AEL 2024/01
Academy of European Law

WORKING PAPER

EU Law and National Law: A Common Legal System

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Academy of European Law

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AEL Working Paper 2024/01

ISSN 1831-4066

Published in March 2024 by the European University Institute.
Badia Fiesolana, via dei Roccettini 9
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu

With the support of the Erasmus+ Programme of the European Union

The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Abstract

The broad objective of this Working Paper is to elucidate the relationship between EU law and national law. One side of the coin of this constellation, the application of Union law by national courts and authorities, has already attracted considerable attention in case law and legal writings and will therefore be treated rather summarily.

This exposé relating to the status of Union law in the national legal orders will be supplemented by a brief chapter on the status of public international law in the Union legal order. The ambition is to throw into relief the differences which emerge when comparing the relationship between public international law and Union law and that between Union law and national law.

The more specific objective and main focus of the present study will be on what can be described as the other side of the coin, *namely the application of national law by Union institutions and bodies*. The traditional assumption has been that Union institutions and bodies, while they may have to take national law into account in some form or another, do not apply national law, the interpretation and application of which is left to national courts and authorities. Hence, this aspect has attracted less attention in legal doctrine. This Working Paper aims at contributing to filling this gap by providing examples, most of which are of fairly recent origin, of situations where the traditional assumption is rebutted and Union institutions and bodies can indeed be said to be called upon to apply national law. To put the question of application of national law by Union institutions and bodies into its proper perspective, this discussion will be preceded by a survey of instances where Union law and national law blend more generally, including the creation of 'composite' procedures and 'hybrid' bodies or structures.

In a concluding chapter, it will be argued that these tendencies are indicative of the fact that while the emergence of Community (now Union) law gave birth to a new legal order, distinct from national law, these historically distinct legal orders now form *a common legal system*. This chapter will also contain a subchapter on the legal challenges facing Union institutions and bodies when called upon to apply national law, including the question of whether national law, then, becomes a question of law or of fact.

Keywords

application of national law; common legal system; composite procedures; direct effect; EU law and public international law; hybrid institutions and bodies; mixed agreements; primacy of Union law; questions of law and of fact

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Preface

This publication owes its origins to the General Course given by the author in the context of the European University Institute (EUI) Summer Course on the Law of the European Union in June 2021. The General Course was entitled “Multilevel Constitutionalism: National Law as EU Law” and thus focused on a subject that has attracted attention only recently, namely the application, by EU institutions and bodies, not only of Union law in the strict sense but also of the national law of the EU Member States.

For the purposes of the present publication, it was thought pertinent to broaden this focus on the relevance of national law for the EU legal order to include some basic observations on the much more traditional subject of the application of Union law by national courts and authorities and the status of Union law in the national legal orders more generally, including the principles of direct effect and primacy of Union law. A short chapter has also been added comparing the relationship between Union law and national law to that of Union law and public international law.

That said, the present publication will mainly focus on the question of the relevance of national law for the EU constitutional and legal order, including references to some recent examples of situations where Union institutions and bodies are called upon to apply and, as the case may be, interpret national law. While the relevant case law and literature consulted will be referred to in the footnotes, the author wishes to single out one publication which was particularly useful for his endeavours: the article by M Prek and S Lefèvre, ‘The EU Courts as “National Courts”: National Law in the EU Judicial Process’ (2017) 54 *Common Market Law Review*, 369.

The author wishes to thank the EUI Academy of European Law for having invited him to give the General Course of the 2021 Summer Course on the Law of the European Union and for having accepted to include the present publication in its Working Paper series.

Los Cristianos, Tenerife, 9 January 2024

Allan Rosas

LIST OF ABBREVIATIONS

CETA	Comprehensive Economic and Trade Agreement
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
EC	European Community
ECB	European Central Bank
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
EEA	European Economic Area
EEC	European Economic Community
EPPO	European Public Prosecutor's Office
ESCB	European System of Central Banks
EU	European Union
EUIPO	European Union Intellectual Property Agency
Eurojust	European Union Agency for Criminal Justice Cooperation
Europol	European Union Agency for Law Enforcement Cooperation
n	footnote
NRAs	National regulatory authorities
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
WTO	World Trade Organization

1. OBJECTIVES

The European Union (EU) legal order is a decentralised order. The application and implementation of EU law is largely left to national actors, including not only national legislative and executive bodies but also courts and sub-national regional and local entities. At the same time, many Union legal acts are to be directly applied by national authorities and courts and do not require national acts of implementation.[1] Concerning the role of national courts, in particular, Article 267 of the Treaty on the Functioning of the European Union (TFEU), in limiting the jurisdiction of the Court of Justice of the European Union (CJEU), notably the European Court of Justice (ECJ),[2] to give preliminary rulings on the 'interpretation' of the Treaties and the 'validity' and 'interpretation' of the acts of EU bodies, leave in principle the application of EU law to the national courts.[3] EU law is, of course, also applied on a daily basis by national administrative and other bodies and actors.

