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To Say What the Law of the EU Is:  
Methods of Interpretation and the European Court of  
Justice

Koen Lenaerts and José A. Gutiérrez-Fons



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**Abstract**

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**Keywords**

European Court of Justice, Treaty on European Union (TEU), treaty interpretation, Charter of Fundamental Rights of the European Union, rule of law, Article 19 TEU and Article 47 Charter



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**TO SAY WHAT THE LAW OF THE EU IS:  
METHODS OF INTERPRETATION AND THE EUROPEAN COURT OF JUSTICE**

*Koen Lenaerts\** and *José A. Gutiérrez-Fons\*\**

## Introduction

In accordance with Article 19 of the Treaty on European Union (TEU), the European Court of Justice (the ‘ECJ’) ‘shall ensure that in the interpretation and application of the Treaties the law is observed’. It follows from that Treaty provision that all EU acts must be interpreted so as to guarantee that ‘the European Union is based on the rule of law’.<sup>1</sup>

As *Les Verts* demonstrates, the ECJ must, in so far as possible, interpret the law with a view to filling any normative lacunae, either in primary or secondary EU law, whose persistence would ‘lead to a result contrary both to the spirit of the Treaty [...] and to its system’.<sup>2</sup> Indeed, as Mertens de Wilmars pointed out in his seminal article,<sup>3</sup> a refusal to interpret a provision of EU law because it is obscure, silent or insufficiently clear would run counter to the principle of effective judicial protection – enshrined in Article 19 TEU and Article 47 of the Charter of Fundamental Rights of the European Union (the ‘Charter’<sup>4</sup>) –, given that such a refusal would constitute a denial of justice.

However, the ECJ must, in the exercise of its jurisdiction, pay due attention to the principle of inter-institutional balance and of the principle of mutual sincere cooperation set out in Article 13(2) TEU.<sup>5</sup> By virtue of those two principles, the ECJ must not encroach upon the prerogatives of the EU legislator as defined in the Treaties. Nor may it proceed to reform the Treaties by means of judicial interpretation, as this would clearly constitute ‘judicial activism’. This point is illustrated by the rulings of the ECJ in *Unión de Pequeños Agricultores v Council* (‘UPA’) and *Jégo-Quéré*.<sup>6</sup> In those cases, it ruled that ‘the condition that a natural or legal person can bring an action [for annulment] only if he is concerned both directly and individually must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually, such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty. The [EU] Courts would otherwise go beyond the

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<sup>1</sup> See Case C-550/09 *E and F* [2010] ECR I-6213, para. 44. See also Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paras 38 and 40, and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para. 281.

<sup>2</sup> Case 294/83 *Les Verts v Parliament* [1986] ECR 1357, para. 25.

<sup>3</sup> See J. Mertens de Wilmars, ‘Réflexions sur les méthodes d’interprétation de la Cour de justice des Communautés européennes’ (1986) *Cahiers de droit européen* 5 et seq.

<sup>4</sup> [2012] C 326/02.

<sup>5</sup> Article 13(2) TEU reads as follows: ‘[e]ach institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation’.

<sup>6</sup> *Unión de Pequeños Agricultores v Council*, above n 1. See also Case C-263/02 P *Commission v Jégo-Quéré* [2004] ECR I-3425.

jurisdiction conferred by the Treaty'.<sup>7</sup> Accordingly, it ruled that a broader interpretation of that condition would require a Treaty amendment which, in accordance with ex Article 48 TEU,<sup>8</sup> was for the Member States to adopt. As a matter of fact, the authors of the Treaty of Lisbon subsequently paid heed to the problem highlighted by *UPA* and *Jégo-Quéré* and decided to modify the fourth paragraph of ex Article 230 EC.<sup>9</sup>

A combined reading of *Les Verts* and *UPA* suggests that, when interpreting the law of the European Union, the ECJ must strike the right balance between, on the one hand, the principle of effective judicial protection and, on the other, the principles of inter-institutional balance and of mutual sincere cooperation.<sup>10</sup> The different methods of interpretation to which the ECJ has recourse operate as a means of achieving that delicate balance.<sup>11</sup>

Unlike the Charter,<sup>12</sup> the Treaties contain no provision listing or giving an order of precedence to the methods of interpretation that the ECJ must follow.<sup>13</sup> In the absence of any such Treaty provision, the ECJ is, in principle, free to choose which of the methods of interpretation at its disposal best serves the EU legal order. In this regard, some scholars posit that the ECJ's methods of interpretation do not depart from the so-called 'classical methods of interpretation', namely literal interpretation, contextual interpretation and teleological interpretation, which are recognised by national legal orders<sup>14</sup> as well as

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<sup>7</sup> *Unión de Pequeños Agricultores v Council*, above n 1, para. 44; *Commission v Jégo-Quéré*, above n 6, para. 36.

<sup>8</sup> *Unión de Pequeños Agricultores v Council*, above n 1, para. 45.

<sup>9</sup> See the fourth paragraph of Article 263 TFEU which states that natural or legal persons do not have to be 'individually concerned' when challenging 'a regulatory act which is of direct concern to them and does not entail implementing measures'. See, in this regard, K. Lenaerts, 'Le traité de Lisbonne et la protection juridictionnelle des particuliers en droit de l'Union' (2009) *Cahiers de droit européen* 711. For an interpretation of the expression 'regulatory act', see Opinion of AG Kokott, delivered on 17 January 2013, in C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* (pending).

<sup>10</sup> See A. Albers Llorens, 'The European Court of Justice, More than a Teleological Court' (1999) 2 *Cambridge Yearbook of European Legal Studies* 357.

<sup>11</sup> See, e.g., R.-M. Chevallier, 'Methods and Reasoning of the European Court in Its Interpretation of Community Law' (1965) 2 *Common Market Law Review* 21; V.D. Degan, 'Procédés d'interprétation tirés de la jurisprudence de la Cour de justice des Communautés européennes – Exposé comparatif avec la jurisprudence de la Cour internationale de Justice' (1966) *Revue trimestrielle de droit européen* 189; R. Ormand, 'L'utilisation particulière de la méthode d'interprétation des traités selon leur effet utile par la Cour de justice des Communautés européennes' (1976) *Revue trimestrielle de droit européen* 624; H. Kutscher, 'Methods of Interpretation as Seen by a Judge at the Court of Justice' in *Reports of a Judicial and Academic Conference held in Luxembourg on 27-28 September 1976*, 1; J. Mertens de Wilmars, above n 3, N. Fennelly, 'Legal Interpretation at the European Court of Justice' (1996) 20 *Fordham International Law Journal* 656; H. Gaudin, 'Les principes d'interprétation de la Cour de justice des Communautés européennes' (1998) *Revue d'affaires européennes* 10; A. Albers Llorens, above n 10; T. Koopmans, 'The Theory of Interpretation and the Court of Justice', in D. O'Keefe and A. Bavasso (eds), *Judicial review in European Union Law – Liber Amicorum in Honour of Lord Slynn of Hadley* (The Hague-London-Boston, Kluwer Law International, 2000) 45, J. Bengoetxea, N. MacCormick and L. Moral Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in G. de Búrca and J.H.H. Weiler (eds), *The European Court of Justice*, Collected Courses of the Academy of European Law (Oxford, Oxford University Press, 2001) 43; A. Arnulf, *The European Union and Its Court of Justice* (Oxford, Oxford University Press, 2006) 607 et seq.; M. Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in the Context of Constitutional Pluralism' (2007) 1 *European Journal of Legal Studies* 1; G. Itzcovich, 'The Interpretation of Community Law by the European Court of Justice' (2009) 10 *German Law Journal* 537; G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford, Hart Publishing, 2012), and G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge, Cambridge University Press, 2012)

<sup>12</sup> See Article 52 of the Charter.

<sup>13</sup> G. Itzcovich, above n 11, at 539 (who observes that 'there is no provision concerning the interpretation of [EU] law, there is no explicit legal norm on the matter.')

<sup>14</sup> See, e.g., H. Kutscher, above n 11, at 1-21, J. Bengoetxea, N. MacCormick, and L. Moral Soriano, above n 11, at 48, and G. Itzcovich, above n 11, at 538.

by public international law, notably by the 1969 Vienna Convention on the law of Treaties ('the 1969 Vienna Convention').<sup>15</sup>

However, even if a particular method of interpretation is recognised by national, EU and international law, the fact remains that the ECJ may, in light of the autonomy of the EU legal order, attach a specific normative importance to that method.<sup>16</sup> In that regard, in *CILFIT*,<sup>17</sup> the ECJ noted that special attention had to be given to 'the characteristic features of [EU] law and the particular difficulties to which its interpretation gives rise'.<sup>18</sup> Next, it went on to describe the difficulties that a national judge – acting as *judge of the Union* – may encounter when interpreting provisions of EU law and the methods of interpretation to which he or she may have recourse in order to overcome those difficulties.<sup>19</sup> First, '[EU] legislation is drafted in several languages and [...] the different language versions are all equally authentic. An interpretation of a provision of [EU] law thus involves a comparison of the different language versions'.<sup>20</sup> Second, '[i]t must also be borne in mind, even where the different language versions are entirely in accord with one another, that [EU] law uses terminology which is peculiar to it'. Stated differently, 'legal concepts do not necessarily have the same meaning in [EU] law and in the law of the various Member States'.<sup>21</sup> Finally, the ECJ held that 'every provision of [EU] law must be placed in its context and interpreted in the light of the provisions of [EU] law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.'<sup>22</sup>

*CILFIT* laid down the principles that a national court must follow when it is called upon to interpret and apply a provision of EU law. At the outset, the national court must examine the wording of the provision in question.<sup>23</sup> However, the literal interpretation of that provision does not always capture its true meaning. For example, where the provision in question contains an autonomous concept of EU law whose meaning differs from the way in which the same concept is defined under national law, the national court must also examine the normative context of that provision and the objectives it pursues.

Moreover, since the EU legal order, notably its general principles, is grounded in the 'constitutional traditions common to the Member States'<sup>24</sup> and in general principles of public international law, the ECJ strives, to the best of its ability, to interpret EU law in harmony with the legal orders that surround it. That being said, in the landmark *van Gend end Loos* case, the ECJ ruled that 'the [EU] constitutes a new legal order of international law'.<sup>25</sup> 'By contrast with ordinary international treaties', the ECJ subsequently wrote in *Costa v ENEL*, 'the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the

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<sup>15</sup> See the 1969 Vienna Convention on the law of Treaties. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, at 331. Article 31 of that Convention states that, in accordance with a general rule of interpretation, '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty [literal interpretation] in their context [contextual interpretation] and in the light of its object and purpose [teleological interpretation]'. As to the supplementary means of interpretation, Article 32 of the 1969 Vienna Convention refers to 'the preparatory work of the treaty and the circumstances of its conclusion'.

<sup>16</sup> J. Mertens de Wilmars, above n 3, at 9-10.

<sup>17</sup> Case 283/81 *CILFIT* *e.a.* [1982] ECR 3415.

<sup>18</sup> *Ibid.*, para. 17.

<sup>19</sup> See A. Arnulf, above n 11, at 607 et seq.

<sup>20</sup> *CILFIT*, above n 17, para. 18.

<sup>21</sup> *Ibid.*, para. 19.

<sup>22</sup> *Ibid.*, para. 20.

<sup>23</sup> A. Albers Llorens, above n 10, 375.

<sup>24</sup> See Article 6(3) TEU.

<sup>25</sup> Case 26/62 *van Gend end Loos* [1963] ECR 1 (English special edition), at 12.

Member States and which their courts are bound to apply.’<sup>26</sup> In accordance with those two seminal judgments, it is safe to say that the interpretation of EU law in light of both the constitutional traditions common to the Member States and of public international law may not call into question the constitutional autonomy of the EU legal order.<sup>27</sup>

The purpose of this contribution is thus to examine the methods of interpretation followed by the ECJ. To that effect, it is divided into three parts. Part I looks at each of the methods of interpretation endorsed by the ECJ in *CILFIT*. In particular, it focuses on determining the limits that are applicable to each one of those methods. Part II is devoted to examining the principle of consistent interpretation of EU law in light of international law and in light of the constitutional law of the Member States. The question is thus whether the ECJ has managed to accommodate the principle of consistent interpretation with the constitutional autonomy of EU law. As we have extensively discussed the interpretative guidelines set out in the Charter elsewhere,<sup>28</sup> Part III follows a selective approach which focuses on determining the interpretative value of the explanations relating to it.<sup>29</sup> Finally, a brief conclusion describes the way in which, in our view, those methods of interpretation interact with one another.

## 1. Classical Methods of Interpretation

### A. Textualism

#### 1. The Importance of Legal Certainty

Literal interpretation (or textualism) may be defined as the action of explaining what a normative text conveys by looking at the usual meaning of the words contained therein. The literal interpretation of a clear and precise provision is the method of interpretation that best reflects the principle of legal certainty, as it guarantees a high degree of predictability in the judgments of the ECJ.<sup>30</sup> One of the most famous examples in which textualism played a major role in the ECJ’s reasoning is the case law relating to the absence of horizontal direct effect of directives.<sup>31</sup> In cases such as *Marshall I*<sup>32</sup> and *Faccini Dori*,<sup>33</sup> the ECJ held that, since a directive is binding only in relation to ‘each Member State to which it is addressed’,<sup>34</sup> the fact of allowing an individual to rely on the provisions of a directive against another individual ‘would be to recognize a power in the [EU] to enact obligations for

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<sup>26</sup> Case 6/64 *Costa v ENEL* [1964] ECR 585.

<sup>27</sup> *Kadi I*, above n 1, para. 285.

<sup>28</sup> K. Lenaerts and J.A. Gutiérrez Fons, ‘The Place of the Charter in the EU Constitutional Edifice’ in S. Peers, T. Hervey, J. Kenner and A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart Publishing, forthcoming). See also K. Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 *European Constitutional Law Review* 375.

<sup>29</sup> See the explanations relating to the Charter of Fundamental Rights, [2007] OJ C 303/17 (‘the explanations relating to the Charter’).

<sup>30</sup> H. Rasmussen, *Towards a Normative Theory of Interpretation of Community Law* (Chicago, University of Chicago Press, 1993) at 33.

<sup>31</sup> See A. Arnall, above n 11, at 608.

<sup>32</sup> Case 152/84 *Marshall v Southampton and South-West Hampshire Health Authority* (‘*Marshall I*’) [1986] ECR 723.

<sup>33</sup> Case C-91/92 *Faccini Dori* [1994] ECR I-3325.

<sup>34</sup> Article 288 TFEU reads as follows: ‘[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods’.

individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations'.<sup>35</sup>

It is true that an EU law provision may be interpreted in light of the normative context in which it is placed and/or in accordance with the purposes it pursues, in particular where there are certain ambiguities relating to the way in which that provision is drafted. However, in accordance with settled case law,<sup>36</sup> where the wording of an EU law provision is clear and precise, its contextual or teleological interpretation may not call into question the literal meaning of that provision, as this would run counter to the principle of legal certainty and to the principle of inter-institutional balance enshrined in Article 13(2) TEU. Stated simply, the ECJ will never ignore the clear and precise wording of an EU law provision.<sup>37</sup>

In cases where a high degree of predictability is of paramount importance, the principle of legal certainty may require the ECJ to follow an interpretation of the EU law provision in question which tries to stay as close as possible to its wording.<sup>38</sup> Notably, in the realm of criminal law, textualism and compliance with the principle of the legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*), – which has been recognized by the ECJ<sup>39</sup> – go hand-in-hand. Just as is the case for national law, EU law relating to judicial cooperation on criminal matters opposes 'creative' methods of interpretation that would depart from the mandatory obligations imposed by the principle of legality. For example, the ECJ will not depart from the wording of an EU law provision where such departure gives rise to (or aggravates) the liability under criminal law of the person concerned. This means that, in the realm of criminal law, EU law may not be interpreted in a way which would give rise to national implementing measures being applied retroactively or by analogy.<sup>40</sup>

In accordance with the maxim '*interpretatio cessat in claris*', only an obscure text may be interpreted in a way that departs from the usual meaning of the words contained therein. Logically, the question is then under which circumstances an EU law provision is considered to be clear and precise. As noted by AG Jääskinen, 'the literal interpretation and the clear meaning may not be synonymous as the literal meaning of a provision may be ambiguous'.<sup>41</sup> For example, is it sufficient for an EU law provision to be clear and precise in one linguistic version or, on the contrary, is the absence of ambiguity required for all the linguistic versions in which that provision is drafted?

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<sup>35</sup> *Faccini Dori*, above n 33, para. 24.

<sup>36</sup> See, e.g., Case C-220/03 *BCE v Germany* [2005] ECR I-10595, para. 31, and Case C-263/06 *Carboni e derivati* [2008] ECR I-1077, para. 48, and Case C-48/07 *Les Vergers du Vieux Tauves* [2008] ECR I-10627, para. 44.

<sup>37</sup> See, e.g., Case C-582/08 *Commission v United Kingdom* [2010] ECR I-07195.

<sup>38</sup> See, e.g., Case C-462/06 *Glaxosmithkline and Laboratoires Glaxosmithkline* [2008] ECR I-3965, paras 28 to 33.

<sup>39</sup> See, e.g., Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609, para. 25, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paras 215 to 219; Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, para. 49, and Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, para. 70.

<sup>40</sup> See, e.g., Case 63/83 *Kirk* [1984] ECR 2689, paras 21 and 22; Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, para. 44; Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paras 74 to 78, *E and F*, above n 1, para. 59.

<sup>41</sup> See Opinion of AG Jääskinen in Case C-582/08 *Commission v United Kingdom*, above n 37, para. 27 (referring to Opinion of Advocate General Mayras in Case 67/79 *Fellinger* [1980] ECR 535, at 550).

## 2. Textualism and Multilingualism

In light of Article 55 of the TEU, the texts of the Treaties in each of the 24 official languages are equally authentic.<sup>42</sup> Article 342 TFEU states that ‘the rules governing the languages of the institutions of the Union shall, without prejudice to the provisions contained in the Statute of the Court of Justice of the European Union,<sup>43</sup> be determined by the Council, acting unanimously by means of regulations’. By adopting Regulation No 1/58,<sup>44</sup> the Council decided to implement the ‘principle of linguistic equality’ which entails a ‘full multilingualism’.<sup>45</sup> That is why, regarding acts adopted by the EU institutions which are of general application, there is a legal obligation to publish them in – and to translate them into – each of the 24 official languages of the EU.<sup>46</sup>

The question is whether the principle of linguistic equality enjoys constitutional status or whether it is simply the result of a political choice. In this regard, it is worth noting that the scope of Regulation No 1/58 *ratione personae* is limited to ‘the institutions of the Union’.<sup>47</sup> It does not therefore apply to bodies, offices and agencies of the EU which are thus not bound by the principle of linguistic equality.<sup>48</sup> One must also draw a distinction between acts directly addressed to the person concerned and acts of general application. In relation to the former, the language in which the relevant procedure is conducted is considered to be the authentic language.<sup>49</sup> Conversely, as to acts of general application, Hanf and Muir observe that the principle of linguistic equality enjoys a ‘quasi-constitutional’ status.<sup>50</sup>

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<sup>42</sup> With the accession of Croatia, there are now 24 official languages. See, in this regard, Article 14 of the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community, [2012] OJ L112/15, which modifies Article 55(1) TEU by adding the word ‘Croatian’.

<sup>43</sup> See Article 64 of the Statute of the Court of Justice of the European Union which provides that ‘[t]he rules governing the language arrangements applicable at the Court of Justice of the European Union shall be laid down by a regulation of the Council acting unanimously’. That regulation is to be adopted ‘at the request of the Court of Justice and after consultation of the Commission and the European Parliament, or on a proposal from the Commission and after consultation of the Court of Justice and of the European Parliament’. See [2012] OJ C 326/226. However, ‘[u]ntil those rules have been adopted, the provisions of the Rules of Procedure of the [ECJ] and of the Rules of Procedure of the General Court governing language arrangements shall continue to apply’. As to the ECJ, see Articles 36 to 42 of its Rules of Procedure, [2012] OJ L 265/1. As to the General Court, see Article 73 of its Rules of Procedure (consolidated version), last modification [2011] OJ L 162/18. As to the Civil Service Tribunal, see Article 29 of its Rules of Procedure (consolidated version), last modification [2011] OJ L 162/19. In principle, the authentic linguistic version of a judgment is determined by the language of the procedure.

<sup>44</sup> See EEC Council: Regulation No 1 determining the languages to be used by the European Economic Community, [1958] OJ L 17/385. English special edition: Series I Volume 1952-1958 P. 59. Last modified by Council Regulation (EU) No 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia, [2013] OJ L 158/1, at 71.

<sup>45</sup> See D. Hanf and E. Muir, ‘Le droit de l’Union européenne et le multilinguisme’, in D. Hanf, E. Muir et K. Malacek (eds), *Langue et construction européenne* (Cahiers du Collège d’Europe, Bruxelles, 2010) at 23.

<sup>46</sup> See Articles 4 and 5 of Regulation No 1/58.

<sup>47</sup> Article 342 TFEU which is the legal basis of Regulation No 1/58 only refers to the working languages of the institutions of the Union. However, see Article 6 of Regulation No 1/58 which states that ‘[t]he institutions of the [European Union] may stipulate in their rules of procedure which of the languages are to be used in specific cases.’

