23
Union Law and its Effects in the National Legal Systems

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I. Forms of Union Law

Union law. 'Union law' consists of the rules enshrined in the Treaties and acts adopted pursuant thereto, as applied and interpreted by the national courts and the Court of Justice. Depending on the origin of the provisions, a distinction may be made between constitutive norms which come into being as a result of action on the part of the Member States themselves (primary Union law), rules created by Union institutions and bodies (secondary or 'derived' Union law), and other rules which have been accepted by case law as being general principles of the Union's legal order. Secondary Union law is constituted by the legislative acts and other acts of the institutions, bodies, offices, or agencies, usually in the form of specific instruments of Union law ('autonomous' acts see, *inter alia*, Article 288 TFEU) as well as the international agreements concluded by the Union ('conventional' acts). **23.001**

Primary and secondary law. Union law encompasses rules which arise as a result of action both by the Member States and by Union institutions and bodies. As has already been mentioned, the sources of Union law may therefore be divided into primary and secondary (or derived) Union law, the latter consisting of (conventional and autonomous) acts of institutions and bodies, as supplemented by fundamental rights and the general principles recognized in the Union legal order.[1] The discussion of the forms of Union law will be based upon this distinction, starting with the ranking order of the various types of provisions. Interinstitutional agreements and collective agreements are a particular form of Union law. The same is true for certain acts of the governments of the Member States and for the case law of the Court of Justice and the General Court, which plays an important part in constructing the Union legal order, even though the tasks of the Union Courts are limited to the interpretation and application of each of the other legal sources. **23.002**

Since the entry into force of the Lisbon Treaty, the characteristics and legal effects previously attributed to the different forms of Community law now apply, more broadly, to the various forms of Union law (see para. 2.006, *supra*). Acts adopted before the entry into force of the Lisbon Treaty outside the Community framework remain in force, with the specific legal regime surrounding them, until they are repealed or amended.

[1] On the relationship between primary and secondary law, see Syrpis, 'The Relationship between Primary and Secondary Law in the EU' (2015) CMLRev 461–87.

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II. Sources of Law and their Hierarchy

23.003 **Hierarchy.** Just as is the case for the primacy of Union law, the relationship between the various sources of Union law is not expressly laid down in the Treaties. Nevertheless, the authors of the Treaties always assumed the existence of a hierarchy between them. This emerges from Article 263 TFEU, under which an action may be brought—in the Court of Justice or in the General Court—for the annulment of acts of Union institutions, *inter alia*, on the ground of 'infringement of the Treaties or of any rule of law relating to their application' (see also Article 146 EAEC). Consequently, judicial review extends to examining whether the acts in question are compatible with all superior legal rules.

23.004 **Primary law.** At the top of the hierarchy of norms, there are the provisions of primary Union law (see para. 24.001 *et seq.*, *infra*), including fundamental rights and the general principles of law whose observance the Court of Justice ensures pursuant to Article 19 TEU (see para. 25.002 *et seq.*, *infra*). Since the institutions and bodies have to act within the powers conferred upon them by the Treaties, secondary or derived Union law is subordinate to those primary norms. Fundamental rights and general principles of law play a role in the interpretation and application of Treaty provisions and other rules of Union law. Therefore, in accordance with a general principle of interpretation, an EU measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter.[2]

23.005 **Secondary law.** In the field of secondary Union law, it is not the form (regulation, directive, etc.) of a given act, but its nature which determines its place within the legal order. Special priority attaches to international law in the Union legal order. The legal force of international agreements concluded by the Union is superior to that of other 'derived' Union acts (see para. 26.002, *infra*). Some principles of international law enshrined in treaties or having the force of customary law take precedence as general principles of Union law (see para. 26.013, *infra*). Apart from international agreements concluded by the Union, there is no predetermined ranking order of the various forms of act which the institutions may adopt. As already said, their place in the legal order is determined by their nature and not by their form. Thus, legislative acts take precedence over delegated or implementing acts (see para. 18.009, *supra*).[3] Moreover, some acts of the Council stand out as being organic in character. In so far as other acts are based upon such an organic act, they may not depart from it unless the organic act is expressly amended.[4] Agreements concluded between institutions are binding upon the institutions concerned by virtue of the principle that an authority is bound by rules which it has itself adopted (*patere legem quam ipse fecisti*; see para. 27.050, *infra*).

23.006 ***Lex posterior* and *lex specialis*.** In addition, as regards the relationship between equivalent provisions of Union law, the principle applies that a later provision (*lex posterior*) prevails

[2] C-540/13 *European Parliament v Council*, 2015, paras 38–40; C-317/13 and C-679/13 *European Parliament v Council*, 2015; C-547/14 *Philip Morris Brands and Others*, 2016, para. 70; C-391/16, C-77/17, and C-78/17, *M*, 2019, para. 77.

[3] However, since the Lisbon Treaty, implementing acts—like delegated acts—are also formally distinguishable from legislative acts by their title (see para. 18-008, *supra*).

[4] e.g. with regard to the Second Comitology Decision: C-378/00, *Commission v European Parliament and Council*, 2003, paras 40–2.

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over an earlier one and a specific provision (*lex specialis*) over a more general one (*lex generalis*). However, in order for this to be so, the later or more specific provision must intend to limit or replace the earlier or general provision, respectively.[5]

23.007 **National law.** In each Member State, Union law is applied in conjunction with the applicable rules of national law. As a consequence, the application of Union law relies, in practice, on national legislative and implementing provisions and on the interpretation and application given to Union law by national case law. These national sources of law do not form a source of Union law as such, although they influence the recognition of general principles of Union law (see para. 25.021 *et seq.*, *infra*). In exceptional cases, the Court of Justice and the General Court have to apply national law.[6] This occurs, for example, in disputes brought before the Union Courts pursuant to an arbitration clause (Article 272 TFEU) concerning a contract governed by the law of a particular Member State.[7] In the absence of an express reference to national law, the application of a provision of Union law may necessitate a reference to the laws of the Member States only where the Union Courts cannot identify in Union law, or in the general principles of Union law, criteria enabling them to define the meaning and scope of such a provision by way of independent interpretation.[8]

III. The Principles of Primacy and Direct Effect of Union Law

23.008 **Principles.** The status of Union law in the national legal systems is a matter of Union law itself.[9] This means that Union law differs from the classical rule of international law that a State determines, apart from the limitations to which it expressly commits itself, the status of international commitments in its legal system. The case law of the Court of Justice relating to the primacy and the possible direct effect of Union law has made it clear that Union law *as such* has effect in the national legal system.[10] Both the Union and the Member States as well as individuals are entitled to enforce the proper application of Union law. On the ground of the need to secure the full effect of Union law, the Court of Justice has developed

[5] See, e.g., C-481/99, *Heininger and Heininger*, 2001, paras 36–9; C-444/00, *Mayer Parry Recycling*, 2003, paras 49–57; C-439/01, *Cipra and Kvasnicka*, 2003, paras 34–40; C-355/12, *Nintendo*, 2014, para. 23; C-263/18, *Nederlandse Uitgeversbond*, 2019, para. 55; C-617/15, *Hummel Holding*, 2017, para. 26; C-41/19, *FX*, 2020, para. 33. See also T-6/99, *ESF Elbe-Stahlwerke Feralpi v Commission,* 2001, para. 102 (ECSC Treaty as a *lex specialis*). See further C-434/15, *Asociación Profesional Elite Taxi*, AG Szpunar Opinion, 2017, points 92–3.

[6] See, e.g., in the context of trademark law, C-263/09 P, *Edwin Co. v OHIM*, 2011, paras 44–58. As the national courts do not have jurisdiction to review the validity of certain preparatory acts in the context of banking supervision, it is inevitable that the Court of Justice and the General Court will have to apply national law in that context as well: see C-219/17, *Berlusconi and Finninvest*, 2018; C-414/18, *Iccrea Banca*, 2019. See also Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) ICLQ 873–906; Kohler and Knapp, 'Nationales Recht in der Praxis des EuGH' (2002) ZEuP 701–26. See further Prek and Lefèvre, 'The EU Courts as 'National' Courts: National Law in the EU Judicial Process' (2017) CMLRev 369–402.

[7] See Van Nuffel, 'De contractuele aansprakelijkheid van de Europese Gemeenschap: een bevoegdheidskluwen ontward' (2000–2001) AJT 157–62.

[8] See Lenaerts and Gutman, '"Federal Common Law" in the European Union: A Comparative Perspective from the United States' (2006) AJCL 1–121; Lenaerts and Corthaut, 'Rechtsvinding door het Hof van Justitie' (2006) AAe 581–8. See further T-43/90, *Díaz García v European Parliament*, 1992, para. 36; T-172/01, *M. v Court of Justice*, 2004, para. 71. For a good example, see the concept of 'lawyer' for the purposes of the Statute of the Court of Justice of the European Union and the CJ and GC Rules of Procedure; see C-515/17 P and C-561/17 P, *Uniwersytet Wrocławski v Research Executive Agency*, 2019, paras 57–68.

[9] 26/62 *Van Gend & Loos*, 1963, 10–12.

[10] See paras 1.025–1.027, *supra.*

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in its case law other requirements with which the national legal system must comply in order to secure the primacy of Union law in practice, which are set out below.[11] Hereinafter, the requirements flowing from the principles of primacy and full effectiveness of Union law are set out both from the perspective of the Court's case law and from the legal systems of the Member States that are to accommodate these principles.

23.009 **CFSP.** As for legal effects, the Treaties make no distinction between acts adopted within the framework of the CFSP and acts adopted in other areas. The principle of the primacy of Union law therefore applies in full to any Union act, including those adopted within the framework of the CFSP. All the same, the Court of Justice has limited jurisdiction with respect to the provisions of the Treaties relating to the CFSP or with respect to acts adopted on the basis of these provisions (Article 275 TFEU; see para.13.012, *supra*).[12]

A. Requirements flowing from the primacy of Union law

1. The principle of primacy of Union law

23.010 **Precedence of primary and secondary Union law.** In its 1964 judgment in *Costa v ENEL* the Court of Justice first articulated the principle that Community law takes precedence over the domestic law of the Member States. The Court held 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 provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question'.[13] The Court derived the primacy of Community law from the specific nature of the Community legal order, referring to the danger that, if the effect of Community law could vary from Member State to Member State in deference to subsequent national laws, this would be liable to jeopardize the attainment of the objectives set out in Article 10 EC [*now Article 4(3) TEU*] and give rise to discrimination prohibited by Article 12 EC [*now Article 18 TFEU*] (see para. 1.027, *supra*). The case was concerned with the primacy of a number of provisions of primary Community law. The Court also upheld the primacy of secondary Community law on the same grounds.[14]

[11] In addition, the Member States are under a duty to take all necessary measures to implement provisions of Union law; see para. 18-002, *supra*.

[12] This has led some to question whether it is appropriate to extend primacy to those CFSP acts that escape judicial review by the ECJ; see Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (Hart Publishing, 2019); see also Hinarejos, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (OUP, 2010), 151–2.