With respect to EU acts requiring implementing measures, Article 291(1) TFEU, which precedes provisions on implementing measures to be taken by the European Commission or exceptionally the EU Council, declares the general rule as follows: 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts'. This provision should be seen against the backdrop of the general clause on sincere cooperation contained in Article 4(3) of the Treaty on European Union (TEU), which provides, inter alia, that '[t]he Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'.

Decentralisation also implies a multifaceted institutional system of application and implementation of Union law and, in broader terms, a system of *multilevel governance*[4] rather than a strictly dual system. While the dualist distinction between Union and national bodies continues to be relevant, one can also discern a more complex institutional structure consisting of a variety of political, semi-political, administrative, and judicial institutions and bodies where the formal distinction between the Union and the national level becomes blurred. This phenomenon can be seen, inter alia, in the tendency to regulate, in Union law, the status and tasks of specially designated national bodies, such as so-called national regulatory authorities (NRAs)[5] and the establishment of certain bodies and legal acts of a hybrid character, such as the national banks which together with the European Central Bank (ECB) constitute the European System of Central Banks (ESCB).[6] One can also refer to the important role played by Member States' representatives in bodies which are formally Union decision-making bodies

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[1] Some of these acts can also be directly invoked by individuals (direct effect). On the concepts of direct applicability and direct effect see, eg A Rosas and L Armati, *EU Constitutional Law: An Introduction*, 3rd rev edn (Oxford, Hart Publishing, 2018), 72-73.

[2] According to Article 19(1) of the Treaty on European Union (TEU), the CJEU consists of the ECJ, the General Court and specialised courts. Since the integration, in 2016, of the Civil Service Tribunal into the General Court, there are no specialised tribunals. At the time of writing, all requests for preliminary rulings under Article 267 TFEU are still handled by the ECJ. According to Article 256(3) TFEU, the General Court could be given jurisdiction to hear and determine questions referred for a preliminary ruling 'in specific areas laid down by the [CJEU] Statute'. Such a reform is pending before the Council and the European Parliament.

[3] The distinction between interpretation and application is not clear-cut, however. See, eg M Broberg and N Fenger, *Preliminary References to the European Court of Justice*, 2nd edn (Oxford University Press, 2014), 154-155.

[4] See, eg Rosas and Armati (n 1), 48, 50-51, 84-85, 96-107.

[5] See subchapter 6.2 below.

[6] See subchapter 6.4.2 below.

such as the Council, the committees belonging to the comitology procedure for implementing Union law, as well as the Union agencies.[7]

These developments suggest that the relationship between Union and national law, and Union and national bodies, is complex rather than straightforward and that national law and national authorities are in various ways involved in the handling of EU matters. Some aspects of this problem area, notably the status of Union law in the national legal orders (direct applicability and effect, primacy, consistent interpretation) are well-known and have already been studied extensively. This study will give pride of place to an angle which has received less attention in legal literature,[8] namely the *relevance of national law*, including national authorities, for the formation, application, and implementation of Union law. While it is not suggested that the EU and national legal orders have become amalgamated, it will be argued that they are interrelated and even intertwined to such an extent that a strict separation of the two does not hold water and that one can even speak of a common legal system.[9] It will, in this context, be asked whether the 'autonomy' that the ECJ has associated with the Union legal order in relation to national law is the same kind of 'autonomy' that it is said to enjoy in relation to public international law.[10]

As to the structure of the ensuing discussion, the main part of the study will examine each of the different functions national law, including national authorities, can be seen to perform in the service of Union law. I shall first look at functions which are more obvious, starting from the role of national law as a source of inspiration for Union law. The discussion will then move on to functions which seem to make national law more directly relevant for Union law purposes, ending with an exposé of some—admittedly exceptional—instances where references to national law appear in the context of the law to be directly applied by Union institutions and other bodies. This discussion on the relevance of national law, while constituting the main part of the study, will be preceded by short summaries of the constitutional character of the EU legal order (Chapter 2), the relationship between Union law and public international law (Chapter 3) and the status of Union law in the national legal orders, notably the principle of primacy (Chapter 4).

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[7] Rosas and Armati (n 1), 102-103.

[8] But see, eg M Prek and S Lefèvre, 'The EU Courts as "National Courts": National Law in the EU Judicial Process' (2017) 54 *Common Market Law Review*, 369; Rosas and Armati (n 1), 80-83; A Rosas, 'International Law – Union Law – National Law: Autonomy or Common Legal System?' in D Petrlik et al (eds), *Évolution des rapports entre les orders juridiques de l'Union européenne, international et nationaux: Liber amicorum Jiří Malenovský* (Bruxelles, Bruylant, 2020), 261.

[9] Rosas and Armati (n 1), 15, 51, 53.