<sup>48</sup> Regarding offices of the EU, this is the case of the OHIM. See Article 119 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, [2009] OJ L 78/1.

<sup>49</sup> See Case C-361/01 P *Kik v OHIM* [2003] ECR I-8283, para. 87.

<sup>50</sup> D. Hanf and E. Muir, above n 45, at 39.

First, the unanimity rule within the Council makes it very difficult, if not impossible, to adopt a linguistic regime that would give preference to some of the official languages of the EU as compared to others.

Second, they posit that there are various Treaty provisions which militate in favour of granting constitutional status to that principle. To begin with, Article 24 TFEU states that '[e]very citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 13 [TEU] in one of the languages mentioned in Article 55(1) [TEU] and have an answer in the same language.' In the same way, Article 21 of the Charter explicitly prohibits discrimination based on 'language'. In the same way, Article 4(2) TEU states that '[t]he Union shall respect the equality of Member States before the Treaties'. For Hanf and Muir, it follows from those Treaty provisions that the institutions of the EU – including the ECJ – would fail to fulfil their obligations under the Treaties, if they were to qualify a linguistic version of an EU act of general application as the authentic version of that act, whilst disregarding the other linguistic versions. That is so unless such a difference in treatment pursues a legitimate objective and complies with the principle of proportionality.<sup>51</sup> As Vanhamme notes, even in cases in which Regulation No 1/58 was not applicable, the ECJ has examined whether a difference in treatment among the different official languages of the EU was justified and proportionate.<sup>52</sup> For Nabli, the principle of linguistic equality is the corollary of an egalitarian principle that applies both to the Member States and to EU citizens.<sup>53</sup>

Third, it seems that the ECJ has recognized the constitutional status of the principle of linguistic equality. According to settled case-law, 'the need for a uniform interpretation of [EU] regulations makes it impossible for the text of a provision to be considered in isolation but requires, on the contrary, that it should be interpreted and applied in the light of the versions existing in the other official languages [...] [A]ll the language versions must, [as a matter of] principle, be recognised as having the same weight and thus cannot vary according to the size of the population of the Member States using the language in question'.<sup>54</sup> In this regard, in *Skoma-Lux*,<sup>55</sup> the ECJ rejected a reading of Regulation No 1/58 that would have watered down the obligation to grant equal treatment to all

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<sup>51</sup> See, in this regard, Case C-566/10 P *Italy v Commission*, judgment of 27 November 2012, not yet reported. In that case, the ECJ set aside a judgment of the European General Court ('EGC') and annulled three notices of open competition which were only published in full in English, French and German and which required candidates to choose one of those three languages as a second language for communications with EPSO and for the tests of the competitions. The ECJ ruled that, 'without its being necessary to rule whether a competition notice is a document of general application within the meaning of Article 4(1) of Regulation No 1, suffice it to hold, in accordance with Article 1(2) of Annex III to the Staff Regulations [which states that competition notices are to be published in the *Official Journal*], read in conjunction with Article 5 of Regulation No 1, which provides that the *Official Journal of the European Union* is to be published in all the official languages, that the contested competition notices ought to have been published in full in all the official languages'. *Ibid.*, para. 71. In addition, the ECJ found that, in light of Article 1d of the Staff Regulations which implements the principle of non-discrimination, the Commission had failed to demonstrate that the requirement of knowledge of one of the three languages in question could be justified in the interest of the service. *Ibid.*, para. 91. See also C-147/13 *Spain v Council* (pending).

<sup>52</sup> See J. Vanhamme, 'L'équivalence des langues dans le marché intérieur: l'apport de la Cour de justice' (2007) *Cahiers de droit européen* 359, at 368. As a basis for his argument, the author refers to *Kik/OHMI*, above n 49, paras 93 and 94, in which the ECJ ruled that 'in determining the official languages of the [EU] which may be used as languages of proceedings in opposition, revocation and invalidity proceedings [set out in Regulation No 207/2009], where the parties cannot agree on which language to use, the Council was pursuing the legitimate aim of seeking an appropriate linguistic solution to the difficulties arising from such a failure to agree. [...] [E]ven if the Council did treat official languages of the [EU] differently, its choice to limit the languages to those which are most widely known in the [EU] is appropriate and proportionate'.

<sup>53</sup> B. Nabli, 'Les implications de l'élargissement sur le multilinguisme institutionnel de l'Union européenne' (2004) *Cahiers de droit européen* 197, at 199.

<sup>54</sup> Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, para. 36. See also Case C-257/00 *Givane and Others* [2003] ECR I-345, para. 36 and C-152/01 *Kyocera* [2003] ECR I – 13833, para. 32.

<sup>55</sup> Case C-161/06 *Skoma-Lux* [2007] ECR I-10841.

official languages when an EU institution adopts an act of general application.<sup>56</sup> It held that ‘the obligations contained in [EU] legislation which has not been published in the *Official Journal of the European Union* in the language of a new Member State, where that language is an official language of the Union, [may not be] imposed on individuals in that State, even though those persons could have learned of that legislation by other means’<sup>57</sup> (e.g. the internet). Indeed, ‘it would be contrary to the principle of equal treatment to apply obligations imposed by [EU] legislation in the same way in the old Member States, where individuals have the opportunity to acquaint themselves with those obligations in the *Official Journal of the European Union* in the languages of those States, and in the new Member States, where it was impossible to learn of those obligations because of late publication’.<sup>58</sup>

It follows from the principle of linguistic equality that, where there are divergences among the different linguistic versions of an EU act of general application, the ECJ may not limit itself to interpreting that act in light of the wording of one of those linguistic versions. Stated differently, textualism, as a method of interpretation, does not suffice where linguistic divergences exist. Indeed, the ECJ has consistently held that ‘the different language versions of a [EU] text must be given a uniform interpretation and hence in the case of divergence between the versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part’.<sup>59</sup>

For example, in *Stauder*,<sup>60</sup> a Commission decision addressed to all the Member States, made butter available at a lower price than normal to certain categories of consumer who were in receipt of certain social assistance. The question was whether that decision made the sale of butter at reduced prices conditional on the name of the consumer being divulged to the retailer. Two of the linguistic versions of the Commission decision, one being the German version, provided that consumers could only purchase the product in question on presentation of ‘a coupon indicating [his or her name]’, whilst in the other versions it was merely stated that a ‘coupon referring to the person concerned’ must be shown, thus making it possible to employ other methods of checking eligibility in addition to the name of the beneficiary.<sup>61</sup> At the outset, the ECJ ruled out that the possibility of considering one linguistic version of the text in isolation, given that this would call into question the uniform application of the Commission decision.<sup>62</sup> It thus decided to interpret the latter in accordance with the intention of its authors and in light of the objectives it pursued. The ECJ reasoned that the most liberal interpretation must prevail given that ‘it [was] sufficient to achieve the objectives pursued by the decision in question’,<sup>63</sup> namely to ensure that the product, when marketed in this way, reached its proper destination. In addition, the ECJ noted that this liberal interpretation was consistent with the

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<sup>56</sup> D. Hanf and E. Muir, above n 45, at 39.

<sup>57</sup> *Skoma-Lux*, above n 55, para. 51. However, the same does not apply in relation to the Member State concerned. ‘[T]he fact that that regulation is not enforceable against individuals in a Member State in the language of which it has not been published’, the ECJ wrote, ‘has no bearing on the fact that, as part of the *acquis communautaire*, its provisions are binding on the Member State concerned as from its accession’. *Ibid.*, para. 59.

<sup>58</sup> *Ibid.*, para. 39.

<sup>59</sup> Just to name a few, Case 30/77 *Bouchereau* [1977] ECR 1999, para. 14; Case C-449/93 *Rockfon* [1995] ECR I-4291, para. 28; Case C-236/97 *Codan* [1998] ECR I-8679, para. 28, and Case C-34/01 *Plato Plastik Robert Frank* [2004] ECR I-4883, para. 64.

<sup>60</sup> Case 29/69 *Stauder* [1969] ECR 419.

<sup>61</sup> *Ibid.*, para. 2.

<sup>62</sup> *Ibid.*, para. 3.

<sup>63</sup> *Ibid.*, para. 4.



*travaux préparatoires*.<sup>64</sup> Hence, it held that the Commission decision had to be interpreted ‘as not requiring— although it [did] not prohibit—the identification of beneficiaries by name’.<sup>65</sup>

However, the principle of linguistic equality does not prevent the ECJ from having recourse to certain language versions of the EU law provision in question, in particular where those versions contribute to reinforcing its legal reasoning.<sup>66</sup> Needless to say, this does not mean that the ECJ gives precedence to certain language versions over the others, simply that those versions may serve to strengthen the contextual and/or teleological interpretation upon which the ECJ’s reasoning primarily rests. They operate as an ancillary, corroborative argument. In those cases, the starting point of the ECJ’s reasoning will not be the literal interpretation of certain language versions of the text in question, but the purpose that that text pursues and the general scheme of which it is part. Only then will the ECJ have recourse to those language versions: their role will thus be limited to confirming the contextual and/or teleological interpretation endorsed by the ECJ in the preceding paragraphs of the judgment. This point is illustrated by the ruling of the ECJ in *Henke*.<sup>67</sup> In that case, the referring court asked whether Article 1(1) of Directive 77/187<sup>68</sup> (now replaced by Directive 2001/23)<sup>69</sup> should be interpreted as meaning that the concept of a ‘transfer of an undertaking, business or part of a business’ applies to the transfer of administrative functions from a municipality to an administrative collectivity.<sup>70</sup> To begin with, the ECJ decided to examine the purpose pursued by Directive 77/187. In light of the first recital of its Preamble, Directive 77/187 sought ‘to protect workers against the potentially unfavourable consequences for them of changes in the structure of undertakings resulting from economic trends at national and [EU] level, through, *inter alia*, transfers of undertakings, businesses or parts of businesses to other employers as a result of transfers or mergers’.<sup>71</sup> Thus, the transfer of administrative functions from a municipality to an administrative collectivity did not constitute a transfer of an undertaking for the purposes of Directive 77/187.<sup>72</sup> In addition, the ECJ observed that ‘[t]his interpretation, moreover, is borne out by the terms used in most of the language versions of the Directive in order to designate the subject of the transfer [...] or the beneficiary of the transfer [...] and is not contradicted by any of the other language versions of the text’.<sup>73</sup>

In the same way, the principle of linguistic equality does not preclude the ECJ from relying on the contextual and/or teleological interpretation of the EU law provision in question so as to discard a linguistic version of that text which is at odds with the common meaning shared by the other versions.<sup>74</sup>

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<sup>64</sup> *Ibid.*, para. 5.

<sup>65</sup> *Ibid.*, para. 6.

<sup>66</sup> I. Schübel-Pfister, ‘Enjeux et perspectives du multilinguisme dans l’Union européenne après l’élargissement, la ‘babélisation’ ?’ (2005) *Revue du marché commun et de l’Union européenne* 325, at 331. See, e.g., Case C-300/05 *ZVK* [2006] ECR I-11169, para. 22.

<sup>67</sup> Case C-298/94 *Henke* [1996] ECR I-4989.

<sup>68</sup> Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of businesses, [1977] OJ L 61/26.

<sup>69</sup> Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, [2001] OJ L82/16.

<sup>70</sup> Under German law, an administrative collectivity was a body of public law which gathers neighbouring municipalities in a rural district in order to strengthen their administration.

<sup>71</sup> *Henke*, above n 67, para. 13.

<sup>72</sup> *Ibid.*, para. 14.

<sup>73</sup> *Ibid.*, para. 15.

<sup>74</sup> See, e.g., Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit and Others* [1996] ECR I-5063 and Case C-268/99 *Jany and Others* [2001] ECR I-8615. See also Case C-64/95 *Lubella* [1996] ECR I-5105, para. 18.

However, some scholars posit that the principle of linguistic equality, as interpreted by the ECJ, may, in some circumstances, be incompatible with the principle of legal certainty. For example, if the Spanish version of an EU legislative text is clear and precise, and regardless of whether the other linguistic versions of that text are also unambiguous, why would the Spanish version not give rise to legitimate expectations on the part of a Spanish citizen who brings an action before Spanish courts?<sup>75</sup> Can EU law actually require that citizen to examine the other 23 linguistic versions of the EU legislative text in question before he decides to start judicial proceedings? In that regard, Schübel-Pfister and Schilling wonder whether both the ECJ and national courts should, in the best interests of EU citizens, limit themselves to interpreting the linguistic version of the EU law provision in question which corresponds to the language governing the procedure, as defined by national law (which, in most cases, will be a language with which the EU citizen concerned is familiar).<sup>76</sup> By contrast, if the EU legislative text in question is ambiguous in the language of the procedure, those authors posit that the EU citizen concerned might be expected to consult the other linguistic versions.<sup>77</sup> Whilst there is arguably some merit in the arguments put forward by Schübel-Pfister and Schilling,<sup>78</sup> it is respectfully submitted that their approach does not guarantee the uniform application of EU law. That is why in *CILFIT* the ECJ stressed the fact that the national court should undertake a comparative study of the different linguistic versions of the EU law provision in question before it decides to apply the ‘*acte claire*’ doctrine.<sup>79</sup> In any event, if the national court considers that such a comparative study is too burdensome and excessively time-consuming, it may always ask the ECJ for assistance. Moreover, the approach put forward by those two authors would run counter to the principle of equal treatment, given that one and the same normative text would be interpreted in different ways depending on the language of the procedure at national level.

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<sup>75</sup> For example, in Joined Cases C-267/95 and C-268/95 *Merck and Beecham* [1996] ECR I-6285, the High Court of Justice of England and Wales asked the ECJ to specify the dates on which the transitional periods provided for by Articles 47 and 209 of the Act of Accession of Spain and Portugal to the then European Communities expired. In accordance with those provisions, ‘the holder of a patent for a pharmaceutical product may, until the end of the third year after that type of product has become patentable in [Spain] and [Portugal], invoke the rights granted by that patent in order to prevent the import and marketing of pharmaceutical products put on the market in Spain and Portugal by himself or with his consent’. *Ibid.*, para. 18. The question was thus what was to be understood by ‘until the end of the third year after...’ For example, if a product became patentable in Spain on 7 October 1992, did the transitional period expire on 6 October 1995 or 31 December 1995? For the referring court, the English version of those provisions of the Act of Accession expressed a clear preference for the earliest date. However, it decided to refer a question to the ECJ on the sole ground that ‘were it not for the warnings often given that sometimes the [ECJ] may, when faced with a fresh question, do something unexpected, [he] would have found the matter *acte clair*’. (See, in this regard, the Opinion of AG Fennelly in that case, para. 18). The ECJ noted that whilst some linguistic versions of Articles 47 and 209 of the Act of Accession favoured the first solution, others favoured the second. Whilst the ECJ finally upheld the interpretation preferred by the referring court, it ruled that the question referred could not be solved solely on the basis of the wording of those provisions, but had to be solved by ‘tak[ing] account of other criteria of interpretation, in particular the general scheme and the purpose of the regulatory system of which the provisions in question form part’. *Ibid.*, paras 21 and 22.

<sup>76</sup> I. Schübel-Pfister, above n 66, at 332 et seq., and T. Schilling, ‘Beyond Multilingualism: On Different Approaches to the Handling of Diverging Language Versions of a Community Law’ (2010) 16 *European Law Journal* 46, at 58 (who argues that ‘[t]o require the citizen to look at all [24] language versions of [an EU] law would considerably diminish the accessibility of that law. Indeed, multilingualism enhances the accessibility of laws only if the citizen can rely on her own language version without further investigation and is in no way required or even expected to take cognisance of the other versions’).

<sup>77</sup> T. Schilling, above n 76, at 58-63

<sup>78</sup> In Case 80/76 *North Kerry Milk Products* [1977] ECR 425, para. 11, the ECJ itself held that ‘[t]he elimination of linguistic discrepancies by way of interpretation may in certain circumstances run counter to the concern for legal certainty, inasmuch as one or more of the texts involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words. Consequently, it is preferable to explore the possibilities of solving the points at issue without giving preference to any one of the texts involved.’

<sup>79</sup> *CILFIT*, above n 17, para. 18.

Furthermore, where the ECJ finds that an EU law provision contains an ‘autonomous concept’ of EU law, it is actually ensuring compliance with the principle of linguistic equality. Indeed, the ECJ has consistently held that ‘it follows from the need for uniform application of European Union law and from the principle of equality that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union’.<sup>80</sup>

### 3. Textualism and the Treaties

Textualism is also difficult to reconcile with another feature of the EU legal order, namely that, as a ‘*traité cadre*’,<sup>81</sup> ‘the Treaties provide no more than a framework’.<sup>82</sup> This means that Treaty provisions, notably those set out in the Preamble, those located under Title I of the TEU (entitled ‘Common provisions’) and those located under Title I, Part I of the TFEU (entitled ‘Principles’), are, more often than not, broadly drafted. The Treaties are imbued with ‘purpose-driven functionalism’, given that their provisions provide the link between the objectives pursued by the EU and the means to attain them. As Arnull observes, the open-texture of the Treaties facilitates a teleological interpretation, whilst limiting the possibilities of a literal interpretation.<sup>83</sup> For example, reliance on a literal interpretation of Article 34 TFEU would not suffice to determine what the expression ‘measures having equivalent effect’ to quantitative restrictions actually means.

#### ***B. The Importance of the Context***

Understood broadly, contextual interpretation may be examined from two different, albeit complementary, perspectives. Internally, contextual interpretation focuses on the purely normative context in which the EU law provision in question is placed. Just as the different parts of an engine must work together to keep it running, the ECJ looks at the functional relationship between the EU law provision in question and the normative system to which it belongs. Externally, contextual interpretation examines the (legislative) decision-making process that led to the adoption of the EU law provision in question. Thus, it makes use, in particular, of *travaux préparatoires*.

#### 1. Systematic Interpretation

Systematic interpretation is based on the premise that the legislator is a *rational actor*. This means that the authors of the Treaties are assumed to have established a legal order that is consistent and complete.<sup>84</sup> Compliance with the principle of consistency requires not only that there should be a

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<sup>80</sup> Just to name a few, see Case 327/82 *Ekro* [1984] ECR 107, para. 11; Case C-287/98 *Linster* [2000] ECR I-6917, para. 43; Case C-170/03 *Feron* [2005] ECR I-2299, para. 26; Case C-316/05 *Nokia* [2006] ECR I-12083, para. 21; Case C-195/06 *Österreichischer Rundfunk* [2007] ECR I-8817, para. 24; C-66/08 *Kozłowski* [2008] ECR I-6041, para. 42, and Case C-174/08 *NCC Construction Danmark* [2009] ECR I-10567, para. 24.

<sup>81</sup> J. Mertens de Wilmars, above n 3, at 13.

<sup>82</sup> T. Tridimas, *The General Principles of EU Law*, 2<sup>nd</sup> ed. (Oxford, Oxford University Press, 2006) 18.

<sup>83</sup> A. Arnull, above n 11, at 612.

<sup>84</sup> Article 7 TFEU states that ‘[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.’ See K. Lenaerts, ‘The Rule of Law and the Coherence of the Judicial System of the European Union’ (2007) 44 *Common Market Law Review* 1625.

consistent interpretation among all the provisions of the Treaties, but also that the EU legislator should consciously take account of that principle. This means that each provision of EU law must be interpreted in such a way as to guarantee that there is no conflict between it and the general scheme of which it is part. As a token of rationality, the EU legislator must also avoid useless duplication. Accordingly, no provision of EU law should be redundant. Instead, each and every provision of that law must be interpreted in light of its '*effet utile*'. For example, an EU law provision should never be given the exact same meaning as another provision belonging to the same normative text. Legal arguments '*a contrario*', '*ad absurdum*', '*a fortiori*', by analogy or based on comparative law are also examples of systematic interpretation.<sup>85</sup>

For example in *Elgafaji*,<sup>86</sup> the ECJ was asked by the Dutch Raad van State to provide some guidance on the definition of 'subsidiary protection' for the purposes of Article 15 (c) of Directive 2004/83 ('the Qualification Directive').<sup>87</sup>

Before examining this case, it is worth providing a brief description of the two alternative types of international protection offered by the EU under the Qualification Directive, namely 'conventional protection' and 'subsidiary protection'. As its name clearly indicates, conventional protection under the Qualification Directive is largely based on the 1951 Geneva Convention.<sup>88</sup> In accordance with Article 2(c) of the Qualification Directive, this type of protection applies to 'a third country national who, owing to a well-founded fear of being persecuted [for the reasons listed in Article 1A(2) of the 1951 Geneva Convention],<sup>89</sup> is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom [the exclusion grounds laid down in] Article 12 [do] not apply'. Persons falling within the scope of conventional protection acquire refugee status.

Where the person concerned does not qualify as a refugee,<sup>90</sup> he or she may benefit from subsidiary protection, provided that 'substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 [of the Qualification Directive]'. That latter provision states that 'serious harm may consist of (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'. The legal basis of Articles 15(a) and 15(b) of the Qualification Directive stems from the European Convention

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<sup>85</sup> G. Itzcovich, above n 11, at 552.

<sup>86</sup> C-465/07 *Elgafaji* [2009] ECR I-921. For a commentary on the merits of that case, see K. Lenaerts, 'The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice' (2010) 59 *International and Comparative Law Quarterly* 255, at 292 et seq.

<sup>87</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] OJ L 304/2, replaced by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9.

