations of which Mr Grogan and the other defendants are officers and medical terminations of pregnancies carried out in clinics in another Member State is too tenuous for the prohibition on the distribution of information to be capable of being regarded as a restriction within the meaning of … the Treaty' (*ibid*., para. 24). The national legislation thus lay outside the scope of European law (*ibid*., para. 31).

162 See Case C-299/95, *Kremzow* v. *Austria* [1997] ECR I-2629, para. 16: 'The appellant in the main proceedings is an Austrian national whose situation is not connected in any way with any of the situations contemplated by the Treaty provisions on freedom of movement for persons. Whilst any deprivation of liberty may impede the person concerned from exercising his right to free movement, the Court has held that a purely hypothetical prospect of exercising that right does not establish a sufficient connection with [European] law to justify the application of [European] provisions[.]'

163 See Case C-309/96, *Annibaldi* v. *Sindaco del Comune di Guidonia and Presidente Regione Lazio* [1997] ECR I-7493, paras. 21 and 24: 'Against that background, it is clear, first of all, that there is nothing in the present case to suggest that the Regional Law was intended to implement a provision of [Union] law either in the sphere of agriculture or in that of the environment or culture … Accordingly, as [European] law stands at present, national legislation such as the Regional Law, which establishes a nature and archaeological park in order to protect and enhance the value of the environment and the cultural heritage of the area concerned, applies to a situation which does not fall within the scope of [European] law.' See also Case C-323/08 *Rodríguez Mayor* v. *Herencia yacente de Rafael de las Heras Dávila* [2009] ECR I-11621, para. 59: 'However, as is clear from the findings relating to the first two questions, a situation such as that at issue in the dispute in the main proceedings does not fall within the scope of Directive 98/59, or, accordingly, within that of [Union] law.'

164 This appears to be the meaning of the phrase in Joined Cases 60–1/84, *Cinéthèque*, para. 26: 'Although it is true that it is the duty of this Court to ensure observance of fundamental rights in the field of [European] law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator.'

> The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity *and to the Member States only when they are implementing Union law*. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.[165]

The provision clarifies that the Charter is in principle addressed to the Union, and will only exceptionally apply to the Member States 'when they are *implementing* Union law'. This codifies the *Wachauf* jurisprudence. The article is, however, silent on the second scenario: the derogation situation.

Is the incorporation doctrine under the Charter thus more 'selective'? The 'Explanations' relating to the Charter are inconclusive. They state: 'As regards the Member States, it follows unambiguously [*sic*] from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States *when they are in the scope of Union law*.'[166] The 'Explanations' then substantiate this statement by referring *both* to *Wachauf* and *ERT*; yet ultimately revert to a formulation according to which European fundamental rights 'are binding on Member States when they *implement* [Union] rules'.[167]

In light of this devilish inconsistency, the 'Explanations' have not much value. The wording of Article 51, on the other hand, is crystal clear and could have proven an insurmountable textual barrier.[168] But it seems that the Court has elected to extend its 'general principles' jurisprudence also to the Charter. In *Fransson*,[169] the Court thus gave an extremely broad reading to the 'incorporation situation' within Article 51 of the Charter. It held:

> [T]he Charter's field of application so far as concerns action of the Member States is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing European Union law. That article of the Charter thus confirms the Court's case-law relating to the

165 Art. 51(1) of the Charter (emphasis added).

166 'Explanations' (n. 73 above), 32 (emphasis added).

167 *Ibid*. (emphasis added). The 'Explanations' here quote Case C-292/97, *Karlsson* [2000] ECR I-2737, para. 37 (itself referring to Case C-2/92, *Bostock*, para. 16).

168 This view is taken by C. Barnard, 'The "Opt-Out" for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?', in S. Griller and J. Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer, 2008), 256 at 263: 'Even if the explanations are wider, it is unlikely that they will be used to contradict the express wording of the Charter since the Explanations are merely guidance on the interpretation of the Charter. The Charter will therefore apply to states only when implementing [European] law[.]'