[10] On references in the case law to the 'autonomy' of the EU legal order in relation to both international and national law see Opinion 2/13 (Accession of the EU to the European Convention on Human Rights) EU:C:2014:2454, para 170; Case C-284/16 *Achmea* EU:C:2018158, para 33; Opinion 1/17 (Comprehensive Economic and Trade Agreement with Canada - CETA) EU:C:2019:341, para 109; Case C-621/18 *Wightman* EU:C:2018:999, para 45.

2. A NEW LEGAL ORDER

Since *Van Gend & Loos*[11], the CJEU[12] has characterised EU law (at the time of the judgment, 'Community law') as constituting 'a new legal order'. True, in that judgment it was added that the 'new legal order' was a legal order 'of international law'. However, already in the following year, in *Costa v ENEL*,[13] the Court, without specifying that the legal order would be one of international law, observed that '[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system'.[14] There is every reason to believe that the omission in the latter judgment of the *Van G*end reference to international law was by design rather than coincidence. The Court apparently wanted to distance itself from a public international law framework, opting instead for a more constitutional approach to the Community Treaties.[15]

That the ECJ opted for such a view of the then Community legal order is confirmed by an overall reading of *Van Gend* and *Costa*. One of the most salient features of these judgments is the idea that the Member States had 'limited their sovereign rights' and that the subjects of this legal order comprised not only the Member States but also their nationals. According to *Van Gend*, '[i]ndependently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage'. This thesis concerning the possibility for individuals to rely directly on Community law led the Court to conclude that the then Article 12 (elimination of customs duties between Member States) of the EEC Treaty 'must be interpreted as producing direct effects and creating individual rights which national courts must protect'. This direct effect followed from Community law itself and thus was not subject to the vagaries of the national laws of the then six Member States.

It was thus obvious almost from the outset that Union law was seen by the Court as a new legal order distinct from public international law. As will be elaborated on later in this study, however, national law, too, plays a significant role in the context of this legal order. One example should already be given here: Direct effect was intimately linked to a view of the importance of national courts and their right, and sometimes obligation, to request preliminary rulings from the ECJ, thus guaranteeing the uniform interpretation of Community law.[16] The preliminary ruling procedure was made available for all questions concerning the interpretation of Community law. The arguments presented by some Member States that the ECJ lacked jurisdiction to rule on the relationship between EEC law and national law were dismissed and the then Article 177 of the EEC Treaty (now Article 267 TFEU) applied, to quote *Costa*, 'regardless of any national law'.

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[11] Case 26/62 *van Gend & Loos* EU:C:1963:1.

[12] It should be recalled (see n 2) that the CJEU refers today to the institution consisting of the Court of Justice (here referred to as the ECJ), the General Court and specialised courts (after the integration of the EU Civil Service Tribunal into the General Court in 2016, there are no specialised courts).

[13] Case 6/64 *Costa v ENEL* EU:C:1964:66.

[14] The reference to the EEC Treaty means the Treaty establishing the European Economic Community, later to become the European Community (EC). According to Article 1(3) TEU, as amended by the Treaty of Lisbon (2007), the EC has been replaced by the Union.

[15] See, eg M Rasmussen, 'Revolutionizing European Law: The History of the Van Gend en Loos Judgment' in H Ruiz Fabri et al (eds), *Revisiting Van Gend en Loos* (Paris, Société de legislation compare, 2014), 59. The author mentions (at 81, n 104) that the then Director-General of the Legal Service of the European Commission, Michel Gaudet, who was one of the architects behind the idea of Community law possessing elements of constitutional law, mentioned in a letter of 1963 that 'he did not like the word "international"' in the relevant wording of the judgment in Van Gend.

[16] See, eg JHH Weiler, 'Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy' in Ruiz Fabri (n 15), 15 at 17

This observation, of course, was linked to the idea of the primacy of Community law over the national laws of Member States. Especially a comparison between the judgment and the opinion of the Advocate General in *Van Gend* shows that the judgment was not about direct effect only but was implicitly based on the idea of primacy as well. One of the arguments of Advocate General Roemer in favour of rejecting the thesis of the direct effect of then Article 12 EEC was to assert that *if* this provision was deemed to have a direct effect, 'breaches of Article 12 would render the national customs law ineffective and inapplicable in only a certain number of Member States'.[17] This was so because the Advocate General assumed that, even if there was direct effect, the national constitution (he mentioned Belgium, Italy, and Germany) would be based on the *lex posterior* rather than the *lex superior* principle when it came to the question of the relationship between international treaties, including the Community Treaties, and domestic law. In other words, he considered that the EEC Treaty was to be conceived as an international treaty which could not prevail over national law if the national rule in question was of a later date (*lex posterior*).

While in *Van Gend*, the Court refrained from making any explicit statement relating to primacy, it is difficult not to see the judgment as an implicit recognition of the primacy of Community law over the laws of Member States.[18] The relevance of direct effect would have been severely compromised if the Community law rules having direct effect could have been superseded by national rules by virtue of either the *lex superior* (in this case the primacy of national law) or the *lex posterior* principle. It was left to *Costa* to make the principle of primacy of Union law explicit. According to the ECJ, the law stemming from the Treaties, 'an independent source of law' could not, 'because of its special and original nature, be overridden by domestic legal provisions, 'however framed'. The transfer of powers from the Member States to the Community carried with it 'a permanent limitation of their sovereign rights'.