<sup>88</sup> The 1951 Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951, *United Nations Treaty Series*, No. 2545, p. 136.

<sup>89</sup> These reasons are: race, religion, nationality, political opinion or membership of a particular social group.

<sup>90</sup> Art 2(e) of the Qualification Directive defines 'person eligible for subsidiary protection' as 'a third country national or a stateless person who does not qualify as a refugee'.

on Human Rights and Fundamental Freedoms (the ‘ECHR’).<sup>91</sup> Article 15(a) implements the prohibition laid down in Protocol 6 to the ECHR, whereby the death penalty is prohibited in peace time. Article 15(b) aims to guarantee a legal status to persons classified as non-removable, that is, to persons covered by Article 3 ECHR as interpreted by the European Court on Human Rights (the ‘ECtHR’).<sup>92</sup> Unlike Articles 15(a) and 15(b), it appears that the situation described in Article 15(c) of the Qualification Directive is more difficult to apprehend. Perhaps, this is due to the *prima facie* semantic tensions between, on the one hand, the terms ‘serious and individual threat’ and, on the other hand, the terms ‘indiscriminate violence’.<sup>93</sup>

The questions referred in *Elgafaji* were specifically directed towards resolving the apparent contradiction in terms contained in Article 15(c). The facts of the case may be summarised as follows. In 2006, Mr and Mrs Elgafaji, two Iraqi nationals, applied for temporary residence permits in the Netherlands. They argued that there would be a risk of serious harm, if they were sent back to Iraq. Before moving to Europe, Mr Elgafaji had worked for a British company providing security clearance between the Baghdad airport and the ‘green zone’. His uncle had been killed by a terrorist attack and a threatening letter stating ‘death to collaborators’ had been fixed on his door. However, the Dutch Minister for Immigration considered that Mr and Mrs Elgafaji had failed to demonstrate ‘a serious and individual threat to their lives’. The Dutch Minister for Immigration posited that the degree of individualization of the threat required by Article 15(c) was identical to that required by Article 15(b). Stated differently, the armed conflict in Iraq that prompted indiscriminate violence was not sufficient to award subsidiary protection. In addition, the applicants had to demonstrate that they were individually targeted by reasons of factors particular to them. In that regard, the referring court asked whether Article 15(c) of the Qualification Directive was to be interpreted as offering protection only in a situation in which Article 3 of the ECHR has a bearing. In the negative, it also asked the ECJ to list the relevant criteria for determining whether a person is eligible for subsidiary protection under Article 15(c) of the Directive.

The ECJ began by shedding some light on the relationship between Article 15 of the Qualification Directive and Article 3 ECHR, a provision which forms part of the EU legal order as a general principle of EU law, the observance of which the EU judiciary ensures. The ECJ noted that ‘it is [...] Article 15(b) which corresponds, in essence, to Article 3 of the ECHR’.<sup>94</sup> By contrast, Article 15(c) is an autonomous concept whose interpretation must be carried out independently but without prejudice to fundamental rights as guaranteed by the ECHR. Next, the ECJ embarked on a systematic interpretation of Article 15 of the Qualification Directive, comparing the three types of ‘serious harm’ defined therein. It pointed out that Articles 15(a) and 15(b) of the Qualification Directive both require the applicant to be ‘specifically exposed to the risk of a particular type of harm’. Conversely, Article 15(c) covers ‘more general risks of harm’.<sup>95</sup> Indeed, the degree of individualization applicable to Articles 15(a) and 15(b) cannot be transposed to situations covered by Article 15(c). Otherwise, this latter provision would become redundant. Besides, the terms ‘armed conflict’ and ‘indiscriminate violence’ imply general situations where many people are at risk. The ECJ then proceeded to link the terms ‘individual threat’ to the concept of ‘indiscriminate violence’. It held that ‘indiscriminate violence’ puts at risk all persons located in the geographical zone of the armed conflict. Hence, it would be logically impossible to interpret the terms ‘individual threat’ as requiring a link between the threat and factors particular to the applicant. Instead, the ECJ reasoned that Article 15(c) covers

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<sup>91</sup> See, e.g., J McAdam, ‘The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime’ (2005) 17 *International Journal of Refugee Law* 461, at 476–479.

<sup>92</sup> See *Salah Sheekh v the Netherlands*, judgment of 11 January 2007, Application no 1948/04 (where the ECtHR appears to give a broader content and scope to art 3 ECHR).

<sup>93</sup> Opinion of AG Poiares Maduro in *Elgafaji*, above n 86, para 31.

<sup>94</sup> *Elgafaji*, above n 86, para. 28.

<sup>95</sup> *Ibid.*, paras 32–34.

situations where the level of indiscriminate violence resulting from an armed conflict is so high that the mere presence of the person concerned in the relevant country or region puts him at real risk of being subject to the serious threat referred to in Article 15(c) of the Directive.<sup>96</sup> The ECJ added that this definition of ‘individual threat’ does not run counter to Recital 26. Whilst the latter covers risks to which the population generally is exposed, Article 15(c) is limited to ‘exceptional situations’.<sup>97</sup> The ECJ observed that the level of indiscriminate violence and the level of individualization are not unrelated concepts. On the contrary, as regards the standard of proof they are inversely proportional: ‘the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection’.<sup>98</sup>

In summary, *Elgafaji* illustrates the fact that a systematic interpretation of an EU law provision may take place in two different, albeit complementary, ways. On the one hand, by interpreting Article 15(c) of the Qualification Directive systematically, the ECJ sought to make sure that that provision enjoyed a scope of application which was specific and exclusive to it. Put differently, it sought to avoid overlaps with Articles 15(a) and 15(b) of the Qualification Directive. On the other hand, the ECJ strived to interpret Article 15(c) in compliance with the general scheme underpinning Article 15: it stressed that the expression ‘serious harm’ conveys a certain degree of individualization of the threat. However, such a degree varies for the three types of harm envisaged by that provision. This shows that a systematic interpretation enables the EU law provision in question to be in harmony with the context in which it is placed.

Moreover, in accordance with the premise that the EU legislator is a rational actor, the latter favours an interpretation which seeks to preserve the validity of his acts over one which would lead to their annulment. ‘According to a general principle of interpretation, a provision must be interpreted, as far as possible, in such a way as not to detract from its validity’.<sup>99</sup>

Likewise, where a provision of EU law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness.<sup>100</sup> It goes without saying that that general principle of interpretation must not trespass on the limit of ‘*contra legem*’.

It follows that, where an EU law provision may be subject to several interpretations, the ECJ must give priority to that which guarantees compliance with primary EU law and ensures its effectiveness. The ruling of the ECJ in *Sturgeon and Others* illustrates this point.<sup>101</sup> In that case, the ECJ was asked whether No Regulation 261/2004<sup>102</sup> confers a right to compensation upon airline passengers in the event of delay. The wording of No Regulation 261/2004 does not expressly create a right to compensation for those passengers whose flights are delayed, as opposed to passengers whose flights are cancelled, on whom such a right is explicitly conferred. Can this legislative silence be read as denying compensation to this category of passengers? The ECJ replied in the negative. It began by observing that, in light of its objectives, Regulation No 261/2004 does not exclude awarding

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<sup>96</sup> *Ibid.*, para. 35.

<sup>97</sup> *Ibid.*, para. 36.

<sup>98</sup> *Ibid.*, para. 39.

<sup>99</sup> See Case C-403/99 *Italy v Commission* [2001] ECR I-6897, para. 37; Case C-361/06 *Feinchemie Schwebda and Bayer CropScience* [2008] ECR I-3865, para. 49 ; Case C-149/10 *Chatzi* [2010] ECR I-8489, para. 43, and Case C-12/11 *McDonagh*, Judgment of 31 January 2013, not yet reported, para. 44.

<sup>100</sup> See, inter alia, Case 187/87 *Land de Sarre and Others* [1988] ECR 5013, para. 19, and Case C-434/97 *Commission v France* [2000] ECR I-1129, para. 21.

<sup>101</sup> Joined Cases C-402/07 and C-432/07 *Sturgeon and Others and Böck v Air France* [2009] ECR I-10923.

<sup>102</sup> Regulation No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, [2004] OJ L46/1.

compensation to passengers whose flights are merely delayed. Nor does Regulation No 261/2004 rule out the possibility that, for the purposes of recognition of the right to compensation, both categories of passengers can be treated alike.<sup>103</sup> Next, the ECJ noted that, in accordance with a general principle of interpretation, ‘a [Union] act must be interpreted in such a way as not to affect its validity’.<sup>104</sup> This means that a Union act must be interpreted in compliance with superior rules of EU law, including the principle of equal treatment. Hence, where passengers whose flights are cancelled and passengers whose flights are delayed are in a comparable situation, Regulation No 261/2004 must be interpreted in such a way as to treat both categories of passengers equally. To this effect, the ECJ noted that both categories of passengers suffer similar damage, consisting of a loss of time. In particular, the situation of passengers whose flights are delayed is comparable to that of passengers who are informed upon arrival at the airport that their flight is cancelled and subsequently re-routed in accordance with Article 5 of Regulation No 261/2004. Since Article 5(1)(c)(iii) of Regulation No 261/2004 only provides for a right to compensation where the cancellation of a flight and its subsequent re-routing entail a loss of time equal to or in excess of three hours, the same should apply in the event of delay.<sup>105</sup> Therefore, the ECJ ruled that in order for Regulation No 261/2004 to comply with the principle of equal treatment, it had to be interpreted so as to grant a right to compensation to passengers whose flights are delayed and who reach their final destination three hours or more after the arrival time originally scheduled by the air carrier.<sup>106</sup> Finally, the ECJ recalled that air carriers are not obliged to pay compensation where they manage to prove that cancellations and delays are caused by extraordinary circumstances.<sup>107</sup>

More recently, in *Nelson and Others*,<sup>108</sup> several airlines, the International Air Transport Association (IATA) and the UK called into question the validity of Articles 5 and 7 of Regulation No 261/2004, as interpreted by the ECJ in *Sturgeon and Others*, on the ground that that judgment was at odds with the principles of legal certainty and proportionality. They urged the ECJ (Grand Chamber) to depart from its findings in *Sturgeon and Others* (a ruling given by a chamber of five judges). As to the principle of legal certainty, they posited that the method of interpretation followed by the ECJ in *Sturgeon and Others* was incompatible with paragraph 76 of the *IATA and ELFAA* judgment. In the latter case, the ECJ conceded that Recitals 14 and 15 of the Preamble of Regulation No 261/2004 gave the impression that, generally, operating air carriers should be released from all their obligations in the event of extraordinary circumstances, and it accordingly gives rise to a certain ambiguity between the intention thus expressed by the [EU] legislature and the actual content of Articles 5 and 6 of Regulation No 261/2004 which do not make this defence to liability so general in character. ‘However’, the ECJ added, ‘such an ambiguity does not extend so far as to render incoherent the system set up by those

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<sup>103</sup> *Sturgeon and Others*, above n 101, para 46.

<sup>104</sup> *Ibid*, para 47.

<sup>105</sup> *Ibid*, para 57.

<sup>106</sup> The approach followed by AG Sharpston is somewhat different. She concurred with the ECJ in acknowledging that if compensation to passengers whose flights are delayed were excluded, then it would be impossible to reconcile Regulation No 261/2004 with the principle of equal treatment. Yet, in contrast to the ECJ, the Advocate General did not provide a particular time-limit after which passengers whose flights are delayed enjoy a right to compensation. In her view, ‘the actual selection of a magic figure is a legislative prerogative’. See Opinion of AG Sharpston in *Sturgeon and Others*, above n 101, paras 93–94. However, the ECJ deployed another argument in order to counter this ‘separation of powers’ objection. It invoked Recital 15 in the Preamble of Regulation No 261/2004, whereby ‘the legislature ... linked the notion of “long delay” to the right to compensation’. Thus, the ECJ did not encroach upon the prerogatives of the EU legislator but simply limited itself to clarifying a legislative choice already contained in Regulation No 261/2004, namely the distinction between ‘delay’ (inferior to three hours) and ‘long delay’ (equal to or in excess of three hours). Whilst the latter gives rise to compensation, the former does not. See *Sturgeon and Others*, above n 101, para 62. See, in the same way, S. Garben, ‘Sky-high Controversy and High-flying Claims? The *Sturgeon* Case Law in Light of Judicial Activism, Euroscpticism and Eurolegalism’ (2013) 50 *Common Market Law Review* 15.

<sup>107</sup> *Sturgeon and Others*, above n 101, para 67 (extraordinary circumstances are defined as those which ‘are beyond the air carrier’s actual control’).

<sup>108</sup> Joined Cases C-581/10 and C-629/10 *Nelson and Others*, Judgment of 23 October 2012, not yet reported.

two articles, which are themselves entirely unambiguous'.<sup>109</sup> For the applicants, this meant that, in *Sturgeon and Others*, the ECJ should not have relied upon Recital 15 of Regulation No 261/2004 with a view to modifying the meaning of the relevant provisions of that Regulation. The ECJ, nonetheless, took a different view: 'as regards [...] the relationship between the judgments in *IATA and ELFAA* and *Sturgeon and Others*, it is apparent [...] that there is no tension between those two judgments, the second judgment applying the principles laid down by the first'.<sup>110</sup> As explained by AG Bot, a distinction should be drawn between the question of interpretation raised in *IATA and ELFAA* and that raised in *Sturgeon and Others*. In the former case, the ECJ explained that the ambiguity which may arise on reading Recitals 14 and 15 of the Preamble of Regulation No 261/2004 could not call into question the fact that the body of that Regulation made clear that the defence of extraordinary circumstances is not a general rule, but applies only to the obligation to pay compensation. Conversely, in *Sturgeon and Others*, the question whether long delays may give rise to compensation could not be answered by looking at the relevant provisions of Regulation No 261/2004. Thus, the ECJ was right to examine Recital 15 of the Preamble thereof. In relation to the principle of proportionality, the applicants argued that, as interpreted by the ECJ in *Sturgeon and Others*, Regulation No 261/2004 would impose an excessive burden on air carriers as they would have to provide compensation to passengers suffering a loss of time equal to or in excess of three hours. They also pointed out that the financial cost brought about by that compensation would be passed on to passengers by means of an increase in fares or a reduction in the number of flights from local airports and services to outlying destinations.<sup>111</sup> Whilst acknowledging that that compensation may entail certain financial consequences to air carriers, the ECJ found that 'those consequences cannot be considered disproportionate to the aim of ensuring a high level of protection for air passengers'.<sup>112</sup> First, not all delays may give rise to compensation, but only long delays.<sup>113</sup> Second, provided that the conditions laid down in Article 7(2)(c) of Regulation No 261/2004 are met, the amount of compensation may be reduced by 50 per cent.<sup>114</sup> Third, compensation is excluded where the delay in question is caused by 'extraordinary circumstances' as defined by the case law of the ECJ.<sup>115</sup> Fourth, air carriers having paid compensation to passengers suffering long delays may seek to recover that amount from any person who caused the delay.<sup>116</sup> Fifth, statistics show that 'the proportion of flights for which delay confers

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<sup>109</sup> Case C-344/04 *IATA and ELFAA* [2006] ECR I-403.

<sup>110</sup> *Nelson and Others*, above n 108, para 64. In para 45 of *IATA and ELFAA*, above n 109, the ECJ found that the authors of the Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC, [2001] OJ L194/38 ('the Montreal Convention') did not intend 'to shield air carriers from any form of intervention other than those laid down by those provisions, in particular action which could be envisaged by the public authorities to redress, in a standardised and immediate manner, the damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes, without the passengers having to suffer the inconvenience inherent in the bringing of actions for damages before the courts' (See *Nelson and Others*, above n 108, para 46). Stated differently, the Montreal Convention does not prevent public authorities from redressing, in a standardised and immediate manner, the damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes. In *IATA and ELFAA*, above n 109, the ECJ ruled that 'the assistance and taking care of passengers envisaged by Article 6 of Regulation No 261/2004 in the event of a long delay to a flight constitute such standardised and immediate compensatory measures' (See *IATA and ELFAA*, above n 109, para 46). In the same way, in *Sturgeon and Others*, the compensation envisaged by Art 7 of Regulation No 261/2004 in the event of a long delay to a flight also constitutes such a standardised and immediate compensatory measure which the Montreal Convention does not oppose (See *Nelson and Others*, above n 108, para 48).

<sup>111</sup> *Nelson and Others*, above n 108, para 73.

<sup>112</sup> *Ibid.*, para 76.

<sup>113</sup> *Ibid.*, para 77.

<sup>114</sup> *Ibid.*, para 78.

<sup>115</sup> See *Sturgeon and Others*, above n 101, para 67. More recently, *McDonagh*, above n 99.

<sup>116</sup> *Nelson and Others*, above n 108, para 80.



entitlement to the compensation provided for under Regulation No 261/2004 is less than 0.15%'.<sup>117</sup> Sixth, applicants failed to provide evidence showing that 'the payment of compensation in the event of long delays to flights would give rise to an increase in fares or a reduction in the number of flights from local airports and services to outlying destinations'.<sup>118</sup> Most importantly, recalling its previous ruling in *Vodafone and Others*,<sup>119</sup> the ECJ held that 'the importance of the objective of consumer protection, which includes the protection of air passengers, may justify even substantial negative economic consequences for certain economic operators'.<sup>120</sup> As a result, the ECJ held that '[c]onsideration [of the questions referred for a preliminary ruling] has disclosed no factor of such a kind as to affect the validity of Articles 5 to 7 of Regulation No 261/2004'.<sup>121</sup>

## 2. The Increasing Importance of *travaux préparatoires*

For 35 years, access to the *travaux préparatoires* relating to the Treaty of Rome remained limited. That is why, in *Reyners*,<sup>122</sup> AG Mayras stressed the fact that 'the States, signatories to the Treaty of Rome, have themselves excluded all recourse to the preparatory work and it is very doubtful whether the reservations and declarations, inconsistent as they are, which have been relied upon can be regarded as constituting true preparatory work. [...] Above all [the ECJ has itself] rejected, on several occasions, recourse to such a method of interpretation by asserting the content and finality of the provisions of the Treaty'.<sup>123</sup>

Contrary to the procedure that led to the adoption of the Treaty of Rome, for the purposes of drafting the Treaty establishing a Constitution for Europe (the 'TCE'),<sup>124</sup> the Member States decided to convene a Convention ('the European Convention') which would invite national and EU representatives, experts and members of civil society to embark on a public debate on the future of the European Union. The results of that debate would provide solid ground for the European Convention to prepare a draft TCE which would be submitted to the intergovernmental conference (the 'IGC') for discussion. In essence, the IGC adopted the draft TCE prepared by the European Convention which was signed in Rome on 2004.

Since the *travaux préparatoires* undertaken by the European Convention are publicly available online,<sup>125</sup> one may wonder what importance they might have for the interpretation of those provisions of the Treaty of Lisbon that reproduce, either word-for-word or at least in essence, the provisions of the draft TCE. In this regard, cases such as *Pringle* suggest a change in the legal culture of the EU Courts which advocates giving more weight to *travaux préparatoires*.

In *Pringle*,<sup>126</sup> the ECJ expressly relied on the *travaux préparatoires* relating to the Treaty of Maastricht when determining the aim pursued by the 'no bail-out clause' enshrined in Article 125

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<sup>117</sup> *Ibid*, para 82.

<sup>118</sup> *Ibid*, para 83.

<sup>119</sup> Case C-58/08 *Vodafone and Others* [2010] ECR I-4999, paras 53 and 69.

<sup>120</sup> *Nelson and Others*, above n 108, para 81.

<sup>121</sup> *Ibid*, para 60.

<sup>122</sup> Case 2-74 *Jean Reyners v Belgian State* [1974] ECR 631.

<sup>123</sup> Opinion of AG Mayras in *Reyners*, above n 122, at 666.

<sup>124</sup> [2003] OJ C169/1.

<sup>125</sup> <<http://european-convention.eu.int/>>

<sup>126</sup> Case C-370/12 *Pringle*, judgment of 27 November 2012, not yet reported.

TFEU (ex Article 104b of the EC treaty which then became ex Article 103 EC),<sup>127</sup> namely to maintain the financial stability of the Monetary Union by ensuring that the Member States follow a sound budgetary policy. That clause ensures that the Member States remain subject to the functioning of the market when they take on debt, since that ought to force them to maintain budgetary discipline. For the purposes of the case at hand, the ECJ observed that the financial assistance granted by the European Stability Mechanism (the ‘ESM’) did not adversely affect Member States’ commitments to implement a sound budgetary policy and was thus compatible with Article 125 TFEU. To that effect, the ECJ reasoned that the ESM would not act as guarantor of the debts of the recipient Member State;<sup>128</sup> that the granting of such financial assistance is subject to strict conditionality which is designed to ensure that the recipient Member State pursues a sound budgetary policy,<sup>129</sup> and that the other Member States which are members of the ESM do not act as guarantors of the debt of the defaulting Member State.<sup>130</sup>

In the same way, in *Inuit Tapiriit*,<sup>131</sup> the European General Court (the ‘EGC’) was called upon to interpret the concept of ‘regulatory act’ for the purposes of the fourth paragraph of Article 263 TFEU (ex Article 230 EC). The last sentence of that paragraph, which was introduced by the Treaty of Lisbon and which, in essence, reproduces Article III-365 of the draft TCE, provides that ‘[a]ny natural or legal person may [...] institute proceedings [...] against a regulatory act which is of direct concern to them and does not entail implementing measures’. Stated differently, the *Plaumann* formula does not apply in relation to regulatory acts which do not require further implementing measures.<sup>132</sup> Thus, the key issue in *Inuit Tapiriit* was whether the concept of ‘regulatory acts’ included legislative acts.<sup>133</sup> The EGC replied in the negative. In addition to interpreting that Treaty provision systematically<sup>134</sup> and teleologically,<sup>135</sup> the EGC examined the drafting history of the fourth paragraph of Article 263 TFEU. Referring to a cover note of the Praesidium of the European Convention,<sup>136</sup> it found that, when considering the proposals for an amendment to the fourth paragraph of ex Article 230 EC, the Praesidium had to choose between the expressions ‘an act of general application’ and ‘a regulatory act’. It adopted the latter approach, ‘since it would enable a distinction to be made between legislative acts and regulatory acts, maintaining a restrictive approach in relation to actions by individuals against

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<sup>127</sup> *Ibid.*, para. 135 (referring to see Draft treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union, *Bulletin of the European Communities*, Supplement 2/91, pp. 24 and 54).