[13] 6/64 *Costa*, 1964, at 594; for the origins of the case, and with it the origins of the doctrine of primacy, see Arena, 'From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of Costa v. ENEL' (2019) EJIL 1017–37; for the further development of the primacy of Community law, see Skouris, 'Der Vorrang des Europäischen Unionsrechts vor dem nationalen Recht. Unionsrecht bricht nationales Recht' (2021) EuR 3-27; Beljin, "Die Zusammenhänge zwischen dem Vorrang, den Instituten der innerstaatlichen Beachtlichkeit und der Durchführung des Gemeinschaftsrechts' (2002) EuR 351–76; De Witte, 'Le retour à *Costa*. La primauté du droit communautaire à la lumière du droit international' (1984) RTDE 425–54. See further, on the primacy of Union law, including the second and third pillar, Lenaerts and Corthaut, 'Of birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) ELRev 287–315. See as to the third pillar, however, C-573/17, *Popławski*, 2019, paras 50–109.

[14] 14/68, *Wilhelm*, 1969, para. 6; 11/70, *Internationale Handelsgesellschaft*, 1970, para. 3; 249/85 *Albako*, 1987, para. 14.

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The case law of the Court of Justice concerned the effects of Community law, that is, the former first pillar of the Union. Since the entry into force of the Lisbon Treaty, the requirements established by the Court of Justice in its case law apply, in principle, to all forms of Union law. Yet, the Treaties contain no express reference to the primacy of Union law, although the framers of the EU Constitution intended to incorporate such a reference. Indeed, the EU Constitution provided in this regard that '[t]he 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' (Article I-6). The 2007 Intergovernmental Conference chose, however, not to incorporate such a reference. However, it stated in a declaration annexed to the Lisbon Treaty that '[t]he 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.'[15] The declaration further quotes an opinion of the Council's Legal Service on the primacy of EC law, which refers to the Court's case law according to which 'this principle is inherent to the specific nature of the European Community' and states that '[t]he fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case law of the Court of Justice'.[16] All this amounts to a general recognition of the principle of primacy of Union law.

23.011 **Precedence over any rule of national law.** As long ago as *Costa* v. *ENEL*, the Court held that Community law could not be overridden by 'domestic legal provisions, however framed'[17]. It follows that Union law (since the Lisbon Treaty) takes precedence over any rule of domestic law which is at variance with it, including 'principles of a national constitutional structure'.[18] This is because if Union law were only binding on the Member States to the extent that it is consistent with their constitutional structure, a situation would ensue in which the application of Union law would differ from one Member State to another. Moreover, important principles which are common to the constitutional traditions of the Member States (see also Article 2 TEU; para. 5.002, *supra*) are subscribed to by the Union itself, notably respect for democracy (see para. 17.046, *supra*), fundamental rights (see para. 25.001 *et seq.*, *infra*), and the rule of law (see para. 30-001 *et seq.*, *infra*).[19] As far as fundamental rights are concerned, the Charter of Fundamental Rights of the European Union applies to the institutions, bodies, offices, and agencies of the Union, and to the Member States when they are implementing Union law (para. 25-008 *et seq.*, *infra*). When a Union act requires national implementing measures, national authorities and judicial bodies may only apply national fundamental rights protection standards to the extent that this does not put the level of protection of the Charter and the primacy, uniformity, and effectiveness of Union law at risk.[20]

[15] Declaration (No. 17), annexed to the Lisbon Treaty, concerning primacy, OJ 2010 C83/344.

[16] Opinion 11197/07 (JUR 260).

[17] 6/64, *Costa*, 1964, 594.

[18] 11/70, *Internationale Handelsgesellschaft*, 1970, para. 3 (which referred in particular to 'fundamental rights as formulated by the constitution of [the] State', but see Union protection of fundamental rights: para. 25.002 *et seq.*). An example may be found in C-285/98, *Kreil*, 2000. See also 30/72, *Commission v Italy*, 1973, para. 11 (precedence over 'budgetary legislation or practice').

[19] For further details, see De Witte, 'Community Law and National Constitutional Values' (1991) 2 LIEI 1–22. See also Corthaut, *EU ordre public* (Wolters Kluwer, 2012), Chapter 12.

[20] C-399/11, *Melloni*, 2013, paras 53–64.

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23.012 **Conflict.** The primacy of Union law means that conflicting national legal rules must give way to provisions of Union law. In order to determine whether such a conflict exists, the aim and purpose of the Union provision must be assessed in the light of what it contains and what—deliberately or not—it does not contain. The national provision continues to be effective solely for those aspects which the Union provision has left unaffected.[21] Often the question arises as to how far a Union act allows the Member States to adopt measures with regard to aspects not dealt with in the Union act. In such a case, it must be inferred from the aims and object of the Union act whether that act governs the area exhaustively or whether it still leaves some latitude for regulation by Member States. If the Union has not exercised a competence which it shares with the Member States, the latter remain free to make their own policy choices in the area covered by that competence.[22] A matter not expressly dealt with by the Union act may be regulated by the Member States provided that their action does not thereby undermine the aims and object of the Union act.[23] In the same way, it has to be determined whether a Union harmonization measure entails 'full' or 'complete' harmonization or whether it allows Member States to deviate from the Union measure (see para. 7-110, *supra*). In some areas, action by the Union may preclude any competence on the part of the Member States (see para. 5-023, *supra*). A national measure is compatible with Union law if it respects both primary and secondary Union law. In the light of the hierarchy of norms of Union law this implies that the mere fact that a national measure is in conformity with a norm of secondary Union law does not in and of itself mean that this measure also complies with primary Union law.[24]

2. The principle of interpretation in conformity with Union law

23.013 **Avoiding conflict.** The primacy of Union law is a conflict rule which applies where a legal relationship is governed by conflicting national and Union rules. Where the application of a national rule is likely to result in a conflict with a Union rule, it must first be determined whether the rules cannot be interpreted and applied in such a way as to avoid a conflict. Naturally, the Union rule must be interpreted in a uniform way in all Member States. As far as the interpretation of national law is concerned, the Court of Justice considers that Article 4(3) TEU places all public authorities,[25] and therefore also judicial authorities, under a duty to interpret the national law that they have to apply as far as possible in conformity with the requirements of Union law.[26] This entails the obligation to change established case law if it is based on an interpretation that is not in conformity with Union law.[27] National courts must therefore consider whether national law (legislation and case law[28]) can be interpreted

[21] For examples in the case law, see in particular 40/69, *Bollmann*, 1970, paras 4–5; 50/76, *Amsterdam Bulb*, 1977, paras 9–30; 111/76, *Van den Hazel*, 1977, paras 13–27; 255/86 *Commission v Belgium*, 1988, paras 8–11; 60/86, *Commission v United Kingdom*, 1988, para. 11; 190/87, *Moorman*, 1988, paras 11–13. See also Hwang, 'Anwendungsvorrang statt Geltungsvorrang? Normlogische und institutionelle Überlegungen zum Vorrang des Unionsrechts' (2016) EuR 355–72.

[22] C-566/15, *Erzberger*, 2017, para. 36; C-638/16 PPU, *X and X*, 2017, paras 40–5; C-507/17, *Google*, 2019, para. 72.

[23] C-355/00, *Freskot AE*, 2003, paras 18–33; C-416/01, *ACOR*, 2003, paras 21–62.

[24] e.g. C-345/09, *van Delft*, 2010, paras 85–6.

[25] C-53/10, *Mücksch*, 2011, paras 21–34 (lower national authorities).

[26] See C-106/98, *Marleasing*, 1990, para. 8; ECJ, C-262/97, *Engelbrecht*, 2000, para. 39; ECJ, C-60/02, *Criminal proceedings against X*, 2004, paras 59–60.

[27] C-441/14, *Dansk Industri*, 2016, paras 33–4; C-55/18, *Federación de Servicios de Comisiones Obreras (CCOO)*, 2019, para. 70.

[28] See C-456/98, *Centrosteel*, 1998, paras 16–17, with case note by Corthaut (2002) Col J Eur L, 293–310.

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or applied in such a way that there is no conflict with Union law. This applies to all rules of Union law, including fundamental rights, general principles of Union law, and rules of international law which are applicable in Union law.[29] Where national law is interpreted in conformity with the provisions of a directive, this practice is referred to as interpretation consistent with a directive (see para. 27-029, *infra*).

Interpreting national law in conformity with Union law may enable public authorities to avoid situations in which national rules have to be set aside on account of a conflict with Union law.[30] However, the duty to interpret national law in conformity with Union law is limited by general principles of Union law, such as the principle of legal certainty, the principle of legality, and the prohibition of retroactivity.[31] Accordingly, the principles of legal certainty and non-retroactivity preclude this obligation to interpret national law in conformity with Union law from leading to the criminal liability of individuals being determined or aggravated.[32] Likewise, the principle of interpretation in conformity with Union law cannot serve as the basis for an interpretation of national law *contra legem*.[33]

3. Duty to set aside conflicting national rules

23.014 **Inapplicability of conflicting national rules.** In the 1978 judgment in *Simmenthal* ('*Simmenthal II*'), the Court of Justice held that 'in accordance with the principle of the precedence of Community 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 national legislative measures to the extent to which they would be incompatible with Community law.'[34]

Consequently, Member States are under a duty not only to avoid adopting a measure conflicting with Community law—Union law since the Lisbon Treaty—and to change any existing conflicting measure,[35] but also—so long as the conflicting measure has not been amended—to refrain from applying it.[36] In the judgment in *Simmenthal II*, the Court of Justice held that 'every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and

[29] For the interpretation and application of national law in the light of fundamental rights, see para. 25.002, *infra*; for the interpretation and application of national law in the light of general principles of Union law, see para. 25.020, *infra*; for the interpretation and application of national law in the light of applicable rules of international law, see para. 26.002, *infra*.

[30] Interpretation in conformity with Union law also makes the question of the direct effect of Union law unnecessary (i.e. 'can the provision of Union law be relied upon by the person seeking redress?'). See Betlem, 'The Doctrine of Consistent Interpretation—Managing Legal Uncertainty' (2002) OJLS 397–418.

[31] On the limits of the duty of consistent interpretation, see C-573/17, *Popławski*, 2019, paras 74–6. See also para. 27-016, *infra* (on regulations) and para. 27.030 *et seq.* (on directives).

[32] See C-579/15, *Popławski*, 2017, para. 32; C-554/14, *Ognyanov*, 2016, paras 63–4; C-387/02, C-391/02 and C-403/02, *Berlusconi*, 2005, paras 70–8; C-60/02, *Criminal proceedings against X*, 2004, paras 61–3.

[33] See C 579/15, *Popławski*, 2017, para. 33

[34] 106/77, *Simmenthal*, 1978, para. 17.

[35] See also 159/78, *Commission v Italy*, 1979, para. 22.

[36] See 48/71, *Commission v Italy*, 1972, paras 6–8. *A fortiori*, a Member State is debarred from adopting specific measures to extend a provision found to be contrary to Union law: C-101/91, *Commission v Italy*, 1993, paras 22–3.