Concerning this limitation of sovereign rights, the ECJ, both in *Van Gend* and *Costa*, qualified the observation that the Member States had limited their sovereign rights by adding that this had taken place only 'within limited fields'. To quote the judgment in *Costa*, the Member States, by creating a Community possessing, inter alia, 'real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community' had 'limited their sovereign rights, albeit within limited fields' and had thus created a body of law which bound both their nationals and themselves. This reference to 'limited fields' has later been dropped and been replaced by a reference to 'ever wider fields.' According to a formula used by the Court since Opinion 1/09, the founding Treaties, 'unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals'.[19] This reference to 'ever wider fields', of course, reflects the considerable broadening of the integration agenda taking place on the basis of the TEU as well as the EEC and EC Treaties, later to be replaced by the TFEU, including amendments to these Treaties brought about by the Single European Act (1986) and the Treaties of Maastricht (1992), Amsterdam (1997), Nice (2001) and Lisbon (2007).

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[17] Case 26/62, Opinion of AG Karl Roemer of 12 December 1962, EU:C:1962:42.

[18] See, eg Weiler (n 16), 17. Rasmussen (n 15), 81, observes that if one is to believe a document from the deliberation on the judgment, 'the omission of the doctrine of primacy was a tactical choice by the majority of judges behind the judgment'.

[19] Opinion 1/09 (Creation of a unified patent litigation system) EU:C:2011:123, para 65. See also Opinion 2/13 (n 10), para 157.

There is no need here to analyse in any greater detail the developments in primary and secondary law[20] and case law which have taken place since *Van G*end and *Costa*. The ECJ case law provides the following summary of the 'essential characteristics' of the Union legal order today:[21]

> *Also according to settled case-law of the Court, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other.*

What is here referred to as the 'constitutional structure' of the EU has also, in the English version of the case law, been referred to as the Union's 'constitutional framework'.[22] The word 'constitutional' also appears in other judgments of the ECJ,[23] including as early as 1986 in *Les Verts*, where the Community Treaties were characterised as a 'constitutional charter based on the rule of law'.[24]

Whilst the EU has not been recognised as a State, its legal order is of a constitutional rather than an intergovernmental nature. The concept of EU constitutional law has become increasingly accepted among legal scholars.[25] It is true that there are some intergovernmental elements in the overall framework, notably in the area of Common Foreign and Security Policy (CFSP), and that in other areas, the intensity of integration and the nature of Union competences and powers vary.[26] The following elements in particular justify the characterisation especially of the non-CFSP part of the legal order as a constitutional order:

- Primacy and direct effect, as defined in Union law
- Internal hierarchy of norms
- A system of fundamental rights
- Legislative powers, as a general rule by majority voting
- A European Parliament elected in direct elections and participating in the legislative process

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[20] Primary law refers above all to the TEU and TFEU with annexed Protocols, the EU Charter of Fundamental Rights and the general principles of Union law while secondary law covers international agreements as well as legislative, delegated, implementing and other legal acts. For a more thorough presentation of the EU internal hierarchy of norms see Rosas and Armati (n 1), 50-62.

[21] The quotation is from the judgment in Case C-284/16 *Achmea* (n 10), para 33.

[22] Opinion 2/13 (n 10), para 158; Opinion 1/17 (n 10), para 110.

[23] Rosas and Armati (n 1), 4.

[24] Case 294/83 *Les Verts v Parliament* EU:C:1986:166, para 23.

[25] See, apart from Rosas and Armati (n 1), eg F Amtenbrink and PAJ van den Berg (eds), *The Constitutional Integrity of the European Union* (The Hague, TMC Asser Press, 2010); A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law*, 2nd rev edn (Oxford, Hart Publishing, 2010); R Schütze, *European Constitutional Law* (Cambridge University Press, 2012); T Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press, 2016); K Lenaerts and P Van Nuffel, *EU Constitutional Law* (Oxford University Press, 2021).

[26] See Rosas and Armati (n 1), 7-18.

- Interrelation and intertwining of Union law and national law
- A compulsory system of judicial control and sanctions

Among these elements, primacy is the one which is most often subject to different interpretations and also controversy. Is primacy absolute, implying that any rule of Union law prevails over any national law, the national constitution included, or are there reservations or caveats to be made concerning the national constitutions or, at any rate, their core elements? Are there limits to primacy following from the need to respect a Member State's national identity inherent in its fundamental political and constitutional structure (to quote a formulation appearing in Article 4(2) TEU)? These questions will be further discussed in Chapter 4.