<sup>128</sup> *Pringle*, above n 126, paras 138-141.

<sup>129</sup> *Ibid.*, paras 142-145.

<sup>130</sup> *Ibid.*, para. 145. For a detailed analysis of that judgment, see K. Lenaerts, ‘Economic Integration, Solidarity and Legitimacy’, Lecture delivered on 26 April 2013 at the K.U. Leuven, available at : <https://www.kuleuven.be/euroforum/page.php?LAN=E&FILE=policy-papers>

<sup>131</sup> T-18/10 *Inuit Tapiriit Kanatami and Others v Parliament and Council*, order of 6 September 2011, not yet reported.

<sup>132</sup> Case 25/62 *Plaumann v Commission* [1963] ECR 95, 107.

<sup>133</sup> For an overview of the legal literature on this question, see M. Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, not Hearts’ (2008) 45 *Common Market Law Review* 617, at 677 et seq; K. Lenaerts, ‘Le traité de Lisbonne et la protection juridictionnelle des particuliers en droit de l’Union’ (2009) *Cahiers de droit européen* 711, at 725 et seq.; S. Peers and M. Costa, ‘Judicial Review of EU Acts after the Treaty of Lisbon’ (2012) 8 *European Constitutional Law Review* 82; A. Albors-Llorens, ‘Remedies against the EU Institutions after Lisbon: An Era of Opportunity?’ (2012) 7 *Cambridge Law Journal* 507; J. H. Jans, ‘On *Inuit* and Judicial Protection in a Shared Legal Order’ (2012) 21 *European Energy and Environmental Law Review* 188; M. Wathelet and J. Wildemeersch, ‘Recours en annulation: une première interprétation restrictive du droit d’action élargi des particuliers?’ (2012) *Journal de droit européen* 75.

<sup>134</sup> T-18/10 *Inuit Tapiriit*, above n 131, paras 44 to 48.

<sup>135</sup> *Ibid.*, para 50.

<sup>136</sup> Praesidium of the Convention of the Future of Europe, Cover Note: ‘Articles on the Court of Justice and the High Court’, Brussels, 12 May 2003, CONV 734/03, at 20. Available at:

<http://european-convention.eu.int/pdf/reg/en/03/cv00/cv00734.en03.pdf>

legislative acts (for which the "of direct and individual concern" condition remains applicable) while providing for a more open approach to actions against regulatory acts'.<sup>137</sup> Thus, it may be deduced that the *travaux préparatoires* relating to Article 263 TFEU had an important bearing on the EGC's ruling.

The applicants have brought an appeal against the order of the EGC which is still pending before the ECJ.<sup>138</sup> In the meantime, it is worth looking at the Opinion of AG Kokott in that case. She concurred with the interpretation of the expression 'a regulatory act' followed by the EGC.<sup>139</sup> In particular, she found its historical analysis of the process that led to the adoption of the last sentence of the fourth paragraph of Article 263 TFEU to be accurate and relevant.<sup>140</sup> Most interestingly, AG Kokott expressed her opinion regarding the interpretative value of the *travaux préparatoires* relating to recent Treaty amendments. In this regard, she observed that: '[d]rafting history in particular has not played a role thus far in the interpretation of primary law, because the '*travaux préparatoires*' for the founding Treaties were largely not available. However, the practice of using conventions to prepare Treaty amendments, like the practice of publishing the mandates of intergovernmental conferences, has led to a fundamental change in this area. The greater transparency in the preparations for Treaty amendments opens up new possibilities for interpreting the Treaties which should be utilised as supplementary means of interpretation if, as in the present case, the meaning of a provision is still unclear having regard to its wording, the regulatory context and the objectives pursued'.<sup>141</sup>

It follows that the more public access to *travaux préparatoires* is granted, the more the ECJ will take them into account. This may explain why at the beginning of the European integration project, *travaux préparatoires* did not play a major role when the ECJ was called upon to interpret secondary EU law, as they were not generally published in the *Official Journal*. As Kutscher noted when he was the President of the Court, the interpretation of EU law cannot be based on documents which are not accessible to the public.<sup>142</sup> Conversely, where *travaux préparatoires* were published, the ECJ did have recourse to them. The explanatory reports that accompanied the Conventions negotiated by the Member States within the framework of ex Article 293 EC that were published in the *Official Journal* illustrate this point.<sup>143</sup> For example, when interpreting the 1968 Brussels Convention,<sup>144</sup> the ECJ often quoted the Jenard Report.<sup>145</sup>

Apart from the problem of the absence of publication of *travaux préparatoires*, scholars have put forward three arguments against giving too much interpretative value to the drafting history of secondary EU acts.

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<sup>137</sup> T-18/10 *Inuit Tapiriit*, above n 131, para. 49.

<sup>138</sup> Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* (pending).

<sup>139</sup> Opinion of AG Kokott, delivered on 17 January 2013, in Case C-583/11 P *Inuit Tapiriit*, above n 138, para. 47.

<sup>140</sup> *Ibid.*, paras 33 et seq.

<sup>141</sup> *Ibid.*, para. 32.

<sup>142</sup> H. Kutscher, above n 11, at 1-21.

<sup>143</sup> See, in particular, the Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Signed at Brussels, 27 September 1968) elaborated by Mr P. Jenard (known as the 'Jenard Report'), [1979] OJ C59/1.

<sup>144</sup> The 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, [1972] OJ L 299/32.

<sup>145</sup> Regarding the Jenard Report, see e.g., Case C-356/05 *Farrell* [2007] ECR I-3067, para. 24; Case C-8/98 *Dansommer* [2000] ECR I-393, para. 27; Case C-271/00 *Baten* [2002] ECR I-10489, para. 48; Case C-3/05 *Verdoliva* [2006] ECR I-1579, para. 32; Case C-343/04 *ČEZ* [2006] ECR I-4557, para. 28; Case C-292/05 *Lechouritou and Others* [2007] ECR I-1519, para. 44; Case C-372/07 *Hassett and Doherty* [2008] ECR I-7403, para. 20; Case C-420/07 *Apostolides* [2009] ECR I-3571, para. 66; Case C-111/08 *SCT Industri* [2009] ECR I-5655, para. 20; Case C-144/10 *BVG*, judgment of 12 May 2011, not yet reported, para. 43; Case C-213/10 *F-Tex SIA*, judgment of 19 April 2012, not yet reported, para. 21; Case C-514/10 *Wolf Naturprodukte GmbH*, judgment of 21 June 2012, not yet reported, para. 26, and Case C-456/11 *Gothaer Allgemeine Versicherung AG*, judgment of 15 November 2012, paras 34 and 37.

First, given that legislative power within the EU is shared between the Commission, the Council and the European Parliament and that those three institutions are collective bodies, it is often difficult to determine the true intentions of the EU legislator.<sup>146</sup> For example, in *Millac*, AG Warner posited that ‘I doubt whether it would ever be appropriate to look at “travaux préparatoires” as an aid to the interpretation of a Council Regulation. The Members of the Council may agree on a text without necessarily having the same views as to its meaning’.<sup>147</sup> In any event, the ECJ has consistently held that ‘declarations formulated in the course of preparatory work leading to the adoption of [an EU act] cannot be used for the purpose of interpreting that [act] where no reference is made to the content of the declarations in the wording of the provision in question, and that they therefore have no legal significance’.<sup>148</sup>

Second, if an EU act is interpreted in light of the *travaux préparatoires* relating to it, such interpretation may produce an ossifying effect which would prevent that act from being adapted to societal changes. For example, as regards the EU directives aimed at combating discrimination based on sex which were originally adopted in the 1970s, one may argue that, in light of changes in the European society that have taken place over the past forty years, the *travaux préparatoires* relating to those directives have lost most of their value.<sup>149</sup>

Third, the drafting of preparatory documents has traditionally ‘left much to be desired’. Unfortunately, one may, more often than not, come across *travaux préparatoires* which ‘are laconic and drafted with little attention to detail and clarity’.<sup>150</sup>

That being said, Schønberg and Frick support the contention that the ECJ has, in recent years, paid more attention to *travaux préparatoires* when interpreting acts of secondary EU legislation. For them, four factors may explain that new trend.<sup>151</sup> First, the ECJ has been influenced by the legal traditions of the Member States according to which national courts have, as a supplementary means of interpretation, recourse to *travaux préparatoires*. Second, the nature of the acts which the ECJ is called upon to interpret has changed in recent years. Currently, the ECJ must examine acts which are highly complex and very technical. Thus, the *travaux préparatoires* relating to those acts may serve as an aid to the interpretation of ambiguous provisions contained therein. Third, they point out that the volume and quality of preparatory documents has significantly improved in recent years. Fourth, Schønberg and Frick highlight the fact that preparatory documents are now often available via the internet.<sup>152</sup>

In support of their contention, Schønberg and Frick argue that the ECJ has made use of *travaux préparatoires* in three different ways.<sup>153</sup> First, the ECJ has made use of *travaux préparatoires* as a supplementary means of interpretation.<sup>154</sup> For example, in *Ibrahim and Teixeira*,<sup>155</sup> the referring court

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<sup>146</sup> G. Itzcovich, above n 11, at 554-555.

<sup>147</sup> Opinion of AG Warner in Case 28/76 *Milac v Hauptzollamt Freiburg* [1976] ECR I 639, at 1664.

<sup>148</sup> See, e.g., Case C-292/89 *Antonissen* [1991] ECR I-745, para. 18; Joined Cases C-197/94 and C-252/94 *Bautiaa and Société française maritime* [1996] ECR I-505, para. 51; Case C-375/98 *Epson Europe* [2000] ECR I-4243, para. 26; Case C-402/03 *Skov and Bilka* [2006] ECR I-199, para. 42; Case C-404/06 *Quelle* [2008] ECR I-2685, para. 32, and Case C-242/08 *Swiss Re Germany Holding* [2009] ECR I-10099, para. 62.

<sup>149</sup> S. Schønberg and K. Frick, ‘Finishing, Refining, Polishing: On the Use of travaux préparatoires as an Aid to the Interpretation of Community Legislation’ (2003) 28 *European Law Review* 149.

<sup>150</sup> *Ibid.*, at 154.

<sup>151</sup> *Ibid.*, at 155.

<sup>152</sup> See, in this regard, <http://ec.europa.eu/prelex/apcnet.cfm?CL=en>.

<sup>153</sup> S. Schønberg and K. Frick, above n 149, at 168.

<sup>154</sup> See, e.g., Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, and Case C-162/09 *Lassal* [2010] ECR I-9217.

asked, in essence, whether, since the entry into force of Directive 2004/38,<sup>156</sup> Article 12 of Regulation No 1612/68,<sup>157</sup> as interpreted by the ECJ in *Baumbast and R*,<sup>158</sup> still meant that the children of a national of a Member State who works or has worked in the host Member State and the parent who is their primary carer can claim a right of residence in the latter State on the sole basis of Article 12 of Regulation No 1612/68, or whether they were required to satisfy the conditions laid down in Directive 2004/38.<sup>159</sup> The ECJ replied that *Baumbast and R* remained good law, since Article 12 of Regulation No 1612/68 had not been repealed by Directive 2004/38. Accordingly, '[s]uch a choice necessarily reveals the intention of the [EU] legislature not to introduce restrictions of the scope of that article, as interpreted by the [ECJ]'.<sup>160</sup> The latter noted that that interpretation was 'confirmed by the fact that the *travaux préparatoires* to Directive 2004/38 [which] show that it was designed to be consistent with the judgment in *Baumbast and R*'.<sup>161</sup>

Second, the ECJ has also had recourse to *travaux préparatoires* as the primary means of interpretation.<sup>162</sup> For example, in *Badische Erfrischungs-Getränke*,<sup>163</sup> the question was whether water is to be recognized as being natural mineral water within the meaning of Article 1(1) of Directive 80/777 in conjunction with Annex I thereto (Section I. Definition),<sup>164</sup> only if it has properties that are favourable to health. Annex I to Directive 80/777 listed two cumulative conditions that had to be met in order for water to be recognised as being mineral water. First, mineral water had to be microbiologically wholesome water that originates underground. Second, mineral water had two characteristics which 'distinguish it from ordinary drinking water, namely its nature which is determined by its mineral content, trace elements or other constituents and, where appropriate, by certain effects and its original state; moreover, the fact that the water originates underground enables both of those characteristics to be preserved intact'.<sup>165</sup> However, unlike the proposal of the Commission for a Directive relating to the exploitation and marketing of natural mineral waters, Annex I which was drafted in a clear and precise manner made no reference to 'properties favourable

(Contd.)

<sup>155</sup> Case C-310/08 *Ibrahim and Secretary of State for the Home Department* [2010] ECR I-1065 and Case C-480/08 *Teixeira* [2010] ECR I-1107. See also Case C-635/11 *Commission v Netherlands*, judgment of 20 June 2013, not yet reported, paras 35 et seq.

<sup>156</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance), [2004] OJ L 158/77.

<sup>157</sup> Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, [1968] OJ L 257/2, which was repealed by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance, [2011] OJ L 141/1. Article 12 of Regulation No 1612/68 corresponds to Article 10 of Regulation No 492/2011.

<sup>158</sup> Case C-413/99 *Baumbast and R* [2002] ECR I-7091.

<sup>159</sup> Article 7(1)(b) of Directive 2004/38 states that 'all Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State'.

<sup>160</sup> *Ibrahim*, above n 155, para. 46, and *Teixeira*, above 155, para. 57.

<sup>161</sup> *Ibrahim*, above n 155, para. 47, and *Teixeira*, above 155, para. 58. The ECJ referred to the 'Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2003) 199 final, p. 7).

<sup>162</sup> See, e.g., Case C-316/95 *Generics BV v Smith Kline & French Laboratories Ltd* [1997] ECR I-3929.

<sup>163</sup> C-17/96 *Badische Erfrischungs-Getränke v Land Baden-Württemberg* [1997] ECR I-4617.

<sup>164</sup> Council Directive 80/777/EEC of 15 July 1980 on the approximation of the laws of the Member States relating to the exploitation and marketing of natural mineral waters, [1980] OJ L 229/1, which was repealed by Directive 2009/54/EC of the European Parliament and of the Council of 18 June 2009 on the exploitation and marketing of natural mineral waters (Recast), [2009] OJ L 164/ 45.

<sup>165</sup> *Badische Erfrischungs-Getränke*, above n 163, para. 15.

to health'. Hence, the ECJ noted that 'the Council did not intend to make recognition of water as natural mineral water dependent on its possessing properties favourable to health'.<sup>166</sup> It follows from *Badische Erfrischungs-Getränke* that the *travaux préparatoires* gain importance when combined with an *argumentum a contrario* : where the Council and, as the case may be, the European Parliament have departed from the proposal of the Commission, the resulting EU act may not be interpreted in a way which runs counter to such departure.<sup>167</sup> In the context of the special legislative procedure, the same applies where the Council was unwilling to take into account an amendment proposed by the European Parliament.<sup>168</sup>

Third, Schönberg and Frick posit that the ECJ has exceptionally had recourse to the drafting history of the EU act in question as a means of 'correcting' its meaning, i.e. so as to render it compatible with primary EU law.<sup>169</sup> The ruling of the ECJ in *Stauder* illustrates this point.<sup>170</sup> In that case, those authors argue that the *travaux préparatoires* enabled the ECJ to interpret a Commission decision in compliance with fundamental rights understood as general principles of EU law and now enshrined in the Charter, whose respect the ECJ ensures.

In light of the foregoing observations, it appears that, whilst *travaux préparatoires* play a limited role when compared with other methods of interpretation,<sup>171</sup> their role is far from being marginal. On the contrary, it seems that they may well become increasingly important in the years to come.

### C. Teleological Interpretation

#### 1. General Observations

Writing extrajudicially, former AG Fennelly noted that '[t]he characteristic element in the [ECJ]'s interpretative method is [...] the so-called "teleological" approach'.<sup>172</sup> As Pescatore observed, the ECJ has, when interpreting primary EU law, given priority to that method of interpretation over the others, since the Treaties are imbued with a purpose-driven functionalism.<sup>173</sup> Indeed, unlike ordinary international treaties which aim to regulate the exchange of provisions, the adjustment of mutual interests, and the delimitation of zones of influence, the founding Treaties are entirely grounded in the idea that there are objectives of paramount constitutional importance that the EU must attain.<sup>174</sup>

Moreover, as mentioned above, the Treaties are drafted in broad terms and entrust the EU political institutions with the implementation of the objectives set out therein. They contain very few concrete rules and often general notions. Where litigation arises, the ECJ must, in spite of the level of generality

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<sup>166</sup> *Ibid.*, para. 16.

<sup>167</sup> Case C-86/03 *Greece v Commission* [2005] ECR I-10979, para. 59.

<sup>168</sup> Case C-391/09 *Runevič-Vardyn and Wardyn* [2011] ECR I-3787, para. 46.

<sup>169</sup> S. Schönberg and K. Frick, above n 149, at 169.

<sup>170</sup> *Stauder*, above n 60, para. 7.

<sup>171</sup> In this regard, the ECJ has held that 'the alleged drafting history [of a Regulation described by a commentator] cannot be relied upon to contest an autonomous interpretation of the Regulation which seeks to give practical effect to the provisions it contains, with a view to its uniform application in the [EU], in compliance with its objective'. See Case C-443/03 *Leffler* [2005] ECR I-9611, para. 48.

<sup>172</sup> N. Fennelly, above n 11, at 664.

<sup>173</sup> P. Pescatore, 'Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de justice', in *Miscellanea W.J. Ganshof van der Meersch*, vol. 2, (Bruxelles, Bruylant, 1972) at 325-363. A. Arnulf, above n 11, at 612.

<sup>174</sup> P. Pescatore, above n 173, at 327.

of the EU law provision in question, exercise its powers of judicial review. Otherwise it would be committing a denial of justice. Thus, Pescatore argued that the ECJ must give concrete expression to notions which are too general and ‘fill out’ Treaty provisions whose meaning is incomplete.<sup>175</sup>

Furthermore, whilst the Treaties may contain notions which are drafted in broad terms, secondary EU legislation is often highly technical and complex. Thus, in order to fill the gap between those two extremes – the generality of primary EU law and the high degree of precision of secondary EU law – the ECJ has no choice but to take into account the objectives pursued by the Treaties.<sup>176</sup>

As explained in the following paragraphs, teleological interpretation and systematic interpretation are often interlinked, since it is by virtue of the latter that the ECJ may identify the objective pursued by the EU law provision in question. Put differently, it is the general scheme of the Treaties or, as the case may be, of the act of secondary EU law in question which enables the ECJ to clarify the objectives pursued by them.

As Bengoetxea rightly observes,<sup>177</sup> one must draw a distinction between three types of teleological interpretation. To begin with, the first type aims to secure the ‘*effet utile*’ (effectiveness) of the EU law provision in question (the so-called ‘functional interpretation’).<sup>178</sup> That type of teleological interpretation and systematic interpretation go hand-in-hand. It is only after examining the normative context in which the EU law provision in question is placed that one may choose the interpretation that best preserves the effectiveness of that provision. In accordance with a second type of teleological interpretation, where an EU law provision is ambiguous or incomplete it must be interpreted in light of the objectives it pursues (the so-called ‘teleological interpretation *stricto sensu*’).<sup>179</sup> Finally, a third type of teleological interpretation focuses on the consequences that flow from an interpretative choice (the so-called ‘consequentialist interpretation’).<sup>180</sup>

Moreover, where an act of EU law pursues more than one objective, all of them having equal importance in the EU legal order but being mutually contradictory in the relevant context, the ECJ applies the principle of proportionality to decide which of those objectives should prevail over the others.<sup>181</sup>

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<sup>175</sup> *Ibid.*, at 328.

<sup>176</sup> *Ibid.*, at 329.

<sup>177</sup> J. Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Oxford, Clarendon, 1993).

<sup>178</sup> Regarding the effectiveness of Article 101 and 102 TFEU, see, e.g., Case C-439/08 *VEBIC* [2010] ECR I-12471, para. 64. Regarding the preliminary reference procedure enshrined in Article 267 TFEU, see, e.g., Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, para. 45. Regarding the primacy of directly effective provisions of EU law, see Case C-409/06 *Winner Wetten* [2010] ECR I-8015, para. 56.