169 Case C-617/10, *Åklagaren* v. *Fransson*, EU:C:2013:105.

> extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union.
>
> The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures (see *inter alia*, to this effect, Case C-260/89 ERT [1991] I-2925) … *Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter*.[170]

In the present case, the Court thus found – over the protesting Member States – that the relevant national measure had to be judicially reviewed in light of EU fundamental rights because it was 'connected' to European Union law.[171] This seems to identify 'implementation' with any action within the scope of Union law – a reading that would naturally include the derogation situation. But more than that: the 'all situations governed by EU law' formulation comes close to a form of total incorporation, admittedly, within the scope of EU law.[172]

What does this generous incorporation doctrine mean for the relationship between the (incorporated) European and a *higher* national human rights standard? What happens, for example, where a Member State, when implementing European law, respects the European standard but violates a higher national standard? Should European law here prevent a Member State from applying its higher standard to a situation governed by European law? The problem seems to be addressed by Article 53 of the Charter, which states:

> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective field of application, by Union law … and by the Member States' constitutions.

[170] *Ibid.*, paras. 17–19 and 21. [171] *Ibid.*, para. 24.

[172] For a recent use of the broad 'all situations' formulation, see Case C-685/15, *Online Games and others*, EU:C:2017:452, para. 55: '[Art. 51(1) of the Charter] confirms the Court's settled case-law, which states that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law.'

The provision has been said to challenge the supremacy of European law,[173] yet the Court has expressly rejected this reading in *Melloni*.[174] The Spanish Constitutional Court here made a preliminary reference to the European Court of Justice about the possibility of refusing to execute a European Arrest Warrant. The wish not to extradite the Italian defendant stemmed from the Spanish constitutional order insisting on an opportunity for retrial in cases where the original conviction had been given *in absentia*. This opportunity did not exist in Italy, and the question thus arose whether the higher Spanish fundamental right could be invoked under Article 53 of the Charter to disapply the Union obligation under the European arrest warrant.

The European Court of Justice had none of it:

> The interpretation envisaged by the national court at the outset is that Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. Such an interpretation would, in particular, allow a Member State to make the execution of a European arrest warrant issued for the purposes of executing a sentence rendered in absentia subject to conditions intended to avoid an interpretation which restricts or adversely affects fundamental rights recognised by its constitution … Such an interpretation of Article 53 of the Charter cannot be accepted. That interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.[175]

Is Article 53 EU Charter therefore a – legally – meaningless political 'ink-blot'?[176] This is not necessarily so, when viewed from the – right – perspective of the principle of pre-emption. Article 53 here simply states that a higher national human rights standard will not be pre-empted by a lower European standard as regards the validity of *national* law.

An illustration of the parallel application of European and national fundamental rights can be seen in *Promusicae* v. *Telefónica de España*.[177] Representing producers and publishers of musical recordings, the plaintiff had asked the defendant to disclose the identities and physical addresses of persons whom it provided with Internet services. These persons were believed to have used

[173] For a discussion of this point, see J. B. Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' (2001) 38 *CML Rev.* 1171.

[174] Case C-399/11, *Melloni* v. *Ministerio Fiscal*, EU:C:2013:107. For an extensive discussion of the case, and its context, see L. Besselink, 'The Parameters of Constitutional Conflict after *Melloni*' (2014) 39 *EL Rev.* 531.

[175] Case C-399/11, Melloni, paras. 56–8 (emphasis added).

[176] Liisberg, 'EU Charter of Fundamental Rights' (n. 173 above) at 1198.

[177] Case C-275/06, *Promusicae* v. *Telefónica de España*.

the KaZaA file exchange programme, thereby infringing intellectual property rights. The defendant refused the request on the grounds that under Spanish law such a disclosure was solely authorised in criminal – not civil – proceedings. Promusicae responded that the national law implemented European law, and it consequently had to respect the European fundamental right to property.