3. EU LAW AND PUBLIC INTERNATIONAL LAW

3.1. General

As already noted, the ECJ has referred to the 'autonomy' enjoyed by Union law in relation to both public international law and the laws of the Member States.[27] It will be argued in the following that the relationship between Union law and public international law is different from the relationship between Union law and the national law of the Member States and so, if the latter relationship is also associated with the idea of 'autonomy' of the Union legal order, it must be a different kind of autonomy. The ECJ itself seems to acknowledge this difference as the Court, in the passage previously quoted,[28] while referring to 'the autonomy of EU law with respect both to the law of the Member States and to international law', seems to have only the Member States' level in mind when stating that the characteristics following from the EU's constitutional structure 'have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other'.

Whether or not 'autonomy' is the best concept to associate with the relationship between the Union and national legal orders, it seems well suited to function as a condensation of the characteristics of the relationship between Union law and public international law. The main purpose of the present chapter is to refer to some features of the latter relationship with a view to illustrating its specificity as compared to the relationship between Union law and national law. As much has already been written about the status of public international law in the Union legal order,[29] what follows is a summary of features thought to be the most relevant for the purposes of this study.

Two different perspectives will be considered. First, the relationship between Union law and public international law will be seen from the perspective of Union law, with a view to recalling how the Union legal order views the status of public international law *qua* Union law (the applicability and effects of public international law in the EU legal order). Second, the perspective will shift to considering Union law from the point of view of the international legal order. Does this order view Union law as domestic law, much in the same way as it looks at the domestic law of States? And to what extent is there a parallel between how the international legal order views Union law and how the Union legal order approaches the national laws of the EU Member States?

3.2. As Seen from the Point of View of the Union Legal Order

While the Union is a subject of international law, which is bound to respect international law,[30] its own constitutional order does not extend to third States or intergovernmental organisations.

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[27] See at n 10.

[28] See at n 21.

[29] See, eg J Wouters et al (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (The Hague, TMC Asser Press, 2008); E Cannizzaro et al (eds), *International Law as Law of the European Union* (Leiden, Martinus Nijhoff Publishers, 2012); M Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (Oxford University Press, 2013); N Zippele, *EU International Agreements: An Analysis of Direct Effect and Judicial Review Pre- and Post-Lisbon* (Cham, Springer International Publishing, 2017); I Govaere and S Garben (eds), *The Interface between EU and International Law: Contemporary Reflections* (Oxford, Hart Publishing, 2019).

[30] See Articles 3(5) and 21 TEU. Concerning relevant case law, see, eg, Case C-286/80 *Poulsen and Diva Navigation* EU:C:1992:453, paras 9 to 10; Case C-162/96 *Racke* EU:C:1998:293, paras 45 to 46; Case C-

Nor do international treaties by their own force automatically become part and parcel of Union law. Public international law is not generally considered as forming part of national (domestic) legal orders unless such an effect is recognised in the national legal order itself. In other words, and as a general supposition,[31] public international law does not prevent States from adopting a dualist approach to the question of the relationship between public international law and domestic law.

To take the question of the United Nations (UN) Charter and UN law more generally, their status in the Union legal order is coloured by the fact that the EU is not a Contracting Party to the Charter and thus not a member of the UN. However, even if the EU were a UN Member, the status of the Charter in the Union legal order would depend on this legal order rather than UN law. In *Kadi I*, the ECJ stated that the resolutions of the UN Security Council 'are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations' and that the UN Charter 'leaves the Member States of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order'.[32] It is clear that these observations apply *a fortiori* to the EU, in view of its non-membership in the UN.

It is thus left to the Union legal order to regulate the specific status of public international law in this legal order. According to settled CJEU case law, international agreements concluded by the Union become an integral part of the EU legal order.[33] The *conclusion* of the agreement (usually by a Council decision) makes it *directly applicable*. In this sense, the EU may be said to adhere to a 'monist' approach. Direct applicability, however, should not be confounded with *direct effect*.[34] If an agreement is deemed to have direct effect, it can be invoked directly by individuals before Union and EU national courts and an internal Union legal act may be declared invalid by the CJEU if found to be in contravention of a public international law rule being directly applicable and having direct effect in the Union legal order.

There is an abundance of case law on the presence or absence of direct effect. While many agreements of a bilateral nature (often trade and cooperation agreements) have been found to contain provisions having direct effect,[35] the contrary is true of most multilateral conventions. The ECJ has, in this respect, established a two-pronged requirement for direct effect: First, the 'nature and the broad logic' of the agreement does not preclude direct effect; second, the content of the provisions relied upon appears to be 'unconditional and sufficiently precise'.[36] Multilateral conventions found to lack direct effect on the basis of the 'nature and broad logic' of the agreement include the GATT and other World Trade Organization (WTO) agreements[37]

366/10 *The Air Transport Association of America* EU:C:2011:864, paras 101 and 123; Case C-266/16 *Western Sahara Campaign UK* EU:C:2018:118, para 47. See also, eg, Wouters et al (n 29); E Cannizzaro et al (n 29).

31 It is readily acknowledged that the question of the relationship between public international law and domestic law is a complex one and that the general assertions in the main text do not give full credit to all the complexities involved.