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must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule'.[37] As primacy only applies when there is a conflict between a national measure and Union law, the question whether a national measure must be set aside only arises if that measure cannot be interpreted in conformity with Union law.[38] Where a national court is faced with a national provision that is incompatible with Union law, it must decline to apply that provision, without being compelled to make a reference to the Court for a preliminary ruling before doing so.[39] If necessary, a national court must alter established case law that is incompatible with Union law to that effect.[40] Where the incompatibility of a provision of national law with Union law is alleged in proceedings in which the national court is asked to annul that provision, a finding of incompatibility will lead to its annulment. The duty to set aside conflicting rules applies not only to national courts, but also to public bodies, including administrative bodies.[41] In order to comply with that duty, lower administrative authorities, such as local authorities, must refrain of their own motion from applying provisions adopted by a higher authority in breach of Union law.[42] Likewise, national authorities may not apply provisions of agreements concluded between Member States if they conflict with Union law.[43] The incompatibility of national legislation with Union provisions can be definitively remedied only by means of national provisions that are binding and have the same legal force as those that have to be modified.[44] Accordingly, the duty to refrain from applying national rules incompatible with Union law applies even with regard to rules which have been declared unconstitutional by the national constitutional court, but have not yet lost their binding force.[45]

However, in *Popławski II*,[46] the Court has clarified that the principle of the primacy of Union law cannot have the effect of undermining the essential distinction between provisions of Union law which have direct effect and those which do not and, consequently, of creating a single set of rules for the application of all of the provisions of Union law by the national courts. While the national courts are required, under the principle of primacy, to interpret national law in conformity with the requirements of the whole of Union law, their duty to set aside conflicting provisions of national law is restricted to those provisions of Union law that have direct effect (see para. 23-032 *et seq.*, *infra*). Indeed, as an organ of a Member State, any national court has the obligation to refrain from applying any provision of national law which is contrary to a provision of Union law with direct effect in the case pending before it.[47] By contrast, a provision of Union law which does not have direct effect

[37] 106/77, *Simmenthal* ('*Simmenthal II*'), 1978, para. 21. See also 249/85, *Albako*, 1987, para. 17; C-262/97, *Engelbrecht*, 2000, para. 40. For directives, see also para. 27-032, *infra*.

[38] C-282/10, *Dominguez*, 2012, para. 23; C-97/11, *Amia*, 2012, paras 27–31; C-752/18, *Deutsche Umwelthilfe*, 2019, paras 40–2.

[39] C-555/07, *Kücükdeveci*, 2010, paras 53–55. In such a case, the national court cannot be prevented from making such reference either: ibid.

[40] C-614/14, *Ognyanov*, 2016, para. 35.

[41] 103/88, *Fratelli Costanzo*, 1989, para. 31. See, e.g., national competition authorities: para. 9.012, *supra*.

[42] 103/88, *Fratelli Costanzo*, 1989, para. 31. See also C-378/17, *The Minister for Justice and Equality and The Commissioner of the Garda Síochána*, 2018, paras 31–52, with note Lazzerini (2019) REALaw 197–208. See also Drake, 'The Principle of Primacy and the Duty of National Bodies Appointed to Enforce EU Law to Disapply Conflicting National Law: An Garda Síochána' (2020) CMLRev 557–68.

[43] C-469/00, *Ravil and Others*, 2003, para. 37.

[44] See C-145/99 *Commission v Italy*, 2002, paras 37–9.

[45] C-314/08 *Filipiak*, 2009, paras 81–5.

[46] C-573/17, *Popławski*, 2019, paras 50–109.

[47] Ibid., para. 61; see also C-409/06, *Winner Wetten*, 2010, para. 55; C-282/10, *Dominguez*, 2012, para. 41; C-569/16 and C-570/16, *Bauer and Willmeroth*, 2018, para. 75; C-824/18, *A.B.*, 2021, paras 140–149; C-30/19, *Braathens Regional Aviation*, 2021, para. 58.

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may not be relied on, as such, in a dispute coming under Union law in order to set aside a conflicting provision of national law.[48] If a provision of Union law does not have direct effect, its enforcement in the national legal order can only be triggered by the Commission by bringing an infringement action against the Member State (Articles 258 to 260 TFEU; see para. 29-039, *infra*), or by national courts interpreting national law as far as possible in line with Union law (see para. 23-013, *supra*) or awarding damages because of State liability (see para. 23-019 *et seq*., *infra*).

A national measure will not only be inapplicable if it is substantively incompatible with a provision of Union law, it may also be inapplicable if it was adopted contrary to a procedure laid down by Union law. This will be the case where a Member State failed to notify technical provisions to the Commission in accordance with a Union procedure for the provision of information.[49] A technical provision which has not been notified to the Commission will be inapplicable only if it constitutes a barrier to trade.[50]

A national court may not decide that a national measure that is contrary to Union law should continue to apply provisionally for reasons of legal certainty.[51] However, when a national measure is in conflict with Union rules aimed at protection of the environment, the Union objective of environmental protection may, in certain circumstances, be better achieved by temporarily maintaining the consequences of the annulled act than by annulling the measure retroactively.[52] Moreover, the disapplication of a national measure is not allowed if it would entail a breach of the principle that offences and penalties must be defined by law, either because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed.[53] Similarly, the principle of effectiveness of Union law and respect of the right, guaranteed by Article 47(1) of the Charter, to effective judicial protection do not oblige a national court to set aside a provision of national law if, in so doing, it infringes another fundamental right guaranteed by Union law.[54]

23.015 ***Simmenthal.*** In *Simmenthal II* the Court of Justice was seized of a question referred to it for a preliminary ruling by an Italian court, which had held that the imposition of certain inspection fees was incompatible with Community law and had therefore ordered the Italian tax authorities to repay them. The tax authorities appealed, relying on case law of the Italian

[48] C-573/17, *Popławski*, 2019, para. 62.

[49] C-194/94, *CIA Security International*, 1996, paras 45–54; C-443/98, *Unilever Italia*, 2000, paras 31–52; C-159/00, *Sapod Audic*, 2002, paras 48–52 (concerning Council Directive 83/189/EEC of 18 March 1993 requiring Member States to notify any draft technical regulations and standards to the Commission, replaced by Directive 98/34 and, subsequently, by Directive 2015/1535; see para. 7.111, *supra*); Voinot, 'Le droit communautaire et l'inopposabilité aux particuliers des règles techniques nationales' (2003) RTDE 91–112; Candela Castillo, 'La confirmation par la Cour du principe de non-opposabilité aux tiers des règles techniques non notifiées dans le cadre de la directive 83/189/CEE: un pas en avant vers l'intégration structurelle des ordres juridiques nationaux et communautaire' (1997) RMCUE 51–9.

[50] C-226/97, *Lemmens*, 1998, para. 35.

[51] C-409/06, *Winner Wetten*, 2010, paras 53–69.

[52] See the special circumstances at issue in C-41/11, *Inter-Environnement Wallonie en Terre wallonne*, 2012, paras 59–62; C-379/15, *Association France Nature Environnement*, 2016, paras 37–42. See also C-411/17, *Inter-Environnement Wallonnie and Bond Beter Leefmilieu Vlaanderen*, 2019, paras 167–82 (maintaining the effects of national law in order to ensure the continuity of electricity supply—see also Belgian Constitutional Court, no. 34/2020 of 5 March 2020, B.26-B.33.4).

[53] C-42/17, *M.A.S and M.B*, 2017, paras 46–62, with case note by Rauchegger (2018) CMLRev 1521–47.

[54] C-752/18, *Deutsche Umwelthilfe*, 2019, para. 43. On the competing considerations that nuance the duty to set conflicting provisions of Union law aside, see also Dougan, 'Primacy and the Remedy of Disapplication' (2019) CMLRev 1459–1508.

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Constitutional Court to the effect that a national law which conflicted with Community law was also incompatible with the Italian Constitution. On this view, the national court could not set aside the law in question until such time as it had been declared unlawful by the Constitutional Court. The Court of Justice ruled that a national court which must apply provisions of Community law is 'under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or constitutional means'.[55] In later case law the Court specified that if a national court is under an obligation to submit certain questions first to a national constitutional court with the result that it cannot immediately set aside a provision of national law deemed to be contrary to Union law, the national court must in any event take any necessary measure to ensure the provisional judicial protection of the rights conferred under the Union's legal order and to refrain from applying that conflicting provision after the constitutional court has ruled.[56]

23.016 ***Factortame.*** The Court of Justice went even further in the 1990 judgment in *Factortame I*, in which the UK House of Lords asked whether an English court had the power, under Community law, to grant an interim injunction against the Crown where a party claimed to be entitled to rights under Community law.[57] The problem had arisen after the Divisional Court of the Queen's Bench Division had applied to the Court of Justice for a preliminary ruling on the compatibility with Community law of nationality requirements imposed by the 1988 Merchant Shipping Act and the 1988 Merchant Shipping (Registration of Fishing Vessels) Regulations in order to put an end to the practice of 'quota hopping' by which foreign vessels without any genuine link with the UK were using its fishing quotas. The House of Lords had to decide whether that court could suspend the relevant provisions by way of interim relief, the Court of Appeal having determined that under common law the courts had no power to suspend the application of Acts of Parliament in that way. Starting out from its judgment in *Simmenthal II* and the principle of sincere cooperation, the Court of Justice ruled that

> the full effectiveness of Community law would be impaired if a rule of national law could prevent a court seized of a dispute governed by Community 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 Community 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.[58]

By so ruling, the Court safeguarded rights derived by individuals from Union law against action of a public authority, even where it had not been finally determined that the action in question was incompatible with Union law.[59]

[55] 106/77, *Simmenthal*, 1978, para. 24.

[56] C-188/10 and C-189/10, *Melki and Abdeli*, 2010, para. 53. See also C-689/13, *PFE*, 2016, paras 39–41.

[57] C-213/89, *Factortame and Others* ('*Factortame I*'), 1990, paras 14–15.

[58] Ibid., para. 21. On 11 October 1990, the House of Lords affirmed the interlocutory injunction against the Secretary of State. See Barav and Simon, 'Le droit communautaire et la suspension provisoire des mesures nationales—Les enjeux de l'affaire *Factortame*' (1990) RMC 591–7.

[59] That the United Kingdom legislation was indeed incompatible with Community law was only determined following the Court's judgment giving a preliminary ruling on questions which had already been referred in

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Full effectiveness. In the judgments in *Simmenthal II* and *Factortame I*, the Court of Justice linked the primacy of Union law with the duty of the national court to secure the full effectiveness (*effet utile*) of Union law, even at the expense of the legal tradition of its own Member State. Just as the primacy principle was associated with Article 10 EC [*now Article 4(3) TEU*] in *Costa v ENEL*, that duty on the part of the national court was also derived from the principle of sincere cooperation enshrined in that article (see para. 5-046, *supra*). As a general rule, the full effectiveness of Union law requires Member States to nullify the unlawful consequences of a breach of Union law.[60] Such an obligation is owed by every organ of the Member State concerned within the sphere of its competence,[61] so that the Member State's administrative authorities and courts that are called upon, within the exercise of their respective powers, to apply provisions of Union law are under a duty to give full effect to those provisions.[62] Consequently, in principle any taxes levied in breach of Union law or benefits unduly refused are to be refunded or paid out, respectively. Where consent has been granted without duly complying with a procedure imposed by Union law, the national court must revoke or suspend that consent so that the correct procedure can be followed.[63] Over time, the Court of Justice has gradually specified more precisely the requirements which Article 4(3) TEU imposes on Member States with a view to securing the 'full effectiveness' in the national legal system of rights derived from Union law.[64] **23.017**

Remedies under national law. The rights conferred by Union law can be enforced before national courts using the rules on jurisdiction and procedure laid down by the Member States for their legal order (principle of national procedural autonomy). In the absence of Union rules governing the matter, it is—in accordance with this principle—for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Union law. But the Member States are responsible for ensuring that those rights are effectively protected in each case.[65] As discussed in more depth **23.018**

C-221/89, *Factortame and Others* ('*Factortame II*'), 1991 and the judgment given on an action brought by the Commission under Article 226 EC [*now Article 258 TFEU*], C-246/89, *Commission v United Kingdom*, 1991. In the latter case, the President of the Court had already granted an application from the Commission for an interim order requiring the United Kingdom to suspend the nationality requirements of the legislation at issue: C-246/89 R, *Commission v United Kingdom* (order of the President), 1989. This was followed by the case concerning State liability for the breach of Community law: C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame* ('*Factortame IV*'), 1996 (para. 23.020, *infra*).