The question before the European Court therefore was this: must Articles 17 and 47 of the Charter 'be interpreted as requiring Member States to lay down, in order to ensure effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings'?[178] Not only did the Court find that there was no such obligation, it added that the existing European legislation would 'not preclude the possibility for the Member States of laying down an obligation to disclose personal data in the context of civil proceedings'.[179] A higher national standard for the protection of property was thus *not* prohibited. However, this higher national standard would need to be balanced against 'a further [European] fundamental right, namely the right that guarantees protection of personal data and hence of private life'.[180] And it was the obligation of the national court to reconcile the two fundamental rights by striking 'a fair balance' between them.[181]

This jurisprudence has been confirmed in *Fransson*.[182] The decisive criterion as to when a higher national fundamental right standard may still apply in a situation governed by EU law seems therefore to be whether EU law entirely or partially 'determines' (or 'pre-empts') a situation. Where it completely pre-empts national law, the higher national standard cannot apply. By contrast, where EU law leaves a margin of discretion to national law and that national law does not conflict with European law, the higher national standard will be allowed.

bb. Special Rules for Poland and the United Kingdom

The general rules governing the relationship between the Charter and the Member States are qualified for Poland and the United Kingdom. The two States have a special Protocol that governs the application of the Charter to them.[183]

[178] *Ibid.*, para. 41. Arts. 17 and 47 of the Charter protect, respectively, the right of property and the right of an effective remedy.
[179] *Ibid.*, para. 54.
[180] *Ibid.*, para. 63.
[181] *Ibid.*, paras. 65 and 68.
[182] Case C-617/10, *Åklagaren* v. *Fransson*, esp. para. 29.
[183] Protocol No. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. The European Council had originally agreed that the Czech Republic would be added to Protocol No. 30; see European Council (29–30 October 2009), Presidency Conclusions – Annex I: (Draft) Protocol on the Application of the Charter of Fundamental Rights of the European Union to the Czech Republic. However, the current Czech government appears to have formally withdrawn the request to be included in Protocol No. 30.

The Protocol is not a full 'opt-out' from the Charter. It expressly requires 'the Charter to be applied and interpreted by the courts of Poland and the United Kingdom'.[184] The Court has confirmed this reading in *NS*: 'Protocol (No. 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland.'[185] However, opinions differ as to whether the Protocol constitutes a simple clarification for the two States – not unlike the 'Explanations';[186] or whether it does indeed represent a *partial* opt-out by establishing special principles for the two countries.[187]

The two Articles that make up the Protocol state:

Article 1

1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.
2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

And:

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

In what ways, if any, do the two articles establish special rules qualifying any incorporation under Article 51 of the Charter? According to Article 1(1) of the Protocol, the Charter must not *extend* the review powers of the national courts to find national laws of these States incompatible with European rights. This

[184] Protocol No. 30, preamble 3.
[185] Joined Cases C-411/10 and C-493/10, *NS* v. *Secretary of State for the Home Department* [2011] ECR I-13905, para. 119.
[186] Protocol No. 30, preamble 8: 'Noting the wish of Poland and the United Kingdom to clarify certain aspects of the application of the Charter'. For a sceptical view on the purpose of the Protocol, see M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) 45 *CML Rev.* 617 at 670: '[T]he Protocol's primary purpose is to serve as an effective political response to a serious failure of public discourse. Indeed, the Protocol emerges as a fantasy solution to a fantasy problem[.]'
[187] *Ibid.*, preamble 10: 'Reaffirming that references in this Protocol to the operation of specific provisions of the Charter are strictly without prejudice to the operation of other provisions of the Charter.'

provision appears to assume that the Charter rights go beyond the status quo offered by the Union's unwritten bill of rights. This is not (yet) certain, but if the Court were to find Charter rights that did not correspond to human rights in the Treaties, then Poland and the United Kingdom would not be bound by these 'additional' rights when implementing European law.[188] The Protocol would consequently constitute a *partial* opt-out from the Charter. This is repeated 'for the avoidance of any doubt' in the context of the 'solidarity' rights in Article 1(2).[189]

But what is the constitutional purpose behind Article 2 of the Protocol? In order to understand this provision, we need to keep in mind that some Charter rights expressly refer to 'national laws governing the exercise' of a European right.[190] Take for example the 'right to marry and right to found a family' – a right of particular concern to Poland.[191] According to Article 9 of the Charter '[t]he right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights'.