<sup>179</sup> For example, in Case C-101/01 *Lindqvist* [2003] ECR I-12971, the ECJ ruled that ‘[i]n the light of the purpose of the directive [i.e. the protection of the right to respect for private life], the expression data concerning health used in Article 8(1) thereof must be given a wide interpretation so as to include information concerning all aspects, both physical and mental, of the health of an individual’. *Ibid.*, para. 50

<sup>180</sup> One of the most paradigmatic examples of the ‘consequentialist approach’ is provided by the ruling of the ECJ in *Costa v ENEL*, above n 26, at 1159, where the ECJ described the consequences that would have followed, had EU law not enjoyed primacy over national law. In this regard, it held that ‘[t]he executive force of [EU] law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the [Treaties] set out in [Article 3 TEU] and giving rise to the discrimination prohibited by Article [18 TFEU]’. Another interesting example is provided by the ruling of the ECJ in Case 314/85 *Foto-Frost* [1987] ECR 4199. Had national courts been empowered to declare acts of secondary EU law invalid, the ECJ found that such power would have given rise to ‘[d]ivergences between courts in the Member States as to the validity of [EU] acts [which] would [have been] liable to place in jeopardy the very unity of the [EU] legal order and detract from the fundamental requirement of legal certainty’. *Ibid.*, para. 15.

<sup>181</sup> See, in this regard, K. Lenaerts and J.A. Gutiérrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU law’ (2010) 47 *Common Market Law Review* 1629, at 1649 et seq.

In addition, in light of the objectives which the EU law provision in question pursues, the latter may be subject to a strict or to a broad interpretation. Where the EU law provision in question constitutes a derogation from the objectives pursued by the Treaties (or is contained in secondary EU law), the EU will interpret such provision strictly.<sup>182</sup> It follows from both a teleological interpretation and a systematic interpretation that ‘exceptions are to be interpreted strictly so that general rules are not negated’.<sup>183</sup> On the contrary, if the objectives pursued by an EU act which contains the provision in question cannot be achieved unless such provision is interpreted broadly, then the ECJ will follow that interpretation.<sup>184</sup> The same applies in relation to EU law provisions which give expression to a principle of constitutional importance for the objectives set out in the Treaties.<sup>185</sup>

More recently, Poiares Maduro posited that the ECJ also follows a ‘meta-teleological’ approach which ‘refers to a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules’.<sup>186</sup> The ‘meta-teleological’ approach tries to identify the ‘constitutional *telos*’ of the EU,<sup>187</sup> which may ‘provide a thicker normative understanding of the law beyond the decision in the case [at] hand’.<sup>188</sup> Logically, the question is what is to be understood by such *telos*. In this regard, he posits that the constitutional *telos* of the EU refers to universal principles which fulfil two main purposes. First, where the authors of the Treaties or, as the case may be, the political institutions of the EU have ‘agreed to disagree’, that political compromise implies that it is necessarily for the ECJ, in light of those universal principles, to solve the questions that that disagreement has left open. Second, those same principles enable the ECJ to cope with changing times. For Poiares Maduro, ‘[t]hey are a function of the dynamic character of the process of integration recognised in the Treaty (notably by [means of the] objective of creating “an ever closer union among the peoples of Europe”)’.<sup>189</sup>

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<sup>182</sup> Notably, this point is illustrated by the case law of the ECJ in the realm of the internal market. See, e.g., Case 46/76 *Bauhuis* [1977] ECR 5, p. 5; Case 113/80 *Commission v Italy* [1981] ECR 01625, para. 7 (holding that, ‘Article 36 [TFEU] constitutes a derogation from the basic rule that all obstacles to the free movement of goods between Member States shall be eliminated and must be interpreted strictly’); Case C-47/02 *Anker* [2003] ECR I-10447, para. 60 (noting that ‘[i]t is also clear from the [ECJ’s] case-law that, as a derogation from the fundamental principle that workers in the [EU] should enjoy freedom of movement and not suffer discrimination, Article [45(4) TFEU] must be construed in such a way as to limit its scope to what is strictly necessary for safeguarding the interests which that provision allows the Member States to protect’), and Case C-337/06 *Bayerischer Rundfunk and Others* [2007] ECR I-11173, para. 64 (stating that ‘[t]he provision in question being an exception to the principal objective of the [EU] rules on the awarding of public contracts, [...] namely freedom of movement of services and a market open to competition which is as wide as possible, it must be interpreted strictly’).

<sup>183</sup> See Case C-346/08 *Commission v United Kingdom* [2010] ECR I-03491, para. 39 and Case C-476/01 *Kapper* [2004] ECR I-5205, para. 72.

<sup>184</sup> See, e.g., Case C-29/99 *Commission v Council* [2002] ECR I-11221, para. 78 (holding that ‘[i]n order to give practical effect to the provisions in Title II, Chapter 3, of the Euratom Treaty, the [ECJ] has interpreted them broadly on several occasions’), and Case C-116/02 *Gasser* [2003] ECR I-14693, para. 41 (‘in order to achieve [the] aims [set out in the 1968 Brussels Convention], Article 21 [thereof] must be interpreted broadly so as to cover, in principle, all situations of *lis pendens* before courts in Contracting States, irrespective of the parties’ domicile’).

<sup>185</sup> In relation to EU legislation on the right to move and reside freely within the territory of the Member States, the ECJ has held that, ‘having regard to the context and objectives of Directive 2004/38, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness’. See, e.g., Case 267/83 *Diatta* [1985] ECR 567, paras 16 and 17; *Baumbast and R*, above 158, para. 74; Case C-291/05 *Eind* [2007] ECR I-10719, para. 43; Case C-127/08 *Metock and Others* [2008] ECR I-6241, para. 84, *Lassal*, above n 154, para. 31. Regarding the judicial review of national decisions falling within the scope of EU law, see Case C-459/99 *MRAX* [2002] ECR I-6591, para. 101. Regarding the principle of loyal cooperation in the Area of Freedom, Security and Justice, see Case C-105/03 *Pupino* [2005] ECR I-5285, para. 42. Regarding the application of the principle of non-discrimination on grounds of nationality in the context of the Euroatom Treaty, see Case C-115/08 *ČEZ* [2009] ECR I-10265, para. 90.

<sup>186</sup> M. Poiares Maduro, above 11. See also M. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press, 2005).

<sup>187</sup> M. Poiares Maduro, above n 11, at 5.

<sup>188</sup> *Ibid.*, at 9.

<sup>189</sup> *Ibid.*, at 11.



## 2. Teleological Interpretation and Judicial Activism

Three decades ago, AG Mayras asked a rhetorical question which is still relevant today, namely ‘[w]here a literal interpretation of a rule of written law leads to an unreasonable or unjust result is it permissible for the [ECJ] to look for another interpretation which avoids that result?’<sup>190</sup>

The literal interpretation of an EU law provision may give rise to lacunae which are incompatible with primary EU law (the wording of such a provision is said to be ‘under-inclusive’) or may render the scope of that provision excessively broad, thereby creating situations which are unfair, have not been foreseen by the EU legislator, or are contrary to the objectives pursued by the latter (the wording of such a provision is said to be ‘over-inclusive’). Is it for the ECJ to fill in the gaps where a provision is under-inclusive or, as the case may be, to restrict its scope where it is over-inclusive by applying it only in so far as it is compatible with the objectives it pursues? Is that possible without the ECJ’s committing an act of judicial activism?<sup>191</sup>

In this regard, some scholars have criticised the teleological approach followed by the ECJ on the ground that it removes all constraints resulting from the wording of the EU law provision in question.<sup>192</sup> In their view, the ECJ will not hesitate to depart from the wording of the EU law provision in question where such departure is necessary to increase the competences of the EU. For those scholars, a purpose-driven interpretation and the EU’s competence creep go hand-in-hand. The argument then runs that by increasing the competences of the EU, the ECJ is also increasing its own powers. Accordingly, the teleological approach threatens the competences which remain with the Member States even in sensitive areas of national sovereignty such as criminal law. If the ECJ were to construe primary and secondary EU law in a way which reflects more closely the wording of that law, compliance with both the principle of inter-institutional balance and the principle of conferral would be better achieved. More recently, Conway has raised a counter-majoritarian objection to the ECJ’s meta-teleological interpretation.<sup>193</sup> In his view, ‘[t]he latter approach of the ECJ (when adopted in its more creative decisions) is arguably inconsistent with the original context of the Community and Union of mediating between continuing Member State sovereignty and the new form of European cooperation, thereby pre-empting what is ultimately a decision for political and democratic contestation of the ongoing development and final destination of the “European project”’.<sup>194</sup>

However, as mentioned above, a purely textualist approach does not suffice to interpret, in a complete and consistent fashion, the provisions of the Treaties which are open texture. Moreover, where various linguistic versions of a legislative act of the EU are inconsistent, the ECJ may not endorse a textualist approach without calling into question the principle according to which all 24 official languages of the EU stand on an equal footing. In our view, those criticisms would be well founded if the authors of the

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<sup>190</sup> Opinion of AG Mayras in C-67/79 *Fellinger* [1980] ECR I- 00535, at 550.

<sup>191</sup> See, e.g., M. Dawson, B. De Witte and E. Muir (eds), *Judicial Activism at the European Court of Justice* (Cheltenham, Edward Elgar Publishing, 2013).

<sup>192</sup> See, e.g. H. Rasmussen, *On Law and Policy in the European Court of Justice* (Dordrecht, Nijhoff, 1986); P. Neill, *The European Court of Justice: A Case Study in Judicial Activism*, evidence submitted to the House of Lords Select Committee on the European Communities, Subcommittee on the 1996 Inter-Governmental Conference, Minutes of Evidence, House of Lords, 18<sup>th</sup> Report (Session 1994-95) 218 et seq., T.C. Hartley, ‘The ECJ, Judicial Objectivity and the Constitution of the EU’ (1996) *Law Quarterly Review* 95 et seq., R. Herzog et L. Gerken, ‘Stop the European Court of Justice’, available at : <<http://euobserver.com/?aid=26714>>.

<sup>193</sup> See generally G. Conway, above n 11.

<sup>194</sup> G. Conway, ‘Levels of Generality in the Legal Reasoning of the European Court of Justice’ (2008) 14 *European Law Journal* 787, at 805.

Treaties had wished the ECJ to act merely as ‘the mouthpiece of the law’.<sup>195</sup> However, it is safe to say that such a limited role is incompatible with the mission with which the authors of the Treaties entrusted the ECJ, namely that of ensuring that ‘in the interpretation and application of the Treaties the law is observed’.

As Koopmans noted, the original version of the EEC Treaty told ‘us nothing about its substantive principles’.<sup>196</sup> It thus provided little guidance as to the content of the ‘law’ to be observed. Bearing in mind that, in the aftermath of World War II, a formalist understanding of EU law would not have been accepted by the Constitutional Courts of the Member States, the EU legal order had to embrace a particular public morality reflecting the basic values of European liberal democracies. That is why, with a view to reassuring the Member States, the ECJ decided to fill the lacunae left by the authors of the Treaties by having recourse to principles capable of ensuring ideological continuity between EU law and national constitutions. General principles of EU law, notably fundamental rights, constituted the paradigmatic example of the way in which the ECJ provided a concrete and material content to Treaty provisions, in this instance Article 19 TEU. Accordingly, since the ECJ filled those lacunae in light of the ‘constitutional traditions common to the Member States’,<sup>197</sup> one could hardly argue that the ECJ acted to the detriment of national sovereignty.<sup>198</sup> In so far as the ECJ combines a teleological interpretation of EU law with a construction of that law grounded in a comparative law method, the objectives pursued by the EU are aligned with those set out in national constitutions, thereby creating a ‘common constitutional space’ which, needless to say, does not threaten national sovereignty.

As mentioned above, teleological interpretation not only enables the ECJ to engage in gap filling, but may also be relied upon with a view to reducing the scope of application of EU law (so-called ‘teleological reduction’). This means that a teleological interpretation of EU law does not always favour EU competence creep. As a matter of fact, the ECJ may depart from the wording of an EU law provision, where it considers that a textualist approach would excessively broaden the scope of that provision, thereby giving rise to unfair situations which were not foreseen by the EU legislator or are contrary to the objectives pursued by the latter. As Kmiec notes, ‘textualists might be deemed judicial

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<sup>195</sup> ‘La bouche de la loi’, C. de Montesquieu, *De l’Esprit des Lois, Livre XI*. In our view, it is only after defining the role that the ECJ is called upon to fulfil, that one may determine whether it enjoys judicial legitimacy or not. The “activism v self-restraint” discourse is misconceived and does not lead to a productive discussion, unless one first solves the following question: what should the role of the ECJ be? In other words, how can the ECJ enjoy external and internal legitimacy? See, e.g., K. Lenaerts, ‘How the ECJ Thinks: A Study On Judicial Legitimacy’ (2013) 36 *Fordham International Law Journal* (forthcoming). In the same way, see A. Arnall, ‘Judicial Activism And The Court Of Justice: How Should Academics Respond?’, in M. Dawson, B. De Witte and E. Muir (eds), above n 191, at 211 et seq. (who observes that ‘the term ‘judicial activism’ is far too indeterminate to provide a useful prism through which to view the [ECJ’s] case law. Accusations of judicial activism can always be rebutted by choosing a different baseline from that of the accuser’). For different ways of understating the concept of ‘judicial activism’, see D. K. Kmiec, ‘The Origin and Current Meanings of Judicial Activism’ (2004) 92 *California Law Review*. 1441.

<sup>196</sup> T. Koopmans, ‘The Birth of European Law at the Cross-roads of Legal Traditions’ (1991) 39 *American Journal of Comparative Law* 495. See also D. Edward, ‘Judicial Activism – Myth or Reality?’, in A.I.L. Campbell and M. Voyatzi (eds), *Legal Reasoning and Judicial Interpretation of European Law* (Hampshire, Trenton Publishing, 1996) 29 et seq., A. Arnall, ‘The European Court of Justice and Judicial Objectivity: A Reply to Professor Hartley’ (1996) *Law Quarterly Review* 411, T. Tridimas, ‘The Court of Justice and Judicial Activism’ (1996) 21 *European Law Review* 199, C.W.A. Timmermans, ‘Judicial Activism and Judicial Restraint’, in C. Baudenbacher et E. Busek (eds), *The Role of International Courts* (Stuttgart, German Law Publishers, 2008) 243, at 245.

<sup>197</sup> Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, at 1135; Case 4/73 *Nold v Commission* [1974] ECR 491, para. 13; Case 44/79 *Hauer* [1979] ECR 3727, para. 15; and Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, para. 13; Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paras 68 and 69; Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, para. 45; Case C-420/06 *Jager* [2008] ECR I-1315, para. 59; Case C-555/07 *Küçükdeveci* [2010] ECR I-365, para. 20, Case C-279/09 *DEB* [2010] ECR I-13849, para. 32; and Case C-571/10 *Kamberaj*, judgment of 24 April 2012, not yet reported, para. 60.

<sup>198</sup> K. Lenaerts and J.A. Gutiérrez-Fons, above n 181, at 1632 et seq.

activists for refusing to consider legislative history or statutory purpose'.<sup>199</sup> The ruling of the ECJ in *Kalfelis* illustrates this point.<sup>200</sup> In that case, the ECJ was asked to interpret Article 6(1) of the 1968 Brussels Convention which lays down 'a special jurisdiction rule' according to which '[a] person domiciled in a Contracting State may also be sued where he is one of a number of defendants, in the courts for the place where any one of them is domiciled'. A literal interpretation of Article 6(1) of the 1968 Brussels Convention would suggest that a connection between the claims made against each of the defendants was not required. However, the ECJ reasoned that such an interpretation would call into question the founding principle set out in the 1968 Brussels Convention, namely that 'jurisdiction is vested in the courts of the State of the defendant's domicile'. Article 6(1) could not be interpreted in a way which would allow the plaintiff 'to make a claim against a number of defendants with the sole object of ousting the jurisdiction of the courts of the State where one of the defendants is domiciled'.<sup>201</sup> As such, a literal interpretation gave rise to 'forum shopping' and had to be ruled out. As to the nature of the connection required, the ECJ found that 'the rule laid down in Article 6(1) therefore applies where the actions brought against the various defendants are related when the proceedings are instituted, that is to say where it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings'.<sup>202</sup> It follows that, in *Kalfelis*, the ECJ engaged in a teleological reduction of the scope of Article 6(1) of the 1968 Brussels Convention.

Finally, in examining the counter-majoritarian objection, Poiares Maduro argues that teleological interpretation 'favours a debate among alternative normative preferences in the interpretation of the rule [that] a simple appeal to text would hide', thereby promoting judicial accountability.<sup>203</sup>

## 2. Consistent Interpretation

### A. The Interpretation of EU Law in Light of International Law

The relationship between international law and EU law is governed by two opposing tendencies. On the one hand, the EU is an autonomous legal order that seeks to establish its own constitutional space between international law and national constitutions. That is why EU law emphasises its separate identity by distinguishing itself from international law. As the ECJ ruled in the seminal *van Gend & Loos* judgment, 'the Community constitutes a *new legal order*'. On the other hand, whilst preserving its autonomy, the EU legal order does not aim to insulate itself from its international law origins. As

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<sup>199</sup> See D. K. Kmiec, above 195, at 1474. See also, M. Poiares Maduro, above n 186, at 10 (who argues that 'an interpretation that pays attention to the goals of the rule, and not simply its wording, prevents opportunistic behaviours and minimises the risk of an interpretative manipulation of the legislation. Such a manipulation would derive, in practise, effects from those rules which were neither wished for nor debated in the political process').

<sup>200</sup> Case 189/87 *Kalfelis* [1988] ECR 5565.

<sup>201</sup> *Ibid.*, paras 8 and 9.

<sup>202</sup> *Ibid.*, para. 12. It is worth noting that Article 6(1) of Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L 12/1, codified the ruling of the ECJ in *Kalfelis*, by adding the following sentence: '[a] person domiciled in a Member State may also be sued where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, *provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*' (emphasis added). Regulation No 44/2001 was repealed by Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L 351/1. However, *Kalfelis* remains good law as Article 8(1) of Regulation No 1215/2012 reproduces Article 6(1) of Regulation No 44/2001.

<sup>203</sup> M. Poiares Maduro, above n 186, at 11. See also E. Paunio and S. Lindroos-Hovinheimo, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law' (2010) 16 *European Law Journal* 395.

the ECJ also ruled in that judgment, ‘the Community constitutes a new legal order of *international law*’. Thus, the autonomy of the EU legal order is not absolute, but relative. The ECJ does not try to separate itself from international law entirely, nor does it allow the latter law to call into question its own autonomy. A traditional ‘monism v dualism’ analysis does not fully express the way in which international law is incorporated into EU law. That incorporation in fact takes place in accordance with a balancing exercise. Provided that international law complies with the basic constitutional tenets of the EU legal order, international obligations binding upon the EU may prevail over secondary EU law.

## 1. Automatic Incorporation

An international agreement is clearly incorporated into the EU legal order where the EU is a contracting party to such an agreement. As Article 216(2) TFEU states, international ‘[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States’. In addition, the incorporation of an international agreement into EU law may take place in accordance with the ‘theory of succession’,<sup>204</sup> i.e. where the EU has ‘assumed, and thus had transferred to it, all the powers previously exercised by the Member States that fall within the [international agreement] in question’.<sup>205</sup> Stated differently, the incorporation of an international agreement into EU law may occur by means of ‘field pre-emption’: if the EU has occupied a policy field to which an international agreement concluded by the Member States applies, then national authorities no longer enjoy the internal powers that are necessary to honour the obligations entered into under such an agreement. In order to respect the Member States’ commitment to remain bound by such an agreement, it is thus for the EU to assume those obligations.

Moreover, principles of customary international law may also be incorporated into the EU legal order. In this connection, the ECJ has ruled that ‘the powers of the [EU] must be exercised in observance of international law, including provisions of international agreements in so far as they codify customary rules of general international law’.<sup>206</sup> Accordingly, provisions contained in international agreements not binding upon the EU but which codify principles of customary international law may nevertheless be incorporated into the EU legal order as such principles. This is so for the 1969 Vienna Convention on the Law of Treaties and for Article 1 of the Chicago Convention.<sup>207</sup> For example, in *Brita*, when determining the territorial scope of the EC-Israel Association Agreement, the ECJ relied on the principle of customary international law ‘*pacta tertiis nec nocent nec prosunt*’, as set out in Article 34 of the 1969 Vienna Convention, according to which ‘treaties do not impose any obligations, or confer any rights, on third States’.<sup>208</sup> In that case, the third party was the Palestine Liberation Organisation (the ‘PLO’) with which the then European Communities (the ‘EC’) had also concluded an association agreement. In accordance with the EC-PLO association agreement, Palestinian customs authorities enjoyed exclusive jurisdiction in respect of products originating in the West Bank. Accordingly, ‘to interpret Article 83 of the EC-Israel Association Agreement as meaning that the Israeli customs

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<sup>204</sup> Joined Cases 21 to 24-72 *International Fruit Company and Others* [1972] ECR 1219.

<sup>205</sup> Case C-301/08 *Bogiatzi* [2009] ECR I-10185, para. 33.

<sup>206</sup> See, to this effect, Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paras 9 and 10; Case C-405/92 *Mondiet* [1993] ECR I-6133, paras 13 to 15; and Case C-162/96 *Racke* [1998] ECR I-3655, para. 45.