[60] C-6/90 and C-9/90, *Francovich and Others*, 1991, para. 36; see earlier with regard to the corresponding provision of Article 86 ECSC: 6/60, *Humblet*, 1960, 569.

[61] C-8/88, *Germany v Commission*, 1990, para. 13; C-201/02, *Wells*, 2004, para. 64.

[62] C-349/17, *Eesti Pagar*, 2019, para. 91; C-628/15, *The Trustees of the BT Pension Scheme*, 2015, para. 54.

[63] C-201/02, *Wells*, 2004, paras 64–70.

[64] The relevant case law is only discussed in outline in the following sections. For a more exhaustive discussion, see Lenaerts, Gutman, and Nowak, *EU Procedural Law* (OUP, 2022), Chapter 4. Cf. Ortino, 'A Reading of the EU Constitutional Legal System through the Meta-principle of Effectiveness' (2016) CDE 91–114; Wallerman, 'Can Two Walk Together, Except They be Agreed? Preliminary References and (the Erosion of) National Procedural Autonomy' (2019) ELRev 159–77; Ross, 'Effectiveness in the European Legal Order(s): Beyond Supremacy to Constitutional Proportionality?' (2006) ELRev 476–98; Delicostopoulos, 'Towards European Procedural Primacy in National Legal Systems' (2003) ELJ 599–613; Temple Lang, 'The Duties of National Courts under Community Constitutional Law' (1997) ELRev 3–18; Fitzpatrick and Szyszczak, 'Remedies and Effective Judicial Protection in Community Law' (1994) MLR 434–41; Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) MLR 19, 40–7; Steiner, 'From Direct Effects to Francovich: Shifting Means of Enforcement of Community Law' (1993) ELRev 3–22.

[65] See, e.g., C-268/06 *Impact*, 2008, paras 44 and 45; C-317/08 to C-320/08 *Alassini and Others*, 2010, para. 47; C-30/19, *Braathens Regional Aviation*, 2021, paras 29–59; C-194/19, *H.A.*, 2021, paras 25–49.

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in Chapter 29 (see para. 29-009 *et seq.*, *infra*), the principle of full effectiveness of Union law implies that the national rules governing claims by which individuals seek to enforce the rights that they derive from Union law 'must not be less favourable than those relating to similar domestic claims' (principle of equivalence) and must not embody requirements and time-limits 'such as in practice to make it impossible or excessively difficult' to exercise those rights (principle of effectiveness).[66] It appears from *Factortame I* and a number of other judgments that the national court must, where necessary, refrain from applying the national legal rules which govern a particular matter, so as to secure the full effectiveness of Union law.[67] Administrative bodies, too, must set aside conflicting procedural rules in order to give full effect to Union law.[68] However, a national court is not required to extend to infringements of Union law a remedy under national law permitting only in the event of infringement of the ECHR or one of the protocols thereto, the rehearing of criminal proceedings closed by a national decision having the force of *res judicata*.[69] Similarly, while Union law does not preclude a Member State from ordering the coercive detention of officials that are unwilling to comply with an order to implement Union law as a matter of equivalence, such measure may only be taken to the extent that national law provides for a proper legal basis for such a measure.[70]

4. Liability of the Member State for damage arising out of a breach of Union law

23.019 ***Francovich.*** The Court of Justice held in *Francovich* that '[t]he full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible'.[71]

[66] 33/76 *Rewe*, 1976, para. 5, and 45/76, *Comet*, 1976, paras 13–16; see also 68/79, *Just*, 1980, paras 25–6; 199/82, *San Giorgio*, 1983, paras 12–17; C-574/15, *Scialdone*, 2018, paras 24–61; C-234/17, *XC*, 2018, paras 25–59. See Girerd, 'Les principes d'équivalence et d'effectivité: encadrement ou désencadrement de l'autonomie procédurale des Etats membres?' (2000) RTDE 75–102.

[67] See, e.g., C-377/89, *Cotter and McDermott*, 1991, paras 20–2 and 26–7 (married women held entitled to benefits/compensatory payments paid to married men in respect of a spouse deemed to be dependent even though this was contrary to a prohibition of unlawful enrichment laid down by Irish law); C-208/90, *Emmott*, 1991, paras 23–4 (Irish authorities held not entitled to rely on procedural rules relating to time-limits for bringing proceedings in an action brought against them by an individual in order to protect rights directly conferred upon him by a Community directive so long as Ireland had not properly transposed the directive into national law); C-271/91, *Marshall* ('*Marshall II*'), 1993, paras 30 and 34–5 (Ms Marshall had succeeded in her claim for unlawful sex discrimination under the equal treatment directive following 152/84 *Marshall* ('*Marshall I*'), 1986; the Court held that the limit imposed on any damages claim which might be awarded by an Industrial Tribunal under the 1975 Sex Discrimination Act was unlawful), see the case note by Curtin (1994) CMLRev 631–52. See Szyszczak, 'Making Europe More Relevant to its Citizens: Effective Judicial Process' (1996) ELRev 351–77; Hoskins, 'Tilting the Balance: Supremacy and National Procedural Rules' (1996) ELRev 365–77. See also para. 29-011, *infra*. For more recent examples, see C-689/13, *PFE*, 2016, paras 37–42; C-585/18, C-624/18 and C-625/18, *A.K.*, 2019, 155–66.

[68] C-118/00, *Larsy*, 2001, paras 50–3.

[69] C-234/17, *XC*, 2018, para. 59.

[70] C-752/18, *Deutsche Umwelthilfe*, 2019, paras 29–56.

[71] C-6/90 and C-9/90, *Francovich and Others*, 1991, para. 33. The principle is therefore intended both to protect the rights of individuals and to maintain the primacy of Community law; see Aboudrar-Ravanel, 'Responsabilité et primauté, ou la question de l'efficience de l'outil' (1999) RMCUE 544–58. Among numerous studies, see Davis, 'Liability in Damages for a Breach of Community Law: Some Reflections on the Question of who to Sue and the Concept of the State' (2006) ELRev 69–80; Tridimas, 'Liability for Breach of Community Law: Growing Up and Mellowing Down?' (2001) CMLRev 301–32; Dantonel-Cor, 'La violation de la norme communautaire et la responsabilité extracontractuelle de l'Etat' (1998) RTDE 75–91; Van Gerven, 'Bridging the Unbridgeable: Community and National Tort Laws after *Francovich* and *Brasserie*' (1996) ICLQ 507–44. Some commentators consider that Union law also puts individuals under a duty to make good damage resulting from a breach of Union law; see Kremer, 'Die Haftung Privater für Verstösse gegen Gemeinschaftsrecht' (2003) EuR 696–705. This is true of competition law; see para. 9.015.

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The Court went on to state that 'the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty' and that a further basis for the obligation of Member States to make good such loss and damage is to be found in the duty of sincere cooperation in Article 4(3) TEU.[72] That principle applies to any case in which a Member State breaches Union law, irrespective of the authority of the Member State whose act or omission was responsible for the breach.[73] It follows that an individual may bring a damages claim in the national courts on account of an act or omission of a legislative organ[74] or on account of decisions of judicial bodies adjudicating at last instance.[75]

23.020 **Conditions for liability.** The conditions under which that liability gives rise to a right to reparation from the State depend on the nature of the breach of Union law giving rise to the loss and damage.[76] The Court of Justice made clear in *Factortame IV* that the conditions under which the State may incur liability for damage caused to individuals by a breach of Union law cannot, in the absence of particular justification, differ from those governing the liability of the Union in like circumstances.[77] With regard to an act or omission of the legislature or executive in breach of Union law, that law confers a right of reparation where three conditions are met: (1) the rule of law infringed must be intended to confer rights on individuals, (2) the breach must be sufficiently serious, and (3) 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.[78] The same three conditions apply to State liability for damage resulting from the decision of a judicial body adjudicating at last instance.[79] According to the Court of Justice, this does not mean that the State cannot incur liability for acts of the legislature, executive, or the judiciary under less strict conditions on the basis of national law.[80] As to

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[72] C-6/90 and C-9/90, *Francovich and Others*, 1991, paras 35–6. See also C-752/18, *Deutsche Umwelthilfe*, 2019, para. 54.

[73] C-224/01, *Köbler*, 2003, para. 31.

[74] C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, 1996, paras 34–6.

[75] C-224/01, *Köbler*, 2003, paras 30–59; C-173/03, *Traghetti del Mediterraneo*, 2006, paras 30–40; C-160/14, *Ferreira da Silva e Brito*, 2015, paras 46–60. See Silveira and Perez Fernandes, 'Preliminary References, Effective Judicial Protection and State Liability. What if the Ferreira da Silva Judgment had not been Delivered?' (2016) Rev EDE 631–66; Ruffert (2007) CMLRev 479–86; Breuer (2004) ELRev 243–54; Wegener (2004) EuR 84–91, and for a somewhat critical view, Wattel (2004) CMLRev 177–90, and Steyger (2004) NTER 18–22. For earlier discussions of this question, see Anagnostaras, 'The Principle of State Liability for Judicial Breaches: The Impact of European Community Law' (2001) E Pub L 281–305; Blanchet, 'L'usage de la théorie de l'acte clair en droit communautaire: une hypothèse de mise en jeu de la responsabilité de l'Etat français du fait de la fonction juridictionnelle?' (2001) RTDE 397–438; for a critical view, see Wegener, 'Staatshaftung für die Verletzung von Gemeinschaftsrecht durch nationale Gerichte?' (2002) EuR 785–800. Apart from state liability, other remedies may also be available in case of violation of Union law by a Member State Court, see Varga, 'National Remedies in the Case of Violation of EU Law by Member State Courts' (2017) CMLRev 51–80.

[76] C-6/90 and C-9/90, *Francovich and Others*, 1991, para. 38.

[77] C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, 1996, paras 40–2.

[78] Ibid., paras 50–1; C-392/93, *British Telecommunications*, 1996, para. 39; C-168/15, *Tomášová*, 2016, paras 22–34. These rules have applied to legislative acts of the Union since 5/71, *Zuckerfabrik Schöppenstedt v Council*, 1971, para. 11: see Lenaerts, Gutman and Nowak, *EU Procedural Law* (OUP, 2022) Chapter 11. For the parallel with the rules on liability applying to the Union, see C-352/98 P, *Laboratoires pharmaceutiques Bergaderm and Goupil v Commission*, 2000, paras 38–44; for breaches of fundamental rights, see Van Gerven, 'Remedies for Infringements of Fundamental Rights' (2004) E Pub L 261–84.

[79] C-224/01, *Köbler*, 2003, paras 51–3; C-173/03, *Traghetti del Mediterraneo*, 2006, paras 42–45.

[80] C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, 1996, para. 66; C-224/01, *Köbler*, 2003, para. 57; C-173/03, *Traghetti del Mediterraneo*, 2006, para. 45. See, e.g., in Belgium with respect to the regulatory activity of the administration: Cass. 14 January 2000, *Arr Cass* 2000, No. 33, referred to in the Eighteenth Annual Report on monitoring Community law, COM(2001)309 fin. According to this 'Evobus' judgment, any ordinary breach of Union law by an administrative authority may constitute a 'fault' for which the State can be held liable. See also Cass 8 December 1994, *Arr Cass* 1994, No. 541 (the second 'Anca' judgment, in which the State was held to be

liability under Union law, it is for the national courts to assess whether those conditions are met, taking into account the guidance that the Court of Justice has given in respect of the three conditions.