Assume that the Court confirms the existence of a directly effective European right that would, in implementing situations, bind the Member States. Would 28 different national laws govern the exercise of this right? Or would the Court revert to the *common* constitutional traditions of the Member States? And even if the former were the case, could a couple consisting of a Spaniard and a Pole claim a right to celebrate their same-sex marriage – a marriage that is allowed in Spain but prohibited in Poland? To avoid any normative confusion, Article 2 of the Protocol thus clarifies that any reference to national laws and practices only refers to 'law or practices of Poland or of the United Kingdom'.

[188] It is not yet certain whether the Court will follow this logic. In Joined Cases C-411/10 and C-493/10, *NS*, the Court seemed to reduce Art. 1(1) to a simple explanation of Art. 51 (*ibid*., para. 120): 'Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.'

[189] And yet, this might only be true for Britain as Declaration No. 62 looks like a Polish 'opt-out' from the opt-out in Protocol No. 30. It states: 'Poland declares that, having regard to the tradition of social movement of "Solidarity" and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.'

[190] The following Charter rights use this phrase: Art. 9 – 'Right to marry and to found a family'; Art. 10 – 'Freedom of thought, conscience, and religion'; Art. 14 – 'Right to education'; Art. 16 – 'Freedom to conduct a business'; Art. 27 – 'Workers' right to information and consultation within the undertaking'; Art. 28 – 'Right of collective bargaining and action'; Art. 30 – 'Protection in the event of unjustified dismissal'; Art. 34 – 'Social security and social assistance'; Art. 35 – 'Health care'; Art. 36 – 'Access to services of general economic interest'.

[191] Declaration No. 61 by the Republic of Poland on the Charter of Fundamental Rights of the European Union: 'The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity.'

c. Incorporation and the European Convention on Human Rights?

All Member States are formal parties to the European Convention, and therefore directly bound by it. Is there thus any need for an incorporation doctrine once the European Union accedes to the ECHR?

The answer is – surprisingly – 'Yes'. For while the substantive human rights standard established by the Convention is, after accession, likely to be the same for the Union and its Member States, the formal legal effects of the Convention will differ. As an international agreement, the European Convention currently only binds the Member States under classic international law; and under classic international law, States remain free as to which domestic legal status to grant to an international treaty. For a majority of Member States,[192] the Convention indeed only enjoys a status equivalent to national legislation, that is: it is placed *below* the national constitution. In the event of a conflict between a European Convention right and a national constitution, the latter will prevail.[193]

This normative hierarchy will change when the Union becomes a party to the European Convention. For once the Convention has become binding on the Union, it will also bind the Member States qua European law. This follows from Article 216 TFEU, according to which '[a]greements concluded by the Union are binding upon the institutions of the Union *and on its Member States*'.[194] The provision 'incorporates' all Union agreements into the national legal orders.[195] The European Convention will thus be *doubly* binding on the Member States: they are *directly* bound as parties to the Convention and *indirectly* bound as members of the Union. And, with regard to the binding effect of the Convention qua European law, the Convention will have a hierarchical status *above* the national constitutions.

d. Excursus: Human Rights and Private Party Actions

This section has so far explored whether national authorities could be subject to EU fundamental rights. A very different question however is this: should fundamental rights also apply to private parties?

[192] On this point, see N. Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71 MLR 183 at 197: '[F]rom the perspective of the domestic courts national constitutional norms emerge as ultimately superior to European human rights norms and national courts as the final authorities in determining their relationship. This seems to hold more broadly: asked about their relationship to Strasbourg, 21 out of 32 responding European constitutional courts declared themselves not bound by ECtHR rulings.'

[193] For the German legal order, see the relatively recent confirmation by the German Constitutional Court in *Görgülü* (2 BvR 1481/04) available in English, at: www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html.

[194] Emphasis added.

[195] A. Peters, 'The Position of International Law within the European Community Legal Order' (1997) 40 *German Yearbook of International Law* 9–78 at 34: 'transposing international law into [European] law strengthens international rules by allowing them to partake in the special effects of [European] law'.