<sup>207</sup> In this regard, the ECJ has held that ‘even though the [1969] Vienna Convention does not bind either the [EU] or all its Member States, a series of provisions in that convention reflect the rules of customary international law which, as such, are binding upon the [EU] institutions and form part of the EU legal order’. See Case C-386/08 *Brita* [2010] ECR I-1289, para. 42. See also *Racke*, above n 206, paras 24, 45 and 46; Case C-416/96 *El-Yassini* [1999] ECR I-1209, para. 47, and Case C-268/99 *Jany and Others* [2001] ECR I-8615, para. 35.

<sup>208</sup> *Brita*, above n 207, para. 44.

authorities enjoy competence in respect of products originating in the West Bank’, the ECJ wrote, ‘would be tantamount to imposing on the Palestinian customs authorities an obligation to refrain from exercising the competence conferred upon them by virtue of the abovementioned provisions of the EC-PLO Protocol. Such an interpretation, the effect of which would be to create an obligation for a third party without its consent, would thus be contrary to the principle of general international law, “*pacta tertiis nec nocent nec prosunt*”, as consolidated in Article 34 of the [1969] Vienna Convention’.<sup>209</sup>

In the same way, in *Walz*,<sup>210</sup> the ECJ was called upon to interpret the term ‘damage’ for the purposes of Article 22(2) of the Montreal Convention,<sup>211</sup> to which the EU is a party. That provision limits the liability of air carriers in the event of destruction, loss, damage or delay affecting checked baggage. The ECJ was thus asked by the referring court whether Article 22(2) of the Montreal Convention was to be interpreted as including both material and non-material damage. Relying on Article 31 of the 1969 Vienna Convention,<sup>212</sup> which codifies a principle of customary international law, and on Article 31(2) of the Articles on Responsibility of States for Internationally Wrongful Acts, drawn up by the International Law Commission of the United Nations,<sup>213</sup> the ECJ replied in the affirmative.

In *ATAA and Others*, referring to primary and secondary sources of international law, notably to Article 1 of the Chicago Convention,<sup>214</sup> the ECJ found that (1) the principle that each State has complete and exclusive sovereignty over its airspace, (2) the principle that no State may validly purport to subject any part of the high seas to its sovereignty, and (3) the principle which guarantees freedom to fly over the high seas, were to be regarded as embodying ‘the current state of customary international maritime and air law’.<sup>215</sup> By contrast, after recalling the existence of the principle of customary international law according to which a vessel on the high seas is, in principle, governed only by the law of its flag,<sup>216</sup> the ECJ rejected the application by analogy of that principle to aircraft flying over the high seas.<sup>217</sup>

It follows from the above that, just as with international agreements to which the EU is a party, principles of customary international law do not need to be ‘translated’ into norms of secondary EU legislation in order for them to form part and parcel of the EU legal order.

## 2. Limits to the Incorporation of International Law

The ECJ has consistently held that ‘by virtue of Article 216(2) TFEU, where international agreements are concluded by the [EU] they are binding upon its institutions and, consequently, they prevail over

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<sup>209</sup> *Ibid.*, para. 52.

<sup>210</sup> Case C-63/09 *Walz* [2010] ECR I-4239.

<sup>211</sup> That Convention was concluded in Montreal on 28 May 1999, signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001, *OJ*, 2001, L 194/39.

<sup>212</sup> In light of Article 31 of the 1969 Vienna Convention, ‘a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose’.

<sup>213</sup> That provision states that ‘[i]njury includes any damage, whether material or moral ...’

<sup>214</sup> The ECJ also referred to the judgment of the International Court of Justice of 27 June 1986 in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *I.C.J. Reports 1986*, p. 392, para. 212), to Article 2 of the Geneva Convention of 29 April 1958 on the High Seas (*United Nations Treaty Series*, Vol. 450, p. 11), to the judgment of the Permanent Court of International Justice of 7 September 1927 in *the Case of the S.S. ‘Lotus’*, *PCIJ 1927*, Series A, No 10, p. 25, and to the third sentence of Article 87(1) of the UN Convention on the Law of the Sea.

<sup>215</sup> Case C-366/10 *ATAA and Others*, judgment of 21 December 2011, not yet reported, para. 104.

<sup>216</sup> *Poulsen and Diva Navigation*, above n 206, para. 22.

<sup>217</sup> *ATAA and Others*, above n 215, para. 106.

acts of the European Union'.<sup>218</sup> This means that international agreements concluded by the EU enjoy *supra-legislative* status.<sup>219</sup>

However, the incorporation of international law into the EU legal order must not call into question the constitutional integrity of the EU legal order. This means that an international agreement binding upon the EU must not call into question the constitutional structure put in place by the authors of the Treaties. Notably, as the ECJ made clear in its Opinion 1/09, 'an international agreement may affect [the ECJ's] own powers provided that the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the [EU] legal order'.<sup>220</sup> This means that all international agreements to which the EU becomes party must ensure compliance with 'the system set up by Article 267 TFEU [which] establishes between the [ECJ] and the national courts direct cooperation as part of which the latter are closely involved in the correct application and uniform interpretation of [EU] law and also in the protection of individual rights conferred by that legal order'.<sup>221</sup> Indeed, 'the tasks attributed to the national courts and to the [ECJ] respectively are indispensable to the preservation of the very nature of the law established by the Treaties'.<sup>222</sup>

Substantively, all international obligations must comply with the constitutional tenets upon which the EU is founded. In particular, the incorporation of international law must ensure compliance with fundamental rights. As is well known, this point is illustrated by the ruling of the ECJ in *Kadi I*.<sup>223</sup> In that case, the ECJ held that 'the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the [Treaties].' For the case at hand, this meant that Regulation No 881/2002 implementing a UN Security Council Resolution was not exempt from judicial review, as this would run counter to 'the [constitutional] principle that all [EU] acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the [ECJ] to review in the framework of the complete system of legal remedies established by the Treat[ies]'.<sup>224</sup> Accordingly, an international agreement which is in breach of those constitutional principles cannot form part of the EU legal order.

Moreover, it is true that by virtue of Article 351 TFEU, EU institutions must not impede the performance of the obligations of Member States which stem from an agreement prior to 1 January 1958 or the date of their accession to the EU. This means that, under certain circumstances,<sup>225</sup> Article 351 TFEU allows primacy of those agreements over secondary EU law. However, as the ECJ stressed in *Kadi I*, 'that primacy [...] would not [...] extend to primary [EU] law, in particular to the general principles of which fundamental rights form part'.<sup>226</sup>

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<sup>218</sup> *Ibid.*, para. 50. See also Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para. 52; Case C-311/04 *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I-609, para. 25; *Intertanko*, above 39, para. 42, and *Kadi I*, above n 1, para. 307.

<sup>219</sup> In the US, this is not the case. In the event of a conflict between an international agreement to which the US is a party and a federal statute passed after the conclusion of such an agreement, the latter prevails over the former. This is known as the 'last-in-time' principle. This is so even for UN Security Council Resolutions. A. Bianchi, 'International Law and US Courts: The Myth of Lohengrin Revisited', *European Journal of International Law* 15 (4), 2004, pp.751–781.

<sup>220</sup> Opinion 1/09 of the Court of 8 March 2011, not yet reported, para. 76 (see also, in the same way, Opinion 1/00 [2002] ECR I-3493, paras 21, 23 and 26.

<sup>221</sup> *Ibid.*, para. 84.

<sup>222</sup> *Ibid.*, para. 85.

<sup>223</sup> *Kadi I*, above n 1,

<sup>224</sup> *Ibid.*, para. 285.

<sup>225</sup> N. Lavranos, 'Revisiting Article 307 EC: The Untouchable Core of Fundamental European Constitutional Law Values and Principles', in: P. Carrozza, F. Fontanelli, and G. Martinico (eds), *Shaping the Rule of Law Through Dialogue* (Groningen, European Law Publishing, 2009) 119.

<sup>226</sup> *Kadi I*, above n 1, para 308.

Accordingly, the ECJ annulled Regulation No 881/2002 in so far as it concerned the appellants, since '[their] rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected'.<sup>227</sup> This was so because they had not been informed of the grounds for their inclusion in the list containing the names of the persons whose assets had to be frozen.<sup>228</sup> Regarding the right to property, the ECJ recognised that threats to international peace and security posed by acts of terrorism may justify the freezing of assets of the persons identified by the UN Security Council as being associated with Al-Qaeda.<sup>229</sup> However, since Regulation No 881/2002 did not enable Mr Kadi to put his case before the competent authorities, the freezing of his assets constituted an unjustified restriction of his right to property.<sup>230</sup>

### 3. The Principle of Consistent Interpretation

As a corollary of the primacy of international agreements concluded by the European Union over instruments of secondary law, the ECJ has consistently held that 'those instruments must as far as possible be interpreted in a manner that is consistent with those agreements'.<sup>231</sup>

Where an international agreement or a principle of customary international law which forms an integral part of the EU legal order does not produce direct effect, the principle of consistent interpretation becomes of paramount importance.<sup>232</sup>

In accordance with that principle, where secondary EU law is open to more than one interpretation, 'the primacy of international agreements concluded by the [EU] over provisions of secondary [EU] legislation means that such provisions must, so far as is possible, be interpreted in a manner that is

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<sup>227</sup> *Ibid.*, para. 334.

<sup>228</sup> *Ibid.* In this regard, the ECJ found that the Council had failed to comply with its obligation to communicate to the appellants the grounds on which their names were included in the list laying down a body of restrictive measures, 'so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable [them] to exercise, within the periods prescribed, their right to bring an action'. *Ibid.*, para. 336. It is true that 'overriding considerations to do with safety or the conduct of the international relations of the [EU] and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters. However, that does not mean, with regard to the principle of effective judicial protection, that restrictive measures such as those imposed by the contested regulation escape all review by the [EU] judicature once it has been claimed that the act laying them down concerns national security and terrorism.' *Ibid.*, paras 342-343. Moreover, the ECJ ruled that 'the contested regulation, in so far as it concerns the appellants, was adopted without any guarantee being given as to the communication of the inculpatory evidence against them or as to their being heard in that connection, so that it must be found that that regulation was adopted according to a procedure in which the appellants' rights of defence were not observed, which has had the further consequence that the principle of effective judicial protection has been infringed'. *Ibid.*, para. 352.

<sup>229</sup> *Ibid.*, para. 363.

<sup>230</sup> *Ibid.*, paras 369-370.

<sup>231</sup> See, e.g., Joined Cases C-335/11 and C-337/11C *HK HK Danmark*, judgment of 11 April 2013, not yet reported, para. 29. In relation to the interpretation of EU law in light of UN Security Council Resolutions, see Case C-84/95 *Bosphorus* [1996] ECR I-3953, paras 13 and 14, Case C-371/03 *Aulinger* [2006] ECR I-2207, para. 30; Case C-117/06 *Möllendorf and Möllendorf-Niehuus* [2007] ECR I-8361, para.54; *Kadi I*, above n 1, para. 297; Case C-340/08 *M and Others* [2010] ECR I – 3913, para. 45. Of course, where an international obligation is incompatible with the constitutional tenets of the EU, the duty of consistent interpretation does not apply.

<sup>232</sup> See, generally, D. Simon, 'Le principe d'interprétation conforme: injection homéopathique ou thérapie palliative ?' in V. Kronenberger, M. T. D'Alessio and V. Placco (eds), *De Rome à Lisbonne: les juridictions de l'Union européenne à la croisée des chemins, Mélanges en l'honneur de Paolo Mengozzi* (Bruxelles, Bruylant, 2013) 279 and G. Gattinara, 'Consistent Interpretation of WTO Rulings in the EU Legal Order?' in E. Cannizzaro, P. Palchetti and R. A. Wessel (eds), *International Law as Law of the European Union* (Leiden, Martinus Nijhoff Publishers, 2011).

consistent with those agreements'.<sup>233</sup> The need to interpret secondary EU law in light of an international agreement concluded by the EU becomes even more pressing where the EU measure in question is 'intended specifically to give effect to [such] an international agreement'.<sup>234</sup>

As mentioned above, in *Lesoochranárske zoskupenie*, the ECJ held that Article 9(3) of the Aarhus Convention did not have direct effect. In light of that provision, it was for national law to lay down the precise criteria under which individuals could exercise the procedural rights provided for. However, the ECJ nuanced that negative answer to the referring court's question by reference to the principles of equivalence and effectiveness. It observed that the provision in question, although drafted in broad terms, was intended to ensure effective environmental protection and that, in accordance with well-established case-law,<sup>235</sup> the detailed procedural rules, to be laid down by national law, governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it impossible in practice or excessively difficult to exercise rights conferred by EU law (principle of effectiveness).

Therefore, if the effective protection of EU environmental law was not to be undermined, it was inconceivable that the relevant provision of the Aarhus Convention should be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.<sup>236</sup> It was for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of that provision and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation, such as the applicant, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.<sup>237</sup>

It follows from the foregoing that, in the fields covered by EU environmental law, the principle of effective judicial protection must be interpreted in accordance with the Aarhus Convention: if national rules on standing do not comply with Article 9(3) of that Convention, effective judicial protection of the rights conferred by EU environmental law is not achieved. Accordingly, EU law mandates national courts to interpret, to the fullest extent possible, national rules on standing so as to meet the objectives pursued by Article 9(3) of the Aarhus Convention.

There are three direct implications that flow from the ruling of the ECJ in *Lesoochranárske zoskupenie*. First, that case demonstrates that the ECJ is willing to endorse the 'new approach' to access to justice in environmental matters which the Aarhus Convention seeks to promote. Second, the approach followed by the ECJ in *Lesoochranárske zoskupenie* is somewhat different from that followed in other cases where national courts are to interpret national law in light of an international agreement. For example, in *HK Danmark*, the ECJ ruled that 'the primacy of international agreements concluded by the [EU] over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements'.<sup>238</sup> For the case at hand, this meant that Directive 2000/78<sup>239</sup> and national law implementing that directive had to be interpreted in light of the United Nations Convention on the Rights of Persons with Disabilities. By contrast, in *Lesoochranárske zoskupenie*, it appears that the duty of consistent interpretation is also grounded in

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<sup>233</sup> Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para. 5. See also Case C-286/02 *Bellio F.lli* [2004] ECR I-3465, para. 33.

<sup>234</sup> Case C-341/95 *Bettati* [1998] ECR I-4355, para. 20, and Case C-306/05 *SGAE* [2006] ECR I-11519, para. 35.

<sup>235</sup> See Case C-268/06 *Impact* [2008] ECR I-2483, paras 44 and 45.

<sup>236</sup> Case C-240/09 *Lesoochranárske zoskupenie*, judgment of 8 March 2011, not yet reported, para. 49.

<sup>237</sup> *Ibid*, para. 51.

<sup>238</sup> *HK Danmark*, above n 231, para. 29.

<sup>239</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.



the principle of effective judicial protection. As a result, the double legal basis in which the ECJ grounded that duty aims to enhance effective enforcement of EU environmental law. This means that Article 9(3) cannot be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.<sup>240</sup> This also means that, in so far as international agreements – which form an integral part of the EU legal system – contribute to offering more extensive protection of rights conferred by EU environmental law, those international agreements may influence the way in which the ECJ interprets general principles of EU law.<sup>241</sup> Put simply, in the field of EU environmental law, the principle of effective judicial protection and Article 9(3) of the Aarhus Convention are in a mutually reinforcing relationship. Last, but not least, the ruling of the ECJ in *Lesoochranárske zoskupenie* limits the adverse repercussions on effective environmental protection which are brought about by the political impasse in the adoption of the EU legislation implementing Article 9(3) of the Aarhus Convention. Until then, the ruling of the ECJ in *Lesoochranárske zoskupenie* may help environmental NGOs to gain access to national courts.

## **B. The Interpretation of EU Law in Light of the Constitutional Traditions Common to the Member States**

### 1. The Importance of Comparative Law

Article 19 TEU provides the constitutional authority for the ECJ to engage in a comparative study of the laws of the Member States.<sup>242</sup> For example, in *Brasserie du Pêcheur and Factortame*,<sup>243</sup> the ECJ ruled that ‘it is for the [ECJ], in pursuance of the task conferred on it by Article [19 TEU] of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the [EU] legal system and, where necessary, *general principles common to the legal systems of the Member States*’.<sup>244</sup>

Apart from Article 19 TEU, two additional Treaty provisions explicitly refer to the laws of the Member States, namely Article 6(3) TEU and Article 340(2) TEU. Article 6(3) TEU mandates the EU to respect ‘[f]undamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, [which] shall constitute general principles of the Union’s law’. That Treaty provision is no less than an explicit endorsement by the authors of the Maastricht Treaty of the case law of the ECJ in the field of fundamental rights protection.

Regarding fundamental rights, it is worth looking at the ruling of the ECJ in *Hauer*,<sup>245</sup> that may be considered a paradigmatic example of a case where the ECJ adopted a comparative law method. In that case, Regulation No 116/76 imposed a prohibition for a period of three years on all new planting

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<sup>240</sup> *Lesoochranárske zoskupenie*, above n 236, para. 50.

<sup>241</sup> From a methodological standpoint, the rationale of the ECJ in *Lesoochranárske zoskupenie* finds support in the Charter. See Articles 52(3) and 53 of the Charter.

<sup>242</sup> For a study of the comparative law method followed by the ECJ, P. Pescatore, ‘Le recours, dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison des droits des États membres’ (1980) *Revue internationale de droit comparé* 352, and K. Lenaerts, ‘Interlocking Legal Orders in the European Union and Comparative Law’ (2003) 52 *International and Comparative Law Quarterly* 873.

<sup>243</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029.

<sup>244</sup> *Ibid.*, para. 27 (emphasis added).

<sup>245</sup> *Hauer*, above n 197.

of vines without any distinction according to the quality of the land concerned.<sup>246</sup> For the case at hand, this meant that, until the expiry of that three-year period, Mrs Hauer could not undertake the new planting of vines on the land she owned, even if that land were recognized as suitable for wine-growing under German law. This was, in her view, incompatible with her right to property as protected under the German Grundgesetz. Hence, the referring court asked the ECJ whether the prohibitions laid down in Regulation No 116/76 were compatible with the right to property. At the outset, the ECJ recalled that fundamental rights, such as the right to property, form an integral part of the general principles of EU law, the observance of which it ensures. Next, it found that Article 1 of the First Protocol to the ECHR (the ‘First Protocol’) accepts, in principle, the legality of restrictions on the use of property, in so far as those restrictions are deemed ‘necessary’ by a State for the protection of the ‘general interest’.<sup>247</sup> However, since the First Protocol did not by itself offer a sufficiently precise answer to the question referred by the national court, the ECJ noted that it was ‘necessary to consider also the indications provided by the constitutional rules and practices of the nine Member States’.<sup>248</sup> First, it observed that national constitutions allow the legislature to limit the use of property in accordance with the general interest. For example, ‘some constitutions refer to the obligations arising out of the ownership of property [<sup>249</sup>], to its social function [<sup>250</sup>] to the subordination of its use to the requirements of the common good [<sup>251</sup>] or of social justice [<sup>252</sup>],’<sup>253</sup> Second, in all the Member States, various legislative acts have given concrete expression to that social function of the right to property. Third, the ECJ observed that ‘all the wine-producing countries of the Community have restrictive legislation, albeit of differing severity, concerning the planting of vines, the selection of varieties and the methods of cultivation [...] In none of the countries concerned are those provisions considered to be incompatible in principle with the regard due to the right to property.’<sup>254</sup> Given that the restrictions laid down in Regulation No 1162/76 were known and accepted as lawful, in identical or similar forms, in the constitutional structure of all the Member States, the ECJ held that such restrictions comply, in principle, with the right to property understood as a general principle of EU law.<sup>255</sup>

Furthermore, by stating that the principle of non-contractual liability of the Union is to be developed ‘in accordance with *the general principles common to the laws of the Member States*’,<sup>256</sup> Article 340

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<sup>246</sup> Council Regulation (EEC) No 1162/76 of 17 May 1976 on measures designed to adjust wine-growing potential to market requirements, [1976] OJ L 135/32 (no longer in force).

<sup>247</sup> *Hauer*, above n 197, para. 19.

<sup>248</sup> *Ibid.*, para. 20.

<sup>249</sup> *Ibid.*, referring to the German Grundgesetz, Article 14 (2), first sentence.

<sup>250</sup> *Ibid.*, referring to the Italian constitution, Article 42 (2).

<sup>251</sup> *Ibid.*, referring to the German Grundgesetz, Article 14 (2), second sentence, and the Irish constitution, Article 43.2.2.

<sup>252</sup> *Ibid.*, referring to the Irish constitution, Article 43.2.1.

<sup>253</sup> *Hauer*, above n 197, para. 20.

<sup>254</sup> *Ibid.*, para. 21.

<sup>255</sup> However, for the ECJ, that determination did not provide a full answer to the question referred by the national court. In addition, the ECJ had to examine whether the restrictions introduced by Regulation No 1162/76 in fact corresponded to the objectives of general interest pursued by the Community or whether, with regard to the aim pursued, they constituted a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property. In this regard, the ECJ found that Regulation No 1162/76 pursued a double objective, namely, on the one hand, to establish a lasting balance on the wine market at a price level which is profitable for producers and fair to consumers and, secondly, to obtain an improvement in the quality of wines marketed. Next, the ECJ held that the restrictions introduced by Regulation No 1162/76 were neither a disproportionate nor intolerable interference with the rights of the owner, given that, despite the fact that that Regulation did not make any distinction according to the quality of the land concerned, they were of a temporary nature and designed to deal immediately with a conjunctural situation characterized by surpluses, whilst at the same time preparing permanent structural measures. *Ibid.*, paras 27 et seq.