23.021 **(1) Provision conferring rights on individuals.** Among the provisions which confer rights on individuals are the Treaty provisions governing the four freedoms.[81] In *Factortame IV*, the Court of Justice ruled that the right of reparation exists whether or not the relevant provision of Union law has direct effect.[82]

23.022 **(2) Sufficiently serious breach.** A breach of Union law will be 'sufficiently serious' if it has persisted despite a judgment of the Court of Justice from which it is clear that the conduct in question constituted an infringement.[83] However, the right of reparation does not depend on the existence of a prior judgment of the Court of Justice.[84] Still, although the national courts have jurisdiction to decide how to characterize the breaches of Union law at issue, the Court of Justice will indicate a number of circumstances which the national courts might take into account,[85] and it will even characterize the breach itself if it has all the information necessary to that end.[86] The national court must take account of the clarity and precision of the rule infringed, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Union institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Union law.[87] Accordingly, the incorrect transposition of provisions of a directive which are capable of bearing several interpretations and on which neither the Court nor the Commission has given any guidance does not necessarily constitute a sufficiently serious breach (see para. 27-035, *infra*). Where, however, at the time when it committed the infringement, a legislative or administrative organ of the Member State in question was not called upon to make any legislative choices and had only considerably reduced discretion, or even none at all, the mere infringement of Union law may be sufficient to establish the existence of a sufficiently serious breach.[88] The Court already held in *Francovich* that there is a sufficiently serious breach where a Member State fails to take any of the measures necessary to achieve the result prescribed by a directive within the period it lays down.[89] In any event, the existence and scope of the

liable for a breach of Community law by a judicial body); see further Weyts, 'Overheidsaansprakelijkheid wegens schending van het EU-recht', in Cariat and Nowak (eds), *Le droit de l'Union européenne et le juge belge/ Het recht van de Europese Unie en de Belgische rechter* (Bruylant, 2015), 397–422.

[81] C-446/04, *Test Claimants in the FII Group Litigation*, 2006, para. 211; C-445/06, *Danske Slagterier*, 2009, paras 21–6.

[82] C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, 1996, paras 18–23, with case notes by Foubert (1996) Col JEL 359–72 and Oliver (1997) CMLRev 635–80.

[83] C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, 1996, para. 57.

[84] Ibid., paras 91–6.

[85] Ibid., paras 56 and 58–64, likewise paras 75–80 (the existence of fault may be taken into account only in order to determine whether the breach is sufficiently serious). For further clarification, see C-94/95 and C-95/95, *Bonfaci and Others and Berto and Others*, 1997.

[86] See C-392/93, *British Telecommunications*, 1996, para. 41; C-118/00, *Larsy*, 2001, paras 40–9; C-224/01, *Köbler*, 2003, paras 101–26; C-452/06, *Synthon*, 2008, paras 36–46.

[87] C-118/00, *Larsy*, 2001, para. 39; C-224/01, *Köbler*, 2003, para. 55.

[88] C-5/94, *Hedley Lomas*, 1996, para. 28 (infringement of Article 29 EC [*now Article 35 TFEU*], which prohibits quantitative restrictions on exports).

[89] C-178/94, C-179/94, C-188/94, C-189/94, and C-190/94, *Dillenkofer and Others*, 1996, paras 22–6. For failure to transpose a directive, see para. 27.035, *infra*.

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discretion available to the Member State must be determined by reference to Union law and not by reference to national law.[90] The mere fact that a national court has deemed it necessary to make a preliminary reference on the interpretation of Union law to the Court of Justice in the course of national proceedings relating to State liability for breach of Union law is not decisive for the determination of the question whether Union law was breached in a sufficiently serious manner by a Member State.[91]

As far as liability for judicial decisions is concerned, the national court must take account of non-compliance by the court adjudicating at last instance with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 267 TFEU.[92] An incorrect application of Union law by a judicial body adjudicating at last instance does not constitute a sufficiently serious breach where the answer to the question is not expressly covered by Union law, not provided by the case law of the Court of Justice, and not obvious.[93]

23.023 **(3) Direct causal link.** Lastly, in order for the State to incur liability, there must be a direct causal link between the breach of the Union obligation resting on the State and the loss or damage sustained by those affected. It is for the national court to assess whether the loss or damage claimed flows sufficiently directly from the breach of Union law to render the State liable to make it good.[94]

23.024 **Reparation for loss and damage.** Provided that these conditions, prescribed by Union law itself, are met, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused.[95] It is the national legal system which determines against what (central or decentralized) authority the claim must be made (see para. 18-005, *supra*) and which designates the judicial authority competent to determine disputes relating to compensation for damage.[96] Naturally, the formal and substantive conditions laid down by national law must not be less favourable than those relating to similar domestic claims and must not be such as to make it impossible or excessively difficult to obtain compensation, in practice.[97]

[90] C-424/97, *Haim*, 2000, para. 40.
[91] C-244/13, *Ogieriakhi*, 2014, paras 51–5.
[92] C-224/01, *Köbler*, 2003, para. 55; C-173/03, *Traghetti del Mediterraneo*, 2006, paras 32 and 43.
[93] C-224/01, *Köbler*, 2003, paras 121–2. This position is not altered by the fact that the national court should have made a reference for a preliminary ruling: ibid., para. 123. See also C-168/15, *Tomášová*, 2016, paras 25–34.
[94] C-446/04, *Test Claimants in the FII Group Litigation*, 2006, para. 218; C-420/11, *Leth*, 2013, paras 45–7.
[95] C-6/90 and C-9/90, *Francovich and Others*, 1991, paras 42–3.
[96] C-224/01, *Köbler*, 2003, paras 44–7 and 50 (concerning compensation for damage resulting from a judicial decision conflicting with Union law).
[97] See para. 29.012, *infra*, and, for the transposition of directives, para. 27.036, *infra*. Thus, it has been held that the following conditions for State liability should be set aside on the ground that they would impede effective judicial protection: a condition making reparation dependent upon the legislature's act or omission being referable to an individual situation; a condition requiring proof of misfeasance in public office (C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, 1996, paras 67–73); and a rule totally excluding loss of profit as a head of damage (ibid., para. 87). For the national courts' subsequent decisions in the *Brasserie du Pêcheur* and *Factortame* litigation, see the judgment of the *Bundesgerichtshof* of 24 October 1996, III ZR 127/91 (1996) Eu ZW 761 (State held not liable in *Brasserie du Pêcheur* because of the lack of a causal link) and the judgment of the Queen's Bench Division of 31 July 1997 in *R. v Secretary of State for Transport, ex p. Factortame and Others (No. 5)* [1997] TLR 482 and (1998) RTDE 93–5 (State held liable for a serious breach). In determining the loss or damage for which reparation may be granted, the national court may always inquire whether the injured person showed reasonable care so as to avoid the loss or damage or to mitigate it (C-178/94, C-179/94, C-188/94, C-189/94, and C-190/94 *Dillenkofer and Others*, 1996, para. 72; C-524/04, *Test Claimants in the Thin Cap Group Litigation*, 2007, paras 124–6; C-445/06, *Danske Slagterier*, 2009, paras 58–69). See further Emiliou, 'State Liability under Community Law: Shedding More Light on the *Francovich* Principle?' (1996) ELRev 399–411. See also C-66/95, *Sutton*, 1997, paras 28–35; C-90/96, *Petrie and Others*, 1997, para. 31; C-127/95, *Norbrook Laboratories*, 1998, paras 106–12.

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B. Incorporation in the Member States' legal systems

23.025 **Monist systems.** The principle of primacy of Union law formulated by the Court of Justice was not automatically applied by each Member State in its domestic legal system. This was possible in the 'monist' Member States, which give international legal norms per se precedence over domestic law. On that ground, those Member States accepted that Union law took precedence in its own right in the domestic legal system.[98]

Accordingly, the primacy of Union law found immediate acceptance in the Netherlands' legal system. This was because it already recognized the principle of the supremacy of international law even before it was codified in the 1953 Constitution. The 1983 Constitution reads as follows: 'Legal provisions valid within the Kingdom shall not be applied if to do so would not be compatible with provisions of treaties and acts of international organisations which are binding on any person' (Article 94). Since Article 12 of the EEC Treaty therefore had precedence in domestic law in so far as it was 'binding on any person', the court hearing *Van Gend & Loos* had only to ascertain, through the preliminary reference to the Court of Justice, whether the provision was capable of having legal effects on individuals (see para. 1-026, *supra*).[99]

Likewise, in Belgium, it had been argued since the early years of the Community that international law, including (then) Community law, took precedence over domestic law. In the judgment of 27 May 1971 in *Franco-Suisse Le Ski*, the Supreme Court (*Hof van Cassatie/Cour de Cassation*) accepted that view in confirming that a law could not prohibit the repayment of charges collected contrary to Article 12 of the EEC Treaty on the ground that:

> where there is a conflict between a domestic provision and a provision of international law which has direct effects in the domestic legal order, the rule laid down by the treaty must prevail; that priority follows from the very nature of international law laid down by treaty; this applies *a fortiori* where, as in this case, the conflict arises between a provision of domestic law and a provision of Community law; this is because the treaties which brought Community law into being established a new legal order by virtue of which the Member States limited the exercise of their sovereign powers in the areas defined in those treaties; . . . it follows from the foregoing that the Judge was obliged to refrain from applying the provisions of domestic law which conflict with [Article 12 EEC].[100]

Consequently, both Belgian and Dutch law followed the Court of Justice in deriving the primacy of Community—now Union—law from the very nature of that law.

[98] See the discussion in Lenaerts and Van Nuffel (Cambien and Bray, eds) , *European Union Law* (Sweet & Maxwell, 2011) of the Benelux countries (paras 21.021 and 21.032–21.033), Austria (para. 21.040), the Baltic States (paras 21.043–21.045), Poland (para. 21.051) and Bulgaria (21.053).

[99] Prechal, 'La primauté du droit communautaire aux Pays-Bas' (1990) RFDA 981–2.

[100] Cass 27 May 1971, *Arr Cass* 959; (1972) SEW 42. On the application of Union law in Belgium, see further Van Meerbeeck, 'Le droit de l'Union européenne devant les juridictions de l'ordre judiciaire', in Cariat and Nowak (eds), *Le droit de l'Union européenne et le juge belge/ Het recht van de Europese Unie en de Belgische rechter*, (Bruylant, 2015), 189–221; Van Nuffel, 'Technieken van doorwerking van EU-recht in het Belgische privaatrecht', in Samoy, Sagaert, and Terryn (eds), *Invloed van het Europese recht op het Belgische privaatrecht* (Intersentia, 2012), 1–40; Wytinck, 'The Application of Community Law in Belgium (1986-1992)' (1993) CMLRev 981–1020; Lenaerts, 'The Application of Community Law in Belgium' (1986) CMLRev 253–86.