32 Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission ('Kadi I')* EU:C:2008:461, para 298.

33 Case 181/73 *Haegeman* EU:C:1974:41 is often cited as the first case to confirm this principle. For examples of more recent cases see Case C-224/16 *Aebtri* EU:C:2017:880, para 50; Case C-266/16 *Western Sahara Campaign* (n 30), paras 45-46.

34 Rosas and Armati (n 1), 72, 77-80.

35 To give but one example, Case C-265/03 *Simutenkov* EU:C:2005:213, para 21.

36 See, eg Joined Cases C-659/13 and C-34/14 *C & J Clark International* EU:C:2016:74, para 84, and case law cited.

37 See, eg Case C-149/96 *Portugal v Council* EU:C:1999:574, para 47; Joined Cases C-659/13 and C-34/14 *C & J Clark International* (n 36), para 85.

and the UN Convention on the Law of the Sea.[38] Examples of conventions which contain provisions which have not been deemed to be unconditional and sufficiently precise include the European Convention on the Protection of Animals Kept for Farming Purposes[39] and the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[40] Multilateral treaties found to have direct effect include the Yaounde/Lomé/Cotonou agreements between the EU and African, Caribbean and Pacific countries[41] and the Montreal Convention for the Unification of Certain Rules for International Carriage by Air.[42]

According to the Union Courts' case law, the absence of direct effect not only affects the right of an individual to rely on an agreement before a Union or national court but also prevents individuals, EU institutions, and Member States from invoking the invalidity of a Union legal act because of incompatibility with the agreement. In the EU internal hierarchy of norms, however, international agreements binding on the Union are, in principle, situated above internal legislation and other legal acts of secondary law. This means that even in the case of an agreement which lacks direct effect, the acts of secondary law must be interpreted as far as possible in keeping with the terms of the agreement (*consistent interpretation*).[43]

While international agreements, and especially those having direct effect, thus prevail over acts of secondary law, the same is not true with respect to the founding Treaties and other parts of primary law. In *Kadi I*, which related to the implementation of UN Security Council sanctions decisions in the EU legal order, the ECJ held that in the EU constitutional order, the primacy of international agreements over acts of secondary law does not extend to primary law, 'in particular to the general principles of which fundamental rights form part' and that international agreements 'cannot have the effect of prejudicing the constitutional principles of the [Union Treaties], which include the principle that all [Union] acts must respect fundamental rights'.[44] The Court did recognise that, in implementing UN sanctions, the Union is required to 'take due account' of the terms and objectives of the resolution concerned and of the relevant obligations under the UN Charter (despite the fact that the EU is not a member of the UN)[45] but could not accept that the internal Union acts implementing UN sanctions would fall outside judicial review, taking into account that such review did not—and still does not—exist at UN level and that EU national courts are precluded from reviewing the validity of Union acts.[46]

The Union Courts have long considered that the EU is bound to respect not only international agreements concluded by it but also *customary* law and other unwritten rules of general international law.[47] While the exact status of general international law in the Union legal order remained somewhat unclear, an ECJ judgment of 2011[48] brought further clarification in this regard. The Court formulated two basic conditions for the control of validity of Union acts: first,

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38 Case C-308/06 *Intertanko* EU:C:2008:312, paras 53-65.

39 Case C-1/96 *Compassion in World Farming* EU:C:1998:113, paras 32-34.

40 Case C-240/09 *Lesoochranárske zoskupenie* EU:C:2011:125, paras 44-45.

41 See, eg Case C-469/93 *Chiquita Italia* EU:C:1995:435.

42 See, eg Case C-344/04 *IATA and ELFAA* EU:C:2006:10, para 39.

43 Rosas and Armati, (n 1), 50 et seq, 70-71.

44 Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission*, (n 32), paras 285, 308.

45 Ibid, para 296.

46 A Rosas, 'Counter-Terrorism and the Rule of Law: Issues of Judicial Control' in AM Salinas de Frías et al (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, 2012), 83 at 105-110.

47 See, eg, the judgments referred to in n 30.

48 Case C-366/10 *The Air Transport Association of America* (n 30).

the relevant principles of customary law should be 'capable of calling into question the competence of the [EU] to adopt that act'; second, the act in question should be 'liable to affect rights which individuals derive from [Union] law or to create obligations under [Union] law in this regard'. A further reserve was added with respect to the intensity of judicial control: since, according to the Court, a principle of customary law does not have the same degree of precision as a provision of an international agreement, judicial review must be limited to the question of whether, in adopting the act in question, 'the institutions of the EU made manifest errors of assessment concerning the conditions for applying those principles'.[49]

It follows from these observations that the specific status of public international law in the Union constitutional order – its binding force, direct applicability, direct effect, place in the hierarchy of norms – is determined by this constitutional order rather than international law. By contrast, as will be argued in greater detail in Chapter 4, the status of Union law in the national legal orders of the EU Member States is determined by the Union constitutional order rather than those national orders. This in principle radical difference between the two relationships may appear as somewhat less radical if, first, the relationship between public international law and Union law is seen from the external perspective of the international legal order and, second, if the relationship between Union law and the national law of the EU Member States is viewed from the perspective of each national constitutional order and the principles of national constitutional identity and conferral recognized in Union law itself. The first perspective will be briefly considered here while the second perspective will be discussed in Chapter 4 in the context of the status of Union law in the national legal orders of Member States.