<sup>256</sup> See Article 340(2) TFEU (emphasis added).

TFEU clearly indicates that the authors of the Treaties envisaged recourse to a comparative law as a means of filling lacunae in the legal order of the EU. This point is illustrated by *FIAMM*,<sup>257</sup> in which the ECJ held that there was no regime governing non-contractual EU liability in the absence of an unlawful act committed by the EU institutions. The ECJ reached that determination by engaging in a comparative examination of the Member States' legal systems from which it deduced that there was no convergence of those legal systems 'as regards the possible existence of a principle of liability in the case of a lawful act or omission of the public authorities, in particular where it is of a legislative nature'.<sup>258</sup>

It follows that, when it comes to the discovery and development of general principles of EU law, the ECJ must take account of the legal systems of the Member States, notably their national constitutions.<sup>259</sup> That is so because a comparative law methodology reinforces the legitimacy of the ECJ.

First, by embarking on a comparative analysis of the laws of the Member States, the ECJ favours a judicial dialogue with national courts. If the ECJ decides to depart from the solution used by a particular national legal system, it must explain why that solution does not fit well with the needs of the EU or, as the case may be, why the solution favoured by the legal systems of the other Member States is better suited to the problem with which EU law is confronted.

Second, where the solution adopted by the ECJ mirrors that set out in the laws of the Member States, the effectiveness of EU law is better achieved.<sup>260</sup> In such a case, national courts and authorities will fully agree with the approach embraced by the ECJ and will have no difficulties in following it.

Third, the use of the comparative law method gives rise to a constructive interaction between the legal order of the EU and those of its Member States. Initially, the dialogue between the ECJ and national courts may serve to highlight the advantages and disadvantages of the different solutions adopted at national level, thus enabling the ECJ to choose the approach that seems most appropriate. Subsequently, by highlighting, in appropriate cases, the fact that the approach adopted by the ECJ has not achieved the results that it had expected, national courts may invite the ECJ to reconsider its approach. This illustrates how the comparative law method and judicial dialogue may go hand-in-hand.

Fourth, in *Omega and Sayn-Wittgenstein*,<sup>261</sup> the ECJ held that 'it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State'.<sup>262</sup> In accordance with Article 4(2) TEU, the EU is to respect the national identities of its Member States.<sup>263</sup> The comparative law method takes due account

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<sup>257</sup> Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others v Council and Commission* [2008] ECR I-6513.

<sup>258</sup> *Ibid.*, para. 175. The EGC had, however, taken a different view, by recognising the existence of such a principle. See Case T-69/00 *FIAMM and FIAMM Technologies v Council and Commission* [2005] ECR II-5393, paras 157-160. See also the Opinion of AG Poiares Maduro in *FIAMM and Others v Council and Commission*, above n 257, paras 54 et seq.

<sup>259</sup> K. Lenaerts and J.A. Gutiérrez-Fons, above n 181, at 1632 et seq.

<sup>260</sup> K. Lenaerts, above n 242, at 880.

<sup>261</sup> Case C-36/02 *Omega* [2004] ECR I-9609 and C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693.

<sup>262</sup> *Omega*, above n 261, paras 37 and 38, and *Sayn-Wittgenstein*, above n 261, para. 91.

<sup>263</sup> In this regard, the ECJ has held that, for the purposes of Article 4(2) TEU, the expression 'national identity' includes, for example, 'the status of the State as a Republic' (see *Sayn-Wittgenstein*, above n 261, para. 92) and 'the protection of a State's official national language' (see Case C-391/09 *Runevič-Vardyn and Wardyn*, judgment of 12 May 2011, not yet reported, para. 86; Case C-51/08 *Commission v Luxembourg*, judgment of 24 May 2011, not yet reported, para. 124 and Case C-202/11 *Las*, judgment of 16 April 2013, not yet reported, para. 86). However, in Case C-393/10 *O'Brien*,

of that constitutional mandate as it promotes ‘value diversity’. Such method does not prevent the level of protection of a fundamental right or that of a general interest from varying from one Member State to another, provided that, in the absence of EU harmonising measures, national measures that derogate from fundamental freedoms do not adversely affect the essential interests of the EU.<sup>264</sup>

Furthermore, apart from the fact that the comparative law method provides an analytical support for the discovery and development of general principles of EU law, it may also be relied upon with a view to clarifying specific provisions of EU law. In other words, it provides a good framework for the ECJ to undertake ‘federal common law-making’.<sup>265</sup> For instance, in *Reed*,<sup>266</sup> the ECJ was called upon to interpret the term ‘spouse’ for the purposes of Article 10 of Regulation No 1612/68.<sup>267</sup> In particular, the referring court asked whether Article 10 of Regulation No 1612/68 could be interpreted as meaning that a person who has a stable relationship with a worker who is a national of another Member State but is employed and resides in the host Member State could be treated as a ‘spouse’ for the purpose of that provision. The ECJ replied in the negative. As the starting point of its reasoning, the ECJ followed the comparative law method: it observed that, since Regulation No 1612/68 applied ‘in all of the Member States, [...] any interpretation of a legal term on the basis of social developments must take into account the situation in the whole Community, not merely in one Member State’.<sup>268</sup> It found that, at the material time, there was no consensus among the Member States on whether unmarried companions should be treated as spouses. Accordingly, ‘[i]n the absence of any indication of a general social development which would justify a broad construction, and in the absence of any indication to the contrary in the regulation, it must be held that the term “spouse” in Article 10 of the Regulation refers to a marital relationship only’.<sup>269</sup> Fifteen years later, in *D and Sweden v Council*,<sup>270</sup> the ECJ refused to interpret the expressions ‘married official’ set out in the Staff Regulations as meaning that the situation of a married official was comparable to the same-sex partnerships recognised by some Member States. In so doing, it held that ‘[i]t is not in question that, according to the definition generally accepted by the Member States, the term “marriage” means a union between two persons of the opposite sex’.<sup>271</sup> However, since those two judgments were delivered, the legal and

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judgment of 1 March 2012, not yet reported, para. 49, the ECJ held that the fact of extending to part-time judges remunerated on a daily fee-paid basis the scope of the principle of equal treatment, as given expression in secondary EU legislation, and the fact of protecting them against discrimination as compared with full-time workers could not have any adverse effect on the national identity of the Member State concerned. Moreover, national measures which, whilst aiming to protect a Member State’s identity, derogate from EU law must be proportionate to that objective. This means that the national identity of the Member States is not absolute but must be weighed against the requirements laid down by EU law. See, in this regard, *Las*, above, paras 29 et seq. For a pluralistic reading of Article 4(2) TEU, see A. von Bogdandy and S. Schill, ‘Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty’ (2011) 48 *Common Market Law Review* 1417, at 1419 (who argue that Article 4(2) TEU ‘this provision endorses a pluralistic vision of the relationship between EU law and domestic constitutional law’). For a different reading of that Treaty provision, see G. van der Schyff, ‘The Constitutional Relationship between the European Union and its Member States: The Role of National Identity in Article 4(2) TEU’ (2012) 37 *European Law Review* 563, at 584 (who argues that Article 4(2) TEU does not ‘qualify the primacy of EU law’).

<sup>264</sup> K. Lenaerts and J.A. Gutiérrez-Fons, above n 181, at 1632 et seq. See, in relation to Article 53 of the Charter, Case C-399/11 *Melloni*, judgment of 26 February 2013, not yet reported, paras 60 and 61 (where the ECJ ruled that ‘Member States are free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the [ECJ], and the primacy, unity and effectiveness of EU law are not thereby compromised’). See K. Lenaerts and J.A. Gutiérrez-Fons, above n 28.

<sup>265</sup> K. Lenaerts and K. Gutman, “‘Federal Common Law’ in the European Union: A Comparative Perspective from the United States” (2006) 54 *American Journal of Comparative Law* 55.

<sup>266</sup> C-59/85 *Netherlands v Reed* [1986] ECR 1283.

<sup>267</sup> Regulation No 1612/68, above n 157.

<sup>268</sup> *Reed*, above n 268, para.13.

<sup>269</sup> *Ibid.*, para. 15.

<sup>270</sup> Joined Cases C-122/99 P and C-125/99 P *D and Sweden v Council* [2001] ECR I-4319.

<sup>271</sup> *Ibid.*, para. 34.

social context has evolved at both national and EU level. For example, according to the most recent Staff Regulations, EU officials in a non-marital relationship recognised by a Member State as a stable partnership who do not have legal access to marriage should be granted the same range of benefits as married couples. At national level, the ECJ has held that, in so far as national law treats marriage and same-sex partnerships alike, any discriminatory treatment regarding benefits deriving from an employment relationship would be contrary to the principle of non-discrimination on grounds of sexual orientation as given expression in Directive 2000/78.<sup>272</sup> For example, if under national law marriage and same-sex partnerships stand on an equal footing, a national measure limiting survivors' benefits under a compulsory occupational pensions scheme to surviving spouses would run counter to the principle of equal treatment. Accordingly, it will be interesting to see how the ECJ will interpret the concept of 'spouse' for the purposes of the relevant secondary EU law, notably Directive 2004/38.<sup>273</sup>

## 2. The Evaluative Approach

The case law of the ECJ shows that there is a strong correlation between the degree of convergence existing among the different national legal systems and the deference shown to national law by the ECJ.<sup>274</sup> The more convergence there is among the legal orders of the Member States, the more the ECJ will tend to follow in their footsteps.<sup>275</sup> Where convergence is not total but a particular approach is common to a large majority of national legal systems, then the ECJ will normally follow that approach, adapting and developing it to fit within the EU context.<sup>276</sup> A good example is provided by the ECJ's case law on the general principle of State liability in damages.<sup>277</sup> By contrast, where there are important divergences among national legal systems, the ECJ will be careful before adopting an 'EU' solution.<sup>278</sup> However, the existence of divergences among national legal systems may not *automatically* rule out the incorporation, into the EU legal order, of a legal principle which is recognized in only a minority of Member States.

As applied by the ECJ, the comparative law method is not tantamount to finding the 'lowest common denominator'. As AG Lagrange observed in *Hoogovens v High Authority*, 'the case law of the [ECJ], in so far as it invokes national laws (as it does to a large extent) to define the rules of law relating to the application of the Treaty, is not content to draw on more or less arithmetical "common denominators" between the different national solutions, but chooses from each of the Member States those solutions which, having regard to the objects of the Treaty, appear to it to be the best or, if one may use the expression, the most progressive. That is the spirit, moreover, which has guided the [ECJ] hitherto.'<sup>279</sup> It follows from the comments of AG Lagrange that the comparative law method and

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<sup>272</sup> Case C-267/06 *Maruko* [2008] E.C.R. I-1757, and Case C-147/08 *Römer*, judgment of 10 May 2011, not yet reported.

<sup>273</sup> See Article 2(2)(a) of Directive 2004/38 which does not provide a definition of the term 'spouse'. See, in this regard, K. Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice' (2009-2010) 39 *Fordham International Law Journal* 1338, at 1355 et seq.

<sup>274</sup> K. Lenaerts and J.A. Gutiérrez-Fons, above n 181, at 1633.

<sup>275</sup> K. Lenaerts, above n 242, at 886.

<sup>276</sup> See, regarding the recognition of the right of property as a general principle of EU law, see *Hauer*, above n 197. Regarding the right of access to documents, Case C-353/99 P *Hautala* [2001] ECR I-9565 and Case C-58/94 *Netherlands v Council* [1996] ECR I-2169. Regarding the retroactive application of a more lenient criminal provision, *Berlusconi and Others*, above n 40.

<sup>277</sup> *Brasserie du Pêcheur and Factortame*, above n 243, and Case C-224/01 *Köbler* [2003] ECR I-10239.

<sup>278</sup> Case C-249/96 *Grant* [1998] ECR I-621.

<sup>279</sup> See Opinion of AG Lagrange in Case 14/61 *Hoogovens v High Authority* [1962] ECR 253, at 283-284. See also Opinion of AG Roemer in Case 5/71 *Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975, especially at 989. More recently, see

teleological interpretation are deeply intertwined. With a view to ascertaining the different interpretative options available in national legal systems, the ECJ will at first have recourse to the comparative law method in order to identify them. Next, the ECJ will choose the option which is best suited to the attainment of the objectives pursued by the EU.

The way in which the evaluative approach operates may be illustrated by contrasting *Mangold*<sup>280</sup> with *Akzo*.<sup>281</sup> In the first case, the ECJ recognised, for the first time, that the principle of non-discrimination on grounds of age constitutes a general principle of EU law. That was so despite the fact that only two Member States had, when *Mangold* was delivered, conferred constitutional status on that principle. Conversely, in *Akzo*, by opting for the approach followed in the majority of Member States, the ECJ held that legal professional privilege could not cover exchanges within a company or group with in-house lawyers.<sup>282</sup> Logically, the question is how those two different outcomes may be reconciled. In this regard, the Opinion of AG Kokott in *Akzo* is revealing. In *Mangold*, she observed that '[the] principle [on non-discrimination on grounds of age] was consistent with a specific task incumbent on the [EU] in combating discrimination (Article 19 TFEU) and had also been given specific expression by the [EU] legislature in the form of a directive'<sup>283</sup>, namely Directive 2000/78.<sup>284</sup> In addition, that principle mirrored a recent trend in the protection of fundamental rights at EU level, which was given concrete expression on the solemn proclamation of the Charter.<sup>285</sup> Accordingly, for the Advocate General, even if a principle is only recognised in a minority of Member States, it may still constitute a general principle of EU law in so far as it reflects a mission with which the authors of the Treaties have entrusted the EU, or mirrors a trend in the constitutional law of the Member States. However, AG Kokott found that those two elements were missing in *Akzo*. She thus posited that '[t]he extension of the protection afforded by legal professional privilege to internal company or group communications with enrolled in-house lawyers is not justified on grounds of any special characteristics exhibited by the tasks and activities of the European Commission as competition authority [<sup>286</sup>] and it does not currently constitute a growing trend among the Member States, be it in the area of competition law or in any other field'.<sup>287</sup>

The evaluative approach followed by the ECJ favours a dynamic interpretation of EU law. Where societal change brings about a high degree of convergence in the laws of the Member States, the evaluative approach enables the EU legal order to cope with those changes, thereby aligning the EU's legal culture with those of its Member States. Drawing on the US theory of democratic constitutionalism, Petkova argues that, although consensus 'is only a complementary element to judicial reasoning and is thus not an independent logical structure on which the courts rely', it 'provides the [ECJ] with a link to popular opinion and the empirical realities of the extrajudicial

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the Opinion of AG Poiares Maduro in *FIAMM and Others v Council and Commission*, above n 257, paras 55 and 56, and the Opinion of AG Trstenjak in Case C-212/08 *Dominguez*, judgment of 24 January 2012, not yet reported, para. 94.

<sup>280</sup> Case C-144/04 *Mangold* [2005] ECR I-9981.

<sup>281</sup> Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals v Commission and Others* [2010] ECR I-8301

<sup>282</sup> *Ibid.*, para. 44. Previously, in Case 155/79 *AM & S Europe v Commission* [1982] ECR 1575, the ECJ, taking account of the common criteria and similar circumstances existing at the time in the national laws of the Member States, held, in paragraph 21 of that judgment, that the confidentiality of written communications between lawyers and clients should be protected at Community level.

<sup>283</sup> Opinion of AG Kokott in *Akzo*, above n 280, para. 96.

<sup>284</sup> Directive 2000/78, above n 239.

<sup>285</sup> Opinion of AG Kokott in *Akzo*, above n 280, para. 96.

<sup>286</sup> She also observed that, in the course of antitrust proceedings, the powers of the Commission are similar to those of national competition authorities. Hence, 'if the vast majority of the Member States have no need to deny the competition authorities access to communications between an undertaking and its enrolled in-house lawyers, it is safe to assume that there is no compelling need to extend the scope of legal professional privilege at European Union level either'. *Ibid.*, para. 99.

<sup>287</sup> *Ibid.*, para. 98.

environment’.<sup>288</sup> This helps EU citizens to identify themselves with the values promoted by the EU. On the other hand, the evaluative approach also enables the EU legal order to preserve its own constitutional autonomy. As Walker notes, whilst the ‘migration of constitutional ideas’ may facilitate a mutual understanding among different levels of governance, it is important to determine the way in which such migration is to take place. Otherwise, there is a risk that a constitutional idea that originated at national level may fail to work in practice or that it may have unintended consequences at EU level.<sup>289</sup> In addition, the evaluative approach may also give rise to a ‘spill over effect’ by triggering a public debate in the Member States in which the solution advocated by the ECJ is not to be found in national law.

### 3. The Explanations Relating to the Charter

Unlike the Charter itself, the explanations relating to it – which were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter – ‘do not as such have the status of law’. However, ‘they are a valuable tool of interpretation intended to clarify the provisions of the Charter’.<sup>290</sup>

The question is then what interpretative value one must give to the explanations relating to the Charter. Are they a manifestation of the ‘authentic interpretation’ of the Charter or merely ‘certified *travaux préparatoires*’?

The difference in value between those two options is by no means without significance. Given that Article 6(3) TUE provides that the explanations relating to the Charter ‘set out the sources of [the] provisions [thereof]’ (as opposed to interpreting the Charter), Ziller opines that those explanations are a compilation of *travaux préparatoires*, but, technically speaking, they are not a manifestation of the ‘authentic interpretation of the Charter’.<sup>291</sup> Stated differently, the explanations relating to the Charter do not interpret the provisions thereof but limit themselves to indicating the sources in the light of which the rights and freedoms recognised by the Charter must be interpreted.<sup>292</sup>

It appears that the explanations relating to the Charter have a higher interpretative value than that of *travaux préparatoires*. Although not legally binding, one cannot ignore the fact that both the authors of the Treaty of Lisbon and those of the Charter insisted on the importance of those explanations. Thus, it would be very difficult for the ECJ to interpret the provisions of the Charter in a way that conflicts with those explanations. Otherwise, the ECJ would be engaging in judicial activism. Only where the explanations relating to the Charter provide no (complete) answer to the questions of interpretation with which the ECJ is confronted may the latter have recourse to other methods of interpretation.

To date, the ECJ has expressly referred to the explanations relating to the Charter on eight occasions.<sup>293</sup> In *DEB*, the ECJ referred, for the first time, to those explanations.<sup>294</sup> It did so with a view

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<sup>288</sup> B. Petkova, ‘The Notion of Consensus as a Route to Democratic Adjudication?’ (2011-2012) 14 *Cambridge Yearbook of European Legal Studies* 663, at 693 and 695.

<sup>289</sup> N. Walker, ‘The Migration of Constitutional Ideas and the Migration of the Constitutional Idea: The Case of the EU’ (2005) *EUI Working Papers Law*, No 4. Available at : <http://cadmus.eui.eu/bitstream/handle/1814/3324/law05-04.pdf>

<sup>290</sup> See the explanations relating to the Charter, above n 29 , at 17.

<sup>291</sup> J. Ziller, ‘Le fabuleux destin des Explications relatives à la Charte des droits fondamentaux de l’Union européenne’, in *Chemins d’Europe: Mélanges en l’honneur de Jean-Paul Jacqué* (Paris, Dalloz, 2010) 765.

<sup>292</sup> *Ibid.*, at 778.

<sup>293</sup> See Case C-279/09 *DEB* [2010] ECR I-13849, para. 32; C-386/10 P *Chalkor v Commission*, judgment of 8 December 2011, not yet reported, para. 37; C-619/10 *Trade Agency*, judgment of 6 September 2012, not yet reported, para. 52; C-283/11 *Sky Österreich*, judgment of 22 January 2013, not yet reported, para. 42; C-617/10 *Åkerberg Fransson*,

to interpreting Article 47 of the Charter which enshrines the principle of effective judicial protection.<sup>295</sup> In this regard, it held that in light of those explanations, ‘the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the ECHR’. This meant, in accordance with Article 52(3) of the Charter, that that provision of the Charter had to be interpreted in the light of the case-law of the ECtHR relating to Article 6(1) of the ECHR. That was precisely what the ECJ did in *DEB* when determining whether Article 47 of the Charter must be interpreted as meaning that, in the context of a procedure for pursuing a claim, brought by a legal person, seeking to establish State liability under EU law, the principle of effective judicial protection precludes a national rule under which the pursuit of a claim before the courts is subject to the making of an advance payment in respect of costs and under which a legal person does not qualify for legal aid even though it is unable to make that advance payment. Drawing on the case law of the ECtHR,<sup>296</sup> the ECJ found that ‘the grant of legal aid to legal persons is not in principle impossible, but must be assessed in the light of the applicable rules and the situation of the company concerned’.<sup>297</sup> In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right, whether they pursue a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which the national rule seeks to achieve.<sup>298</sup> The ECJ further held that, in making that assessment, the national court must take into consideration the subject-matter of the litigation, whether the applicant has a reasonable prospect of success, the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant’s capacity to represent himself effectively. In order to assess the proportionality of the national rule, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts. With regard, more specifically, to legal persons, the national court may take into consideration, *inter alia*, the form of the legal person in question and whether it is profit-making or non-profit-making, the financial capacity of the partners or shareholders and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.<sup>299</sup>

Apart from Article 47 of the Charter,<sup>300</sup> the ECJ has also made explicit use of the explanations relating to Articles 16, 24 and 51 of the Charter. For example, in *Sky Österreich*, the referring court asked the ECJ to examine the validity of Article 15(6) of Directive 2010/13 in light of Articles 16 and 17 of the Charter.<sup>301</sup> In other words, it asked whether that provision gave rise to an infringement of the fundamental rights of the holder of exclusive broadcasting rights, namely the freedom to conduct a business and the right to property, since the holder of those rights is required to authorise any other broadcaster, established in the EU, to make short news reports, without being able to seek

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judgment of 26 February 2013, not yet reported, para. 20; Case C-334/12 *RX-II Arango Jaramillo e.a. v EIB*, judgment of 28 February 2013, not yet reported, para. 42; Case C-14/13 *Cholakova*, order of 6 June 2013, not yet reported, para. 29; Case C-648/11 *MA e.a.*, judgment of 6 June 2013, not yet reported, para. 3.