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Dualist systems. By contrast, in 'dualist' systems, international legal provisions do not form part of the domestic legal system unless and until they have been incorporated therein by a provision of national law. If the principle of primacy of Union law is given no legal force superior to the provision incorporating it, the process of incorporation does not necessarily secure the primacy for Union law.[101] Thus, the legal force of primary and secondary Union law in the United Kingdom was based upon section 2(1) of the 1972 European Communities Act. As far as the relationship with domestic law is concerned, although section 2(4) did not recognize the primacy of Union law as such, it did provide that any enactment passed, or to be passed, shall be construed and have effect subject to the 'foregoing provisions' of that section, which include section 2(1), the effect of which was to incorporate the whole of Union law into the law of the United Kingdom. The European Communities Act thus ranked supreme in the sense that anything in UK substantive law inconsistent with any of rights and obligations flowing from Union law was abrogated or had to be modified to avoid the inconsistency, even if contained in primary legislation. **23.026**

Generally,[102] it is particularly in Member States that provide for a system of constitutional review that the question arises as to whether Union law must be regarded as being subordinate to the national constitution and whether provisions of Union law may be tested against the national constitution. From the point of view of Union law, it is irrelevant what method a given Member State uses in order to provide a basis for the primacy of Union law within its domestic legal system, provided that that law actually is given precedence over domestic law. This latter outcome must be achieved in spite of the reluctance which some constitutional courts have shown in accepting the primacy of Union law.[103]

Support for primacy in national law. In practice, most national legal systems combine 'monist' and 'dualist' elements. Most Member States have introduced in their constitutions a provision that authorizes the transfer of decision-making powers to the Union in their constitutions. In Belgium the Constitution was amended in 1970 to introduce an Article 25*bis* (now Article 34) which provides that the exercise of certain powers can be transferred to international organizations by way of act of parliament or treaty. A similar clause was inserted in the Dutch Constitution (Article 92) and the German Constitution (Article 24). **23.027**

[101] Compare the developments in Ireland with those in Denmark as set out in paras 21.034 and 21.036, respectively, in Lenaerts and Van Nuffel (Cambien and Bray, eds), *European Union Law* (Sweet & Maxwell, 2011). See further the discussion in the same book of the Czech Republic, Slovakia, Hungary, and Malta (paras 21.047 to 21.050). See also the judgment of the Danish Supreme Court (*Højesteret*) of 6 December 2016 in Case No. 15/2014 *Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A*, in response to C-441/14, *Dansk Industri*, 2016; see further Madsen, Palmer Olsen and Šadl, 'Legal Disintegration? The Ruling of the Danish Supreme Court in AJOS', VerfBlog, 2017/1/30, https://verfassungsblog.de/legal-disintegration-the-ruling-of-the-danish-supreme-court-in-ajos/.

[102] For a more extensive survey of the primacy of Union law in the national legal systems, see Łazowski (ed.), *The Application of EU law in the New Member States—Brave New World* (Cambridge University Press, 2010); Kellermann et al. (eds), *The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre) Candidate Countries: Hopes and Fears* (TMC Asser Press, 2006); Henrichs, 'Gemeinschaftsrecht und nationale Verfassungen. Organisations- und verfahrensrechtliche Aspekte einer Konfliktlage' (1990) Eu GRZ 413–23; Bonichot et al., 'L'application du droit communautaire dans les différents Etats membres de la Communauté économique européenne' (1990) RFDA 955–86; Pescatore, 'L'application judiciaire des traités internationaux dans la Communauté européenne et dans ses Etats membres', *Etudes de droit des Communautés européennes. Mélanges offerts à P. H. Teitgen* (Pedone, 1984), 355–406.

[103] See the discussion below of the judgment of 5 May 2020 of the German Constitutional Court (para. 23.029). In addition to the commentators cited above, see Darmon, 'Juridictions constitutionnelles et droit communautaire' (1988) RTDE 217–51; Schermers, 'The Scales in Balance: National Constitutional Courts v. Court of Justice' (1990) CMLRev 97–105.

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Both in Germany (Article 23(1)) and France (Article 88) a more specific provision was inserted in the Constitutions before the adoption of the EU Treaty, laying down the conditions under which those States have become Member States of the European Union. Most non-founding Member States have inserted similar provisions in their constitutions.[104] While those provisions do not mention the primacy of Union law, they may nonetheless enable national courts to found the primacy of Union law not only on the specificity of Union law itself, but also on a provision of national constitutional law. Consequently, the French *Conseil constitutionnel* derives the primacy of Union law from Article 88 of the French Constitution.[105] The Belgian Supreme Administrative Court (*Raad van State/ Conseil d'Etat*) in its *Goosse* and *Orfinger* decisions went even further and has held to this effect that Article 34 of the Belgian Constitution does not only afford the constitutional basis for the transfer of powers to the European Union but also for the jurisdiction of the Court of Justice to ensure the uniform interpretation of Union law, even though this limits the legal effects of national constitutional provisions.[106]

From a Union perspective it is irrelevant on what basis a Member State arrives at recognizing the primacy of Union law, as long as Union law is effectively granted primacy over national law. Problematic in this respect was the thesis of the Italian Constitutional Court derived from the fact that Article 11 of the Italian Constitution allows for the transfer of competences to international organizations. According to the Italian Constitutional Court this implied that every national law that is contrary to Union law is automatically also in conflict with the Italian Constitution, with the result that lower courts could not give primacy to Union law over the contrary national law without first referring a question as to the constitutionality of the law to the Italian Constitutional Court (see para. 23-015, *supra*). In 1984 the Italian Constitutional Court abandoned that thesis.[107]

23.028 **Relationship between Union law and the national constitution.** In Member States that provide for a system of constitutional review the question soon arose to what extent the primacy of Union law could be reconciled with the necessity to ensure that all norms that are applied within a Member State are in accordance with the national constitution. In some Member States the constitutional court has taken the position that primacy of Union law is only possible to the extent that Union law respects the limits set by the national constitution to the competences of the Union.[108] Therefore, some scholars have tried to explain the relationship between Union law and national law from a non-hierarchical perspective ('constitutional pluralism').[109] Nonetheless, the reservations expressed by certain constitutional

[104] For an overview, see Lenaerts and Van Nuffel (Cambien and Bray, eds.) , *European Union Law* (Sweet & Maxwell, 2011), para. 21.034 *et seq*.

[105] Décision No. 2004-505 DC of 19 November 2004.

[106] *Raad van State/Conseil d'Etat*, 5 November 1996, No. 62.621 (*Goosse*) and No. 69.922 (*Orfinger*), discussed in 'Annex VI—Application of Community law by national courts' to the Fourteenth Annual Report on monitoring the application of Community law (1996), OJ 1997 C332/202.

[107] Judgment No. 170/84 of 8 June 1984; for an English translation, see (1994) CMLR 756; see Barav, 'Cour constitutionelle italienne et droit communautaire: le fantôme de *Simmenthal*' (1985) RTDE 313–41. More recently, see Gaja, 'New Developments in a Continuing Story: The Relationship Between EEC Law and Italian Law' (1990) CMLRev 83–95.

[108] The leading example is Germany, discussed hereafter in para. 23.029. See also, e.g., Belgium, discussed, *infra*, at para. 23.030.

[109] See Walker, 'The Idea of Constitutional Pluralism' (2002) MLR 317–59; Poiares Maduro, 'Contrapunctual law: Europe's constitutional pluralism in action', in Walker (ed.) *Sovereignty in Transition* (OUP, 2003), 501–37; Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) ELJ 262–307; Avbelj and Komárek, 'Four Visions of Constitutional Pluralism' (2008)

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courts do not pose a problem from a Union law perspective either, provided that in practice the effective and uniform application of Union law within the Member States concerned is not impeded.[110]

23.029 **German Constitutional Court.** In this respect the *Solange* case law of the *Bundesverfassungsgericht* (German Constitutional Court) has been particularly influential. A (then) Community measure was challenged in a German court on the ground that it violated fundamental rights enshrined in the German Basic Law (*Grundgesetz*). Although the Court of Justice answered a question referred for a preliminary ruling by the court concerned by saying that the measure did not infringe any fundamental right,[111] the national court deemed it necessary to bring the matter before the *Bundesverfassungsgericht* too. That court held that the transfer of sovereignty to the Community made under Article 24 of the Basic Law could not result in Community legislation detracting from the essential structure of the Basic Law. Despite the judgment of the Court of Justice and the primacy of Community law, the *Bundesverfassungsgericht* considered that it was necessary to conduct a second review of the Community legislation in the light of the fundamental rights guaranteed by the Basic Law *so long as* the Community legal order lacked a democratically elected parliament with legislative powers and powers of scrutiny and a codified catalogue of fundamental rights.[112] In order to guarantee the uniform application of Community law, the Court of Justice confirmed, for its part, that observance of fundamental rights formed part of the requirements that Community acts had to satisfy in order to be valid and therefore had to be enforced within the context of Community law itself.[113] In 1986, after considering the case law of the Court of Justice, the *Bundesverfassungsgericht*, referring to the importance that the Community institutions attached to the protection of fundamental rights and democratic decision-making, declared that an additional review of Community legislation in the light of the fundamental rights guaranteed by the Basic Law was no longer necessary *so long as* the case law of the Court of Justice continued to afford the level of protection found.[114]

The *Solange* case law of the *Bundesverfassungsgericht* has operated as a most valuable impetus for the consolidation of democracy and respect for fundamental rights at the level of the Union, now reflected in Article 2 TEU as well as in Title II of the TEU and the Charter

EuConst 524–7; Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) ELJ 389–422; Barents, 'The Precedence of EU Law from the Perspective of Constitutional Pluralism' (2009) EuConst 421–46; Avbelj and Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, 2012).

[110] See, in this respect, Baquero Cruz, *What's Left of the Law of Integration* (OUP, 2018), Chapter 3 ('Against Constitutional Pluralism').

[111] 11/70, *Internationale Handelsgesellschaft*, 1970, paras 3–20.

[112] The judgment in question is the so-called (first) *Solange* judgment of 29 May 1974, BVerfGE 37, 271; for an English translation, see (1974) 2 CMLR 540; see Ipsen, 'BVerfG versus EuGH *re* "Grundrechte" ' (1975) EuR 1–19.

[113] 44/79 *Hauer*, 1979, paras 13–16 (in which reference is made to the judgments in *Internationale Handelsgesellschaft* and *Nold* and to the fact that the institutions recognized 'that conception' in the Joint Declaration of 5 April 1977; para. 25.003, *infra*).

[114] Judgment of 22 October 1986 (*Solange II*) (1986) BVerfGE 73, 339; for an English translation, see (1987) 3 CMLR 225; see the commentary by Frowein (1988) CMLRev 201–6. The *Bundesverfassungsgericht* referred to the Joint Declaration of 5 April 1977 and the Declaration of the European Council of 7 and 8 April 1978 on democracy (1978) 3 EC Bull. 5. For the ensuing debate, see, among others, Ehlermann, 'Zur Diskussion um einen "Solange III"-Beschluss: Rechtspolitische Perspektiven aus der Sicht des Gemeinschaftsrechts' (1991) EuR 27–38; Everling, 'Brauchen wir "Solange III"?' (1990) EuR 195–227; Tomuschat, 'Aller guten Dinge sind III?' (1990) EuR. 340–61.