3.3. As Seen from the Point of View of the International Legal Order

The fact that the application of international legal rules in the EU internal legal order depends on how this question is regulated in the Union legal order itself does not prejudice the way this question is seen from the external point of view of the international legal order. The binding force of public international law rules does not depend on the content of domestic law. According to Article 26 of the Vienna Convention on the Law of Treaties of 1969, every treaty in force is binding upon the parties to it and must be performed by them in good faith while Article 27 spells out that a party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. There is a caveat to this provision, however, as Article 46, referred to in Article 27, allows a State to invoke the fact that its consent to be bound by a treaty was expressed in manifest violation of a rule of its internal law of fundamental importance.[50] Apart from such exceptional circumstances, which have a high threshold of application,[51] States will incur international responsibility for breaches of public international law rules (internationally wrongful acts) even if their action or non-action constituting the breach was required by their domestic law.[52]

The same principle applies to the EU, which, as a subject of international law, enjoys a wide-ranging competence to conclude international agreements and the capacity to be bound by customary international law, much in the same way as States do.[53] The ECJ has confirmed

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[49] Ibid, paras 107-110.

[50] On Articles 26, 27 and 46 of the Vienna Convention see, eg A Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000) 144-145, 252-253.

[51] According to Article 46(2) of the Vienna Convention, a violation is 'manifest' 'if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.'

[52] See, eg J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), 86-90.

[53] See, in particular, Article 216(1) TEU.

that the EU, too, will incur international responsibility for internationally wrongful acts. The international agreements concluded by the Union are binding not only upon its own institutions but also on its Member States,[54] which according to the Court 'fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the [Union] which has assumed responsibility for the due performance of the agreement'.[55]

It is thus conceivable that EU law, notably primary law, requires a certain conduct which will be found by an international dispute settlement body to contravene an international legal rule binding on the Union.[56] This, of course, is not a desirable outcome, and there are some mechanisms in the EU legal order which may have a direct or indirect bearing on the objective of ensuring compliance by the Union with its international obligations. The judicial control of the validity of Union legal acts with regard to international agreements binding upon the Union constitutes one relevant device. It is true that the lack of direct effect of a particular agreement may be an obstacle to such a review. On the other hand, the principle of consistent interpretation will often be enough to guarantee the fulfilment of international obligations. It should also be noted that lack of direct effect could in some instances enhance rather than hamper the achievement of this objective. WTO law comes readily to mind since, because of its complexity, there is a risk that decisions of lower national courts would not be based on a proper understanding of the various WTO agreements and the extensive case law of the WTO dispute settlement bodies.[57] In order to minimize the risk of discrepancies between Union law and public international law, the Union Courts, in their search for the appropriate interpretation of public international law rules, may turn to guidance which may be provided by the case law of international courts proper.[58] It should be noted that the Union Courts may for this purpose refer to decisions of such bodies even if the latter are not part of a dispute settlement system contained in a convention to which the Union itself has adhered.[59]

In this context, it should also be recalled that, according to well-established ECJ case law, the EU, as a subject of international law, may, in principle, become bound by clauses on third-party dispute settlement contained in international agreements concluded by the Union.[60] On

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[54] Today this principle is spelled out in Article 216(2) TFEU.

[55] Case 104/81 *Kupferberg* EU:C:1982:362, para 13. See also, eg Case 12/86 *Demirel* EU:C:1987:400, para 11; Case C-13/00 *Commission v Ireland* EU:C:2002:184, para 15; Case C-239/03 *Commission v France* EU:C:2004:598, para 26; Case 66/18 *Commission v Hungary* EU:C:2020:792, para 66. See further A Rosas, 'International Responsibility of the EU and the European Court of Justice' in MD Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Oxford, Hart Publishing, 2013), 152.

[56] The prime example is Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* (n 32).

[57] See Rosas (n 55), 139-159 at 147. The ECJ occasionally refers to the decisions of WTO dispute settlement bodies, see, eg Case C-245/02 *Anheuser Busch* EU:C:2004:717, paras 49 and 67; Case C-260/08 *HEKO Industrieerzeugnisse* EU:C:2009:768, para 22; Case 66/18 *Commission v Hungary* (n 55), para 92.

[58] A Rosas, 'With a Little Help from My Friends: International Case-Law as a Source of Reference for the EU Courts', (2005) 5 *The Global Community Yearbook of International Law and Jurisprudence* (Oceana Publications, 2006), 203; A Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue', (2007) 1 *European Journal of Legal Studies*.