Traditionally, fundamental rights are solely addressed to public authorities. They are designed to protect private individuals against *public* power; and, as such, they will not address situations in which a private party violates another private party's fundamental rights. But if a private company systematically pays women less than men, does this not also violate the fundamental principle of equal treatment? For many legal orders, the answer here depends on the comparability of private and public conduct. Although State action generally covers everyone, private actions may only apply to a limited number of persons; and in safeguarding private choices – even morally indefensible ones – classic constitutional doctrine generally denies the *direct* application of fundamental rights to private parties. Nonetheless, in seeing fundamental rights as objective values, some constitutional orders accept their *indirect* or *limited* direct application.[196]

How has the European constitutional order solved this question? Some articles of the European Treaties have indeed been found to address private as well as public parties.[197] By contrast, the European Convention on Human Rights is not addressed to private actions; and the argument has been extended to the Charter.[198] Yet even if the Charter does not directly apply to private parties, it may, as we saw above, still have an indirect effect whenever the Court uses it to interpret European primary or secondary law.

Conclusion

The protection of human rights is a central task of the European judiciary. Unfortunately, the Union has not reserved one place for human rights, but has instead developed three bills of rights. Its unwritten bill of rights results from the general principles of Union law; the Charter of Fundamental Rights adds a written bill of rights for the Union; and the European Convention on Human Rights has provided an external bill of rights – even prior to formal accession by the Union. This chapter has analysed these three bills of rights and their respective relations to each other. The picture shown in Figure 12.4 has thereby emerged.

The EU's human rights 'surplus' has created a range of technical problems. We saw above, that the complexity of the Union's fundamental rights regime is

[196] For German constitutionalism, see BVerfGE 7, 198 (*Lüth*).

[197] See Art. 157 TFEU on the right to equal pay, which the Court held to apply to private parties in Case 43/75, *Defrenne* v. *Sabena* [1976] ECR 455, para. 39: 'The prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.'

[198] P. Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press, 2010): '[The Charter] will not bind private parties such as employers.' If this view is accepted, there will indeed exist 'an uneasy tension in normative terms between the solely vertical scope of the Charter rights, when compared to the vertical and horizontal scope of some Treaty articles' (*ibid.*, 209).

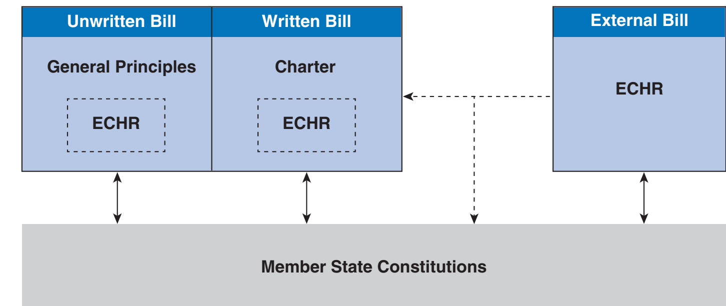

Figure 12.4 Relationship between the Union's Three 'Bills of Rights'

mainly rooted in the parallel coexistence of three sources of fundamental rights. For even if the EU Charter has become the primary instrument for the judicial review on fundamental right grounds, the relationship between the Charter and the EU Treaties (and the ECHR) is still not perfectly clarified. With regard to the EU Treaties, it thus continues to be unclear to what extent the more specific provisions within the Treaties will always determine the substantive outcome in a human rights challenge; and, as regards the ECHR, there remains some doubt as to what extent the Treaties and the Charter are (materially) bound by the Convention standard.

A second major complexity has arisen out of the coexistence of European and national fundamental rights. For instead of choosing either a simple separation model or a simple incorporation model, the Union has chosen a selective incorporation model according to which the Member States are *sometimes* bound by EU fundamental rights. Unlike the US legal order, incorporation thereby does not depend on *which* fundamental right is at stake but rather depends on the *situation* in which a Member State acts. Classically, if a State adopts national measures to implement or derogate from European law, it will be bound by EU fundamental rights; and nationals of that Member State can thus invoke these EU fundamental rights against their own State.

FURTHER READING

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