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of Fundamental Rights of the European Union. In matters fully determined by Union law, the *Bundesverfassungsgericht* now directly enforces the Charter of Fundamental Rights of the European Union rather than the Basic Law—this as a matter of primacy of Union law—when it reviews the conformity with fundamental rights of the relevant German implementation acts.[115]

On the contrary, the *Bundesverfassungsgericht* stated its 'conditional' acceptance of the primacy of Union law on 12 October 1993 when it ruled on the constitutionality of the law ratifying the EU Treaty.[116] It set out that German constitutional law accepted acts of the 'European institutions and bodies' only in so far as they remained within the bounds of the Treaty provisions approved by the ratification law and made it plain that it would itself review whether such acts remained within the bounds of the Union's principles of conferred powers, subsidiarity, and proportionality.[117] In a judgment of 30 June 2009, the *Bundesverfassungsgericht* held the German federal law ratifying the Lisbon Treaty compatible with the Basic Law, while requiring certain amendments to be made to the laws governing the role of the *Bundesrat* and *Bundestag* (chambers of the federal parliament) in the framework of the Union's decision-making process.[118] In this judgment, the *Bundesverfassungsgericht* further clarified that it will review whether Union law runs the risk of depriving the Basic Law's constitutional identity from its core content ('identity review').[119] However, in *Honeywell* the *Bundesverfassungsgericht* later stressed the exceptional nature of this, and held that while it still reserves the right to review Union acts with regard to the Basic Law, the Union could only be deemed to have acted *ultra vires* if the Court of

[115] German Constitutional Court, 6 November 2019, 1 BVR 16/13 ('Recht auf Vergessen I'), and, of the same date, 1 BVR 276/17 (Recht auf Vergessen II'). These judgments incorporate the *Åkerberg Fransson* and *Melloni* case law of the Court of Justice (C-617/10, *Åkerberg Fransson*, 2013; C-399/11, *Melloni*, 2013—see, *infra* para. 25.012) and constitute a remarkable completion of the *Solange* jurisprudence wholly consistent with Union law. See also Wendel, 'The two-Faced Guardian—or How One Half of the German Federal Constitutional Court Became a European Fundamental Rights Court' (2020) CMLRev 1383–426; Thym, 'Friendly Takeover, or: the Power of the "First Word". The German Constitutional Court Embraces the Charter of Fundamental Rights as a Standard of Domestic Judicial Review' (2020) EuConst 187–212.

[116] The '*Maastricht-Urteil*'; for the text, see (1993) Eu GRZ 429; (1993) EuR 294; (1974) 1 CMLR 57. For the conditional nature of that acceptance, see Zuleeg, 'The European Constitution under Constitutional Constraints: The German Scenario' (1997) ELRev 19–34.

[117] Points C.I.3. and C.II.2., under b, ibid., 89 and 94, respectively. Among the many commentaries on that judgment, see; Hahn, 'La Cour constitutionnelle fédérale d'Allemagne et le Traité de Maastricht' (1994) RGDIP 107–26; Herdegen, 'Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union"' (1994) CMLRev 235–49; Ipsen, 'Zehn Glossen zum Maastricht Urteil' (1994) EuR 1–21; Kokott, 'Deutschland im Rahmen der Europäischen Union—zum Vertrag von Maastricht' (1994) AöR 207–37; Meessen, 'Maastricht nach Karlsruhe' (1994) NJW 549–54; Tomuschat, 'Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts' (1993) Eu GRZ 489–96. For the role which the Court of Justice could play in this connection by giving preliminary rulings at the request of the German Constitutional Court, see Grimm, 'The European Court of Justice and National Courts: The German Constitutional Perspective after the Maastricht Decision' (1997) Col JEL 229–42.

[118] Judgment of 30 June 2009, 2 BvE 2/08, available in English at: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html. See Ziller, 'The German Constitutional Court's Friendliness towards European Law: On the Judgment of *Bundesverfassungsgericht* over the Ratification of the Treaty of Lisbon' (2010) E Pub L 53–73; Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court' (2009) CMLRev 1795–822; Schorkopf, 'The European Union as an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon' (2009) GLJ 1219–40; Niedobitek, 'The Lisbon Case of 30 June 2009—A Comment from the European Law Perspective' (2009) GLJ 1267–75. See also Editorial Comments (2009) CMLRev 1023–33; Doukas, 'The Verdict of the German Federal Constitutional Court on the Lisbon Treaty: Not Guilty, But Don't Do It Again!' (2009) ELRev 866–88; Halberstam and Möllers, 'The German Constitutional Court says "Ja zu Deutschland!"'(2009) GLJ 1241–58.

[119] Judgment of 30 June 2009, 2 BvE 2/08paras 238–41.

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Justice—after being properly given the opportunity to address the matter, if need be after a preliminary ruling request from the *Bundesverfassungsgericht* itself—has not rectified what the *Bundesverfassungsgericht* sees as a sufficiently qualified breach of the Union's constitutional framework, thereby committing a 'manifest error' (in the eyes of the *Bundesverfass ungsgericht*).[120] The judgment of the Court in *Mangold*[121] as to the horizontal direct effect of general principles of Union law (para 25-020, *infra*) was deemed not to fall foul of that standard.

This form of benevolent vigilance was put under strain in the wake of the crisis of the euro area. When the European Central Bank announced its—never-implemented—plan for Outright Monetary Transactions (OMT),[122] this plan, and the role the *Bundesbank* would have to play in putting it into operation as part of the ESCB, were challenged before the *Bundesverfassungsgericht*. In line with the approach announced in *Honeywell*, the *Bundesverfassungsgericht* submitted a request for a preliminary ruling on the validity of the scheme to the Court of Justice.[123] Following the Court's reply in *Gauweiler*,[124] the *Bundesverfassungsgericht*, while expressing some concern about the impact of the plan, upheld the participation of Germany in the OMT.[125] When a second set of monetary interventions[126] was challenged before the *Bundesverfassungsgericht*, the latter made a new reference for a preliminary ruling[127] setting out its concerns, which the Court of Justice rejected in its judgment in *Weiss*.[128] Consequently, the *Bundesverfassungsgericht* dismissed the Court's assessment of the proportionality of the contested ECB acts as wholly inadequate[129] and thus constituting a 'manifest error' in the sense of *Honeywell*.[130] Yet, the *Bundesverfassungsgericht* stopped short

[120] Judgment of 6 July 2010, 2 BvR 2661/06.

[121] C-144/04, *Mangold*, 2005; see also C-427/06, *Bartsch*, 2008 and C-555/07, *Kücükdeveci*, 2010.

[122] Decisions of the Governing Council of the European Central Bank (ECB) of 6 September 2012 on a number of technical features regarding the Eurosystem's outright monetary transactions in secondary sovereign bond markets ('the OMT decisions').

[123] Judgment of 14 January 2014, 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13.

[124] C-62/14, *Gauweiler*, 2015.

[125] Judgment of 21 June 2016, 2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13, with case note by Classen (2016) EuR 529–43; see further Sauer, 'Der novellierte Kontrollzugriff des Bundesverfassungsgerichts auf das Unionsrecht' (2017) EuR 186–205. See also Tischendorf, 'Europa unter deutscher Supervision. Die Verantwortung der Verfassungsorgane des Bundes für die Geld- und Außenhandelspolitik der Europäischen Union' (2018) EuR 695–723.

[126] Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme, OJ 2015 L121/20, since replaced by Decision (EU) 2020/188 of the European Central Bank of 3 February 2020 on a secondary markets public sector asset purchase programme (OJ 2020 L39/12).

[127] Judgment of 18 July 2017, 2 BvR 859/15; 2 BvR 1651/15; 2 BvR 2006/15; 2 BvR 980/16.

[128] C-493/17, *Weiss*, 2018.

[129] Judgment of 5 May 2020, 2 BvR 859/15. The *Bundesverfassungsgericht* simply applied the three-step *German* understanding of proportionality ('geeignet, erforderlich, angemessen'), whereas the Court of Justice did not go into this third step, as it is not provided for in Article 5(4) TEU, defining the principle of proportionality applicable to acts of Union institutions—also the German version of Article 5(4) TEU only speaks of 'erforderlich', see C-493/17, *Weiss*, 2018, paras 71–100. See also X, 'Not Mastering the Treaties: The German Federal Constitutional Court's PSPP judgment' (2020) CMLRev 969–74; Dermine, 'The Ruling of the Bundesverfassungsgericht in PSPP—An Inquiry into its Repercussions on the Economic and Monetary Union: Bundesverfassungsgericht 5 May 2020, 2 BvR 859/15 and others, PSPP' (2020) EuConst 525–51; Wegener, 'Karlsruher Unheil—Das Urteil des Bundesverfassungsgerichts vom 5. Mai 2020 (2 BvR 859/15) in Sachen Staatsanleihekäufe der Europäischen Zentralbank' (2020) EuR 347–63.

[130] The judgment not only applies the wrong proportionality test, derived from German law but contrary to the wording of Article 5(4) TEU (paras 5.034 *et seq. supra*), it also raises issues concerning the uniform application of Union law, and hence the equality of Member States and their citizens before Union law (Article 4(2) TEU; Article 20 of the Charter of Fundamental Rights of the European Union).

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of then declaring these ECB acts to be *ultra vires*, by giving the ECB the opportunity to better explain the proportionality of the measures. The ECB did respond to this, and the *Bundestag* subsequently indicated that these additional arguments sufficed to meet the conditions set by the *Bundesverfassungsgericht*,[131] thus defusing the conflict. Thereafter, the *Bundesverfassungsgericht* held that there were no grounds to consider the response given to its earlier judgment manifestly inadequate and dismissed the applications brought to have that judgment executed.[132]

23.030 **Belgian Constitutional Court.** A good illustration of the influence which the German *Solange* case law still has for other Member States[133] is offered by the case law of the Belgian Constitutional Court (*Grondwettelijk Hof/ Cour constitutionnelle*). As far as the acceptance of primacy of Union law over provisions of constitutional law is concerned, the state of Belgian law has indeed become less clear since the Constitutional Court held that it has jurisdiction to assess the constitutionality of laws ratifying a treaty and of treaties themselves.[134] However, the Constitutional Court did not hold that Union law ranks lower than the Constitution. Moreover, the review of the constitutionality of laws by way of preliminary rulings from the Constitutional Court has been expressly excluded for laws 'ratifying a constituent treaty with respect to the European Union or the European Convention on Human Rights'. The Constitutional Court thus found that it lacked jurisdiction to review whether the national law approving the European Single Act violated the principle of non-discrimination by not providing for compensation for the customs agents that lost activities due to the establishment of the internal market.[135] Nevertheless, according to the Constitutional Court in a more recent judgment, the Belgian Constitution does not allow for the discriminatory abridgement of the identity as enshrined in the political and the constitutional basic structure of the State or the core values of the protection offered by the Constitution to legal subjects.[136]

[131] See, first, the Account of the monetary policy meeting of the Governing Council of the European Central Bank held in Frankfurt am Main on Wednesday and Thursday, 3–4 June 2020, https://www.ecb.europa.eu/press/accounts/2020/html/ecb.mg200625~fd97330d5f.en.html, and, second, the Antrag der Fraktionen CDU/CSU, SPD, FDP und BÜNDNIS 90/DIE GRÜNEN (19/20621), as adopted on 2 July 2020.

[132] Decision of 29 April 2021, 2 BvR 1651/15, paras 95–111.

[133] For an overview of the approach in other Member States, see Lenaerts and Van Nuffel (Cambien and Bray, eds), *European Union Law* (3rd edn, Sweet & Maxwell, 2011), para. 21.034 *et seq*.