<sup>294</sup> *DEB*, above n 293.

<sup>295</sup> *Ibid.*, para. 32.

<sup>296</sup> See Eur. Court H.R., judgment in *Del Sol v. France* of 26 February 2002, § 26; decision in *Puscasu v. Germany* of 29 September 2009, p. 6, last paragraph; judgment in *Pedro Ramos v. Switzerland* of 14 October 2010, § 49; Eur. Court H.R., decision in *VP Diffusion Sarl v. France* of 26 August 2008, pp. 4, 5 and 7, and Eur. Court H.R., decision in *CMVMC O’Limov. Spain* of 24 November 2009, paragraph 26).

<sup>297</sup> *Ibid.*, para. 52

<sup>298</sup> *Ibid.*, paras 59 and 60.

<sup>299</sup> *Ibid.*, paras 61 and 62.

<sup>300</sup> *Chalkor v Commission*, above n 293; *Trade Agency*, above n 293; *Arango Jaramillo e.a. v EIB*, above n 293.

<sup>301</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, [2010] OJ L 95/1.



compensation exceeding the additional costs directly incurred in providing access to the signal. For the case at hand, this meant that Sky, which by virtue of a contract concluded on 21 August 2009 (the ‘contract’) had acquired the exclusive right to broadcast Europa League matches in the 2009/10 and 2010/11 seasons on Austrian territory, was required to grant ORF the right to produce short news reports, but was not entitled to demand remuneration greater than the additional costs directly incurred in providing access to the satellite signal, which were non-existent in this case. As to the right to property, the ECJ pointed out that the content of Article 15(5) of Directive 2010/13 was already contained in Article 3k of Directive 89/552, as amended by Directive 2007/65 which came into force on 19 December 2007. Since Sky concluded the contract after the entry into force of Directive 2007/65, the ECJ found that this contract could not ‘confer an established legal position on a broadcaster, [such as Sky,] protected by Article 17(1) of the Charter, enabling it to exercise its broadcasting right autonomously [...] in the sense that it could demand compensation exceeding the additional costs directly incurred in providing access to the signal, contrary to the mandatory provisions of Directive 2007/65’.<sup>302</sup> Next, the ECJ relied on the explanations relating to Article 16 of the Charter with a view to determining the extent of the particular freedoms covered by the overall freedom to conduct a business. In this regard, it found that ‘Article 16 of the Charter covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition’.<sup>303</sup> The freedom of contract further includes the freedom to choose with whom to do business and to determine the price of a service. Since Article 15(6) of Directive 2010/13 obliges the holder of exclusive broadcasting rights to grant access to other broadcasters wishing to make short news reports and prevents such holder from seeking compensation beyond the additional costs directly incurred in providing access to the signal, the ECJ reasoned that ‘Article 15(6) amounts to interference with the freedom to conduct a business of holders of exclusive broadcasting rights’.<sup>304</sup> ‘However’, the ECJ wrote, ‘the freedom to conduct a business is not absolute, but must be viewed in relation to its social function’.<sup>305</sup> As the explanations relating to Article 16 state themselves, limitations to that freedom are allowed, provided that they complied with Article 52 of the Charter, i.e. they must ‘be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the [EU] or the need to protect the rights and freedoms of others’. First, the ECJ observed that Article 15(6) of Directive 2010/13 does not adversely affect the essence of the freedom to conduct business, as the holder exclusive broadcasting rights can still make use of them or grant them to any other economic operator on a contractual basis.<sup>306</sup> Second, regarding the principle of proportionality, Article 15(6) of Directive 2010/13 pursues a legitimate objective, namely the safeguarding of the freedoms protected under Article 11 of the Charter, which covers the freedom to receive information and the promotion of pluralism in the European media. Article 15(6) of Directive 2010/13 pursues that aim in an appropriate fashion, since it allows any broadcaster, irrespective of its commercial power and financial capacity, to make short news reports.<sup>307</sup> The ECJ also found that there was not a less restrictive means of attaining the objective pursued by Article 15(6) of Directive 2010/13 as effectively as the application of that provision. If the holder of broadcasting rights were entitled to ask for compensation exceeding the costs directly incurred in providing access to the signal, that would ‘deter or even prevent certain broadcasters from requesting access for the purpose of making short news reports and thus considerably restrict the access of the general public to the

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<sup>302</sup> *Sky Österreich*, above n 293, paras 38-39.

<sup>303</sup> *Ibid.*, para. 42.

<sup>304</sup> *Ibid.*, para. 44.

<sup>305</sup> *Ibid.*, para. 45 (referring to Joined Cases C-184/02 and C-223/02 *Spain and Finland v Parliament and Council* [2004] ECR I-7789, paras 51 and 52, and Case C-544/10 *Deutsches Weintor*, judgment of 6 September 2012, para. 54, not yet reported).

<sup>306</sup> *Sky Österreich*, above n 293, para. 49.

<sup>307</sup> *Ibid.*, para. 53.

information'.<sup>308</sup> Finally, the ECJ acknowledged that there is a conflict of fundamental rights between the freedom to conduct a business, on the one hand, and the freedom of citizens of the [EU] to receive information and the freedom and pluralism of the media, on the other.<sup>309</sup> In this regard, the ECJ noted that in adopting Directive 2010/13, the EU legislator had sought to reconcile the requirements of the protection of those different rights and freedoms and to achieve a fair balance between them.<sup>310</sup> That is why the right of access of broadcasters wishing to make short news reports is limited to general news programmes. Thus, Directive 2010/13 rules out the use of extracts from the signal in programmes serving entertainment purposes. In addition, Article 15(6) of Directive 2010/13 limits the length of such extracts to a maximum of ninety seconds and requires broadcasters to identify the source of those extracts. Accordingly, since the EU legislator had struck the right balance between those two fundamental rights, the ECJ held that there was no factor that was liable to affect the validity of Article 15(6) of Directive 2010/13.

Moreover, in *MA e.a.*, the explanations relating to the Charter also played an important role in the ECJ's reasoning. In that case, the ECJ was called upon to interpret Article 6 of Regulation No 343/2003 (the 'Dublin Regulation').<sup>311</sup> In particular, the referring court asked whether the second paragraph of Article 6 of the Dublin Regulation had to be interpreted as meaning that, where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State to be designated the 'Member State responsible' is the one where that minor lodged his first application, or the one in which the minor is present after having lodged his most recent asylum application there. At the outset, the ECJ found that a literal interpretation of the second paragraph of Article 6 of the Dublin Regulation did not provide a clear answer as to which of those two options had to be followed.<sup>312</sup> Accordingly, the ECJ decided to interpret that provision systematically and teleologically. Unlike Articles 5(2) and 13 of the Dublin Regulation,<sup>313</sup> the second paragraph of Article 6 thereof contains neither the expression 'first lodged his application' nor the expression 'the first Member State with which the application for asylum was lodged'. Had the authors of that Regulation intended, for the purposes of the second paragraph of Article 6 of the Dublin Regulation, to designate the 'first Member State' as the Member State responsible for examining the asylum application, they would have used the same expression as in Article 13 thereof.<sup>314</sup> In addition, when looking at the objectives pursued by the Dublin Regulation, the ECJ reasoned that all the provisions of that Regulation had to be interpreted in light of the Charter, notably Article 24 thereof.<sup>315</sup> Paraphrasing the explanations relating to that provision of the Charter, the ECJ held that 'the child's best interests must [...] be a primary

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<sup>308</sup> *Ibid.*, para. 55.

<sup>309</sup> *Ibid.*, para. 59.

<sup>310</sup> *Ibid.*, para. 60.

<sup>311</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (the 'Dublin Regulation'), [2003] OJ L50/1. Article 6 of that regulation provides:

'Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor.

In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum.'

<sup>312</sup> *MA e.a.*, above n 293, para. 49.

<sup>313</sup> Article 5(2) of the Dublin Regulation reads as follows: '[t]he Member State responsible in accordance with the criteria shall be determined on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State.' For its part, Article 13 of the same regulation provides that '[w]here no Member State responsible for examining the application for asylum can be designated on the basis of the criteria listed in this Regulation, the first Member State with which the application for asylum was lodged shall be responsible for examining it.'

<sup>314</sup> *Ibid.*, para. 52.

<sup>315</sup> *Ibid.*, para. 56 and 57.

consideration in all decisions adopted by the Member States on the basis of the second paragraph of Article 6 of Regulation No 343/2003'.<sup>316</sup> This meant that, where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the second paragraph of Article 6 of Regulation No 343/2003 must be interpreted as designating as responsible the Member State in which the minor is present after having lodged an application there.<sup>317</sup> Interpreted in that manner, the second paragraph of Article 6 of Regulation No 343/2003 achieves the objective of enabling unaccompanied minors to have prompt access to the procedures for determining refugee status.<sup>318</sup>

Finally, in the seminal *Åkerberg Fransson* case, the ECJ also referred to the explanations relating to Article 51(1) in order to confirm its findings. The facts of the case may be summarised as follows. In 2009, the Swedish Public Prosecutor's Office brought criminal proceedings against Mr Åkerberg Fransson on charges of serious tax offences. He was accused of providing false information which brought about a loss of public revenue linked to the levying of income tax and VAT. Prior to that, in 2007, on the basis of the same alleged act of providing false information, the Swedish authorities had, in the course of administrative proceedings, imposed a financial penalty (tax surcharge) on Mr Åkerberg Fransson. With a view to seeing the criminal charges brought against him dismissed, Mr Åkerberg Fransson sought to rely on Article 4 of Protocol No 7 of the ECHR and Article 50 of the Charter which reflect the *ne bis in idem* principle. Accordingly, the referring court asked the ECJ whether EU law precluded criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him for the same acts of providing false information.

In order to answer that difficult question, the ECJ had first to determine whether the Charter was applicable to a situation such as that of Mr Åkerberg Fransson. At the outset, it held that Article 51(1) of the Charter 'confirms [its] case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the [EU] legal order'.<sup>319</sup> That case-law is fully consistent with Article 6(1) TEU and Article 51(2) of the Charter, according to which the provisions of the Charter cannot be interpreted in breach of the principle of conferral. Furthermore, the ECJ held that '[t]hat definition of the field of application of the fundamental rights of the [EU] is borne out by the explanations relating to Article 51 of the Charter [...] [according to which] the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act within the scope of [EU] law'.<sup>320</sup> In this regard, the ECJ drew a distinction between the situations falling within the scope of EU law and those falling outside the scope of that law. Whilst in relation to the former the compatibility of the national legislation at issue with fundamental rights may be examined in light of the Charter, in relation to the latter the ECJ lacks jurisdiction to do so. Stated differently, '[t]he applicability of [EU] law entails [the] applicability of the fundamental rights guaranteed by the Charter'.<sup>321</sup> On the contrary, where 'a legal situation does not come within the scope of [EU] law, the [ECJ] does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction'.<sup>322</sup>

For the purposes of the case at hand, this meant that in order for Article 50 of the Charter to be applicable to the situation of Mr Åkerberg Fransson, the ECJ had to determine whether there was a

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<sup>316</sup> *Ibid.*, para. 59.

<sup>317</sup> *Ibid.*, para. 60.

<sup>318</sup> *Ibid.*, para. 61.

<sup>319</sup> *Åkerberg Fransson*, above n 293, para. 18.

<sup>320</sup> *Ibid.*, para. 20.

<sup>321</sup> *Ibid.*, para. 21.

<sup>322</sup> *Ibid.*, para. 22.

connecting factor between the tax penalties and criminal proceedings to which he had been or was subject and EU law. The question was therefore whether Sweden was fulfilling an obligation imposed by EU law. To begin with, the ECJ found that those tax penalties and criminal proceedings were partially connected to the fact that Mr Åkerberg Fransson had breached his obligations to declare VAT. By imposing those tax penalties and by bringing those criminal proceedings, Sweden was thus complying with its obligation 'to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion'<sup>323</sup> as provided for by Articles 2, 250(1) and 273 of Directive 2006/112<sup>324</sup> and by the principle of loyal cooperation.<sup>325</sup> Additionally, since the collection of VAT revenue contributes to the financing of the EU budget, national legislation which seeks to deter individuals from adversely affecting such collection protects the EU's financial interests. It follows that by imposing tax penalties and by bringing criminal proceedings against Mr Åkerberg Fransson, Sweden was also fulfilling its obligations under Article 325 TFEU, according to which Member States are 'obliged to counter illegal activities affecting the financial interests of the [EU] through effective deterrent measures and, in particular, [...] to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests'.<sup>326</sup> Accordingly, the ECJ concluded that tax penalties and criminal proceedings such as those at issue in the case at hand 'constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 [...] and of Article 325 TFEU and, therefore, of [EU] law, for the purposes of Article 51(1) of the Charter'.<sup>327</sup> Moreover, that conclusion was not called into question by the fact that the national legislation upon which those tax penalties and criminal proceedings were founded had not been specifically adopted in order to transpose Directive 2006/112.<sup>328</sup>

Cases such as *DEB*, *Sky Österreich*, *MA e.a.* and *Åkerberg Fransson* demonstrate that the explanations relating to the Charter must be taken into account when the ECJ interprets the Charter. In *DEB*, they meant that the ECJ was obliged to interpret Article 47 of the Charter in line with the case law of the ECtHR relating to Article 6(1) of the ECHR. In *Sky Österreich*, they enabled the ECJ to determine the material content of the freedom to conduct a business. In *MA e.a.*, they stressed the fact that the Dublin Regulation had to be interpreted so as to guarantee the protection of the child's best interest as provided for by Article 24 of the Charter. Finally, in *Åkerberg Fransson*, they confirmed that, for the purposes of determining the scope of application of the Charter, the case law of the ECJ relating to the protection of fundamental rights remains good law.

#### 4. Concluding Remarks

The purpose of our contribution was to seek to shed some light on the ECJ's methods of interpretation. We began our analysis by stressing the fact that there is a strong correlation between the principle of legal certainty and literal interpretation, according to which the ECJ may not depart from the clear and precise wording of an EU law provision ('*interpretatio cessat in claris*'). However, due to the special features of the EU legal order, textualism is subject to two important limitations. First, as the Treaties provide no more than a framework, their provisions are drafted in broad terms and are characterised by

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<sup>323</sup> *Ibid.*, para. 25.

<sup>324</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. [2006] OJ L 347/1. Previously, Articles 2, 250(1) and 273 of Directive 2006/112 were set out in Articles 2 and 22 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, [1977] OJ L 145/1.

<sup>325</sup> Article 4(3) TEU.

<sup>326</sup> *Åkerberg Fransson*, above n 293, para. 26.

<sup>327</sup> *Ibid.*, para. 27.

<sup>328</sup> *Ibid.*, para. 28.

a purpose-driven functionalism which limits the possibilities of a textualist approach. Second, the principle of linguistic equality – which, in our view, enjoys a ‘quasi-constitutional’ status – compels the ECJ to examine whether the wording of an EU act of general application is clear and precise in the 24 official languages in which it is drafted. Thus, where linguistic divergences arise, the ECJ may not give priority to one linguistic version over the others, but must interpret the EU law provision in question in light of the normative context in which it is placed and the objectives it pursues.

We also found that the systematic interpretation of EU law pursues a double objective. That method of interpretation seeks to define a scope of application which is specific and exclusive to the EU law provision in question. Put differently, it aims to avoid duplication of other provisions contained in the same normative text. It also seeks to interpret the EU law provision in question in harmony with the general scheme in which it is placed. As to *travaux préparatoires*, recent developments in the case law show that their importance is increasing, notably where the ECJ is called upon to interpret acts of secondary EU legislation which are highly technical. Given that many *travaux préparatoires* are now published in the *Official Journal*, the principle of legal certainty no longer poses problems. Accordingly, we see no reason why the ECJ should not take them into account. That being said, the role that the *travaux préparatoires* relating to the draft TCE will play when the ECJ is called upon to interpret the new Treaty provisions which reproduce, either word-for-word or at least in essence, the provisions of that draft Treaty, remains an open question.

Unsurprisingly, our analysis has shown that the teleological method of interpretation plays an important role in the ECJ’s legal reasoning. This is so because the Treaties are imbued with teleology. Contrary to the view of some scholars, a teleological interpretation does not by itself give rise to EU competence creep. Nor does it adversely affect national sovereignty. At the beginning of the European integration process, compliance with (what is now) Article 19 TEU required the ECJ to fill the normative lacunae left by the authors of the Treaties. Since the legitimacy of the EU legal order was conditioned upon aligning the objectives pursued by the EU with the values in which national constitutions are grounded, the ECJ decided to engage in gap filling by having recourse to the constitutional traditions common to the Member States. Horizontally, teleological interpretation does not encroach upon the political process. Nor does it undermine the principle of democracy. On the contrary, since judges must state the reasons why a provision pursues one objective instead of another, teleological interpretation reinforces judicial accountability as it renders the ECJ’s determinations subject to public scrutiny. In addition, teleological interpretation may be relied upon with a view to reducing the scope of application of an EU law provision which is ‘over-inclusive’, thereby preventing such provision from being applied in situations not foreseen by the EU legislator.

Moreover, the ECJ tries, in so far as possible, to interpret EU law in light of both international law and the legal principles common to the Member States. As to international law, the ECJ has recourse to customary international law (as codified by the 1969 Vienna Convention) when interpreting the international agreements to which the EU is a party. In the same way, secondary EU legislation implementing international obligations must be interpreted in light of international law. However, the ECJ has held that there are limits to the automatic incorporation of international law into EU law and thus to the duty of consistent interpretation. Notably, international obligations may not call into question the constitutional structure of the EU, nor may they undermine the EU constitutional tenets, of which fundamental rights are part and parcel. The ECJ also interprets EU law in light of the legal principles common to the Member States by applying a comparative law method. In so doing, the ECJ does not try to find the ‘lowest common denominator’, but rather those national solution(s) that would best fulfil the objectives pursued by the EU or that would best give expression to a growing trend in the constitutional laws of the Member States where such a trend can be identified.

Unlike the Treaties, Article 6(1) TEU and Title VII of the Charter provide the interpretative guidelines in light of which the Charter is to be interpreted. Notably, special attention has to be given to the explanations relating to the Charter. As mentioned above, it would be very difficult for the ECJ to interpret the provisions of the Charter in a way that conflicts with those explanations. Otherwise, the

ECJ would be engaging in judicial activism. Only where the explanations relating to the Charter provide no (complete) answer to the questions of interpretation with which the ECJ is confronted may the latter have recourse to other methods of interpretation.

Furthermore, throughout our contribution, we have sought to demonstrate that none of the methods of interpretation applied by the ECJ must be examined in isolation. Where the EU law provision in question is ambiguous, obscure or incomplete, all the methods of interpretation employed by the ECJ may operate in a mutually reinforcing relationship. A literal interpretation of an ambiguous EU law provision, which is by itself insufficient to clarify the meaning of such a provision, may be confirmed by the context in which it is placed and by the purposes it pursues. In the same way, in order to determine the objectives pursued by an EU law provision, the ECJ may have recourse to its drafting history and/or to the normative context in which it is placed. The same applies in relation to the principle of consistent interpretation. Both the ECJ and national courts must interpret EU law in light of international law. This means that international law may provide useful guidance when determining the objectives pursued by an act of secondary EU legislation which implements international obligations binding upon the EU. In so doing, the ECJ demonstrates that EU law is open to external influences. In the same way, the comparative law method may also clarify the *telos* of an EU law provision. By examining the solutions adopted at national level in a similar context and the reasons justifying those solutions, the ECJ may identify the objectives pursued by the EU law provision in question. Most importantly, the comparative law method favours a constructive dialogue between the ECJ and the national courts, in particular the national constitutional courts. It also facilitates a mutual understanding between the two levels of governance. Judicial dialogue is a constitutional feature of the EU legal order which is inherently linked to the very nature of EU law. A combined application of the methods of interpretation applied by the ECJ shows that the philosophical foundations of EU law are not those of a hierarchical legal order where interpretation is the result of a 'top-down' and dogmatic approach. On the contrary, 'to say what the law of the EU is' involves a complex balancing exercise which must be struck in a pluralist environment where the mutual exchange of ideas is of the essence.