[134] Judgment of 16 October 1991, No. 26/91, *B.S./M.B.*, 23 November 1991, *A.A.*, 1991, 271; see also judgments of 3 February 1994, No. 12/94, *B.S./M.B*, 11 March 1994, *A.A.*, 1994, 211; and of 26 April 1994, No. 33/94, *B.S./M.B.*, 22 June 1994, *A.A.*, 1994, 419. See the critical commentary by Louis, 'La primauté, une valeur relative?' (1995) CDE 23–8; Popelier, 'Ongrondwettige verdragen: de rechtspraak van het Arbitragehof in een monistisch tijdsperspectief' (1994–1995) RW 1076–80; for an approving commentary, see Brouwers and Simonart, 'Le conflit entre la Constitution et le droit international conventionnel dans la jurisprudence de la Cour d'arbitrage' (1995) CDE 7–22; Melchior and Vandernoot, 'Contrôle de constitutionnalité et droit communautaire dérivé' (1998) RBDC 3–45.

[135] Judgment of 14 January 2004, No. 3/2004, *MB* 9 March 2004.

[136] Judgment of 28 April 2016, No. 62/2016, para. B.8.7. See also the contributions in (2017) TBP 293–372 (special edition *Stabiliteitsverdragarrest Grondwettelijk Hof*); Rosoux, 'L'ambivalence ou la double vocation de l'identité nationale—Réflexions au départ de l'arrêt n° 62/2016 de la Cour constitutionnelle belge' (2019) CDE 91–148; El Berhoumi et al., 'Het Stabiliteitsverdrag-arrest van het Grondwettelijk Hof: een arrest zonder belang?' (2017) CDPK 398–429.

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C. The direct effect of Union law

23.031 ***Van Gend & Loos.*** Ever since the 1963 judgment in *Van Gend & Loos*, it is clear that individuals may derive rights directly from Union (then Community) law[137]. In that judgment, the Court of Justice gave a preliminary ruling on a question raised by the Netherlands *Tariefcommissie* as to whether individuals might derive rights from Article 12 EEC which the courts had to protect. The Court of Justice held that '[t]o ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions'.[138] The Court inferred from the special nature of the Community legal order that Community law is 'intended to confer upon [individuals] rights which become part of their legal heritage' (see para. 1-026, *supra*). The Court stated that '[t]hese rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community'. After inquiring into the substance and wording of Article 12 EEC, the Court held that the prohibition laid down in that article on Member States increasing import duties or charges having equivalent effect which they already applied in their trade with each other had direct effect.[139]

23.032 **Conditions for direct effect.** Not all of the provisions of Union law have direct effect.[140] The decisive test for determining whether or not a given provision has direct effect is its content. The Court of Justice has consistently held that a provision produces direct effect if it is 'clear and unconditional and not contingent on any discretionary implementing measure'.[141] Although the Court has not always formulated that test in the same way, it refers to a provision which is sufficiently precise ('clear') and requires no further implementation (involving a margin of discretion) by Union or national authorities in order to achieve the effect sought in an effective manner ('unconditional').[142] A provision that is only given concrete scope through the enactment of measures by the institutions or the Member States does not confer any rights on individuals which national courts may enforce.[143] Such is the case, for instance, for a provision which puts an authority under a duty to act, except for those aspects for which the authority has no discretion. A prohibition to act—like the standstill provision of Article 12 EEC—is a plain example of a provision which affords the Member States no discretion, and hence has direct effect.

A provision has direct effect where the court is able, without the operation of other implementing measures, to reach an interpretation which may be applied to the case at issue, as a result of which individuals may enforce the rights derived from that provision.[144] The judgment in *Van Gend & Loos* already made clear that a provision does not lack sufficient clarity simply on the ground that the national court deemed it necessary to make a

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[137] 26/62, *Van Gend & Loos*, 1963, 11–13.
[138] Ibid., 12.
[139] Ibid., 12–13.
[140] C-573/17, *Popławski*, 2019, para. 59.
[141] 44/84, *Hurd*, 1986, para. 47.
[142] See C-128/92, *Banks*, 1994, Opinion AG Van Gerven, point 27.
[143] 28/67, *Molkerei-Zentrale Westfalen*, 1968, 153; 13/68, *Salgoil*, 1968, 461.
[144] See, e.g., 12/81, *Garland*, 1982, paras 14–15.

reference to the Court of Justice on the interpretation of the provision in question. In *Van Gend & Loos*, the Court of Justice indicated that 'an illegal increase [of a customs duty] may arise from a rearrangement of the tariff resulting in the classification of the product under a more highly taxed heading and from an actual increase in the rate of customs duty'. That interpretation allowed the Netherlands court to apply the prohibition set out in Article 12 EEC to the benefit of an undertaking.[145] Likewise, Article 45 TFEU (free movement of workers) is not prevented from having direct effect because para. 3 of that article contains a reservation with regard to limitations justified on grounds of public policy, public security, or public health. This is because 'the application of those limitations is ... subject to judicial control'.[146]

23.033 **Direct effect of primary law.** The Court of Justice has repeatedly had to rule on whether provisions of the Treaties have direct effect.[147] Where a Treaty provision is recognized as having direct effect, an individual may rely upon it against Union and national authorities (vertically) and, in some cases, against other individuals (horizontally).[148] The application of the Treaties in the Member States does not depend on whether they have been transposed into the national legal system. When a Treaty provision having horizontal direct effect is invoked against an individual, the fact that the Member States have not enacted any provisions to implement this provision is therefore not such as to exclude its application. Treaty provisions where the horizontal effect has been recognized include Articles 101 and 102 TFEU (see paras 9.015 and 9.017); Article 157 TFEU (see para. 9-048, *supra*); and, vis-à-vis organizations not governed by public law where they lay down collective rules in the exercise of their legal autonomy, the provisions on the free movement of persons, and the freedom to provide services (see paras 7.044 and 7.081; see also para. 6.018, *supra* as regards non-economically active citizens). If a provision has direct effect, such is the case from the time when it entered into force or, as the case may be, from the end of the transitional period. In exceptional cases, however, the Court of Justice may place limitations on the temporal effect of a judgment recognizing the direct effect of a provision (see para. 28.006, *supra*).

The same applies to the Charter of Fundamental Rights of the European Union. The Court has indeed found that several rights enshrined in the Charter have horizontal direct effect, with the result that national courts must apply it between private parties notwithstanding the existence of conflicting provisions of national law.[149] However, a national court is not

[145] 26/62, *Van Gend & Loos*, 1963, 14–15.

[146] 41/74, *Van Duyn*, 1974, para. 7. See, with regard to Article 56 EC [*now Article 63 TFEU*] (free movement of capital), C-163/94, C-165/94, and C-250/94, *Sanz de Lera and Others*, 1995, para. 43.

[147] e.g., it has long been established that the following articles of the TFEU have direct effect: Article 18 TFEU; Article 28 TFEU; Article 30 TFEU; Articles 34, 35, and 36 TFEU; Article 37(1) and (2) TFEU; Articles 45 to 62 TFEU in general, and particularly Articles 45, 49, 56, and 57 TFEU; Article 101(1) TFEU; Article 102 TFEU; Article 106(1) and (2) TFEU; Article 108(3), last sentence, TFEU; Article 110, first and second paras TFEU; and Article 157 TFEU. See already the list in Schermers and Waelbroeck, *Judicial Protection in the European Union* (Kluwer, 2001), § 359, 183–5 (with a list of provisions to which the Court of Justice denied direct effect at 185).

[148] See, e.g., 36/74, *Walrave*, 1974, paras 17–25 (Articles 12, 39, and 49 EC [*now Articles 18, 45, and 56 TFEU*]); 43/75, *Defrenne*, 1976, para. 39 (Article 119 EC [*now Article 157 TFEU*]); C-281/98, *Angonese*, 2000, paras 30–6 (Article 48 EC *[now Article 45 TFEU]*); C-555/07, *Kücükdeveci*, 2010, paras 50–6 (granting horizontal effect to the general principle of Union law relating to non-discrimination on grounds of age—Article 21 of the Charter of Fundamental Rights of the European Union) and C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, 2018 (granting horizontal direct effect to the right to paid annual leave—Article 31(2) of the Charter).

[149] See, e.g., C-176/12, *AMS*, 2014, para. 47; C-414/16, *Egenberger*, 2018, para. 76; C-193/17, *Cresco Investigation*, 2019, paras 76–89 (Article 21 of the Charter); C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, 2018, para. 79 (Article 31(2) of the Charter); see, *infra*, para. 25.010.

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required, solely on the basis of Union law, to refrain from applying a provision of national law which is incompatible with a provision of the Charter of Fundamental Rights of the European Union which, like Article 27, does not have direct effect.[150]

23.034 **Direct effect of secondary law.** Alongside provisions of the Treaties, provisions contained in acts of Union institutions may be invoked by individuals. In principle, whether such provisions have direct effect depends on the same substantive criteria that apply to Treaty provisions.[151] However, depending on the type of act, additional factors may have to be taken into account.[152] As far as international agreements concluded by the Union are concerned, it must always be ascertained whether the possible direct effect of their provisions is consistent with the spirit, the general scheme, and the terms of the agreement.[153] Provisions of autonomous acts of the institutions have direct effect, in principle, if the substantive criteria are fulfilled, but their vertical or horizontal effect further depends on the type of act in which they are laid down. Under Article 288 TFEU, regulations are binding and 'directly applicable' without any need for transposition, on all within the national legal system who are substantively affected thereby. Where a provision of a regulation has direct effect, an individual may rely upon it against other individuals too.[154] There is no such horizontal direct effect in the case of provisions of directives, which, if they satisfy the requirements for direct effect, can embody only obligations for State bodies.[155]

23.035 **Direct applicability.** In indicating that a provision has 'direct effect', the Court of Justice sometimes uses the expression 'direct applicability'.[156] Some commentators consider that these expressions are not strictly defined and use both of them in referring to the possibility for an individual to rely upon a provision.[157] For a clearer understanding of the effect of Union law, it is nevertheless more illuminating to make a distinction between 'direct applicability' (whether a provision requires implementation *as a legal instrument*) and 'direct effect' (whether the *substance* of a provision may be relied upon in order to make a claim).[158] Where a provision is 'directly applicable', and hence does not require implementation in the national legal system—which is the case for Treaty provisions and regulations—it follows, as explained above, that, where that provision fulfils the substantive conditions for 'direct effect', it cannot only be relied upon against Union and national authorities but, in some cases, also against other individuals.

[150] C-176/12, *Association de médiation sociale*, 2014, paras 44–8; C-573/17, *Popławski*, 2019, para. 63.

[151] See 9/70 *Grad*, 1970, paras 5–6; see also C-486/08, *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, 2010, para 21–5 (same conditions apply to agreements concluded between the social partners which are implemented by a directive of the Council). For a survey of the direct effect of various provisions of Union law, see Prinssen and Schrauwen (eds), *Direct Effect. Rethinking a Classic of EC Legal Doctrine* (Europa Law, 2002); Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) ELRev 155–77.

[152] For an overview discussing the Charter, directives, and framework decisions, see C-573/17, *Popławski*, 2019, paras 63–71.

[153] Para. 26.003, *infra*.

[154] Para. 27.016, *infra*.

[155] Para. 27.022 *et seq.*, *infra*. For decisions, see para. 27.041, *infra*.

[156] C-213/03, *Pêcheurs de l'Étang de Berre*, 2004, para. 39.

[157] See, for instance, Lauwaars and Timmermans, *Europees recht in kort bestek* (Kluwer, 2003), 22–4 and 107–9; Barents and Brinkhorst, *Grondlijnen van Europees recht* (Kluwer, 2003), 52; see also Prechal, 'Does Direct Effect Still Matter?' (2000) CMLRev 1047–69.

[158] See already Winter, 'Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law' (1972) CMLRev 425–38.

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