[59] An example is offered by the occasional references in the ECJ's case law to judgments of the International Court of Justice. The EU cannot be a party to disputes before that Court. Subjects on which guidance from ICJ case law have nevertheless been sought include the international law of treaties, as codified in the Vienna Convention of 1969 (see, eg Case C-162/96 *Racke* (n 30), paras 24, 50), the law of the sea, as codified in the UN Convention on the Law of the Sea (Case C-286/90 *Poulsen and Diva Navigation* (n 30), para 10) and issues of borders, territory, sovereignty and recognition (Case C-104/16 P *Council v Front Polisario, (*n 34), paras 28, 88, 91).

[60] See, eg Opinion 1/91 (EEA Agreement), EU:C:1991:490, paras 39-40, 70; Opinion 2/13 (n 10), paras 182-183. See more generally A Rosas, 'International Dispute Settlement: EU Practices and Procedures' 46 (2003)

the other hand, the Court, while certainly recognising that the Union may be held internationally accountable for breaches of public international law, has circumscribed the possibility of adhering to international dispute settlement mechanisms by some conditions and has in some instances found that a specific dispute settlement mechanism was incompatible with the 'autonomy' of the Union legal order. Negative opinions in this respect have been rendered with regard to the judicial organ envisaged for an agreement establishing a European laying-up fund for inland waterway vessels, the first (hybrid) version of the judicial system envisaged for the European Economic Area Agreement (EEA), the international judicial body envisaged for a unified patent regime, and the draft agreement providing for the accession of the EU to the European Convention on Human Rights (ECHR).[61] This case law provides further illustration of the fact that the Court insists on the 'autonomy' and the special characteristics of the Union legal order as distinct from the international legal order and refuses to accept any automatic primacy of public international law over Union law, notably Union primary law.

In Opinion 1/17, the ECJ specified a number of conditions which underpinned the Court's acceptance of the investor-to-state dispute settlement system contained in the EU-Canada Comprehensive Economic and Trade Agreement (CETA) as not being an intrusion into the 'autonomy' of the EU legal order. The Court paid attention, inter alia, to the fact that the Investment Tribunal was supposed to regard domestic law, including Union law, as a matter of fact and lacked jurisdiction to interpret and apply Union law other than the CETA Agreement itself.[62] By contrast, as will be explained below, the national law of the EU Member States may in some instances become the applicable law also at Union level and its interpretation and application should then be viewed as a question of law rather than of fact.[63]

Under Article 218(11) TFEU, the Court may be called upon to provide an opinion on the compatibility of an envisaged international agreement 'with the Treaties'. The ECJ has recently held that this mechanism does not extend to assessing the compatibility of an agreement with public international law as such: In Opinion 1/19 relating to the Istanbul Convention (violence against women), the Court observed that the procedure under Article 218(11) TFEU 'does not concern the compatibility with public international law of the conclusion of an international agreement by the European Union or, accordingly, the consequences that might arise from a future infringement of that law in the implementation of that agreement'.[64] Even the perspective that the EU could incur liability at the international level due to an inability to fulfil its treaty commitments under a mixed agreement (following from the fact that the Union adhered to only some limited parts of the agreement while some Member States refused to adhere to the

German Yearbook of International Law 284; A Rosas, 'The EU and International Dispute Settlement' (2017) 1 *Europe and the World: A Law Review* 7; M Cremona, A Thies and RA Wessel (eds), *The European Union and International Dispute Settlement* (Oxford, Hart Publishing, 2017).

61 Opinion 1/76, EU:C:1977:83 and A Rosas, 'EU External Competence in the Absence of Internal Rules, and the Sleeping Beaty: Opinion 1/76 (Laying-Up Fund for Inland Waterway Vessels)' in G Butler and RA Wessel (eds), *EU External Relations Law: The Cases in Context* (Oxford, Hart Publishing, 2022), 97; Opinion 1/91 (n 60); Opinion 1/09 (n 19) and Opinion 2/13 (n 10**)**.

62 Opinion 1/17 (n 10), paras 109-118. Articles 8.31.1 and 8.31.2 CETA. See also K Bradley, 'Investor-State Dispute Tribunals Established under EU International Agreements: Opinion 1/17 (EU-Canada CETA) in Butler and Wessel (n 61), 959

63 See Chapter 7, notably subchapters 7.3, 7.4 and 7.5, and subchapter 8.2.

64 Opinion 1/19 (*I*stanbul Convention on preventing and combating violence against women and domestic violence) EU:C:2021:198, para 272. See also S Adams, ***La procédure d'avis devant la Cour de justice de l'Union européenne*** (Bruxelles, Éditions Bruylant, 2011), 274.

agreement altogether) did not persuade the Court to take that public international law problem into account.[65] I have made some critical comments on this approach elsewhere.[66]

It is true that the ECJ has more generally stated that 'when the European Union decides to exercise its powers they must be exercised in observance of international law'.[67] This general statement led the Court to insist on the mixed character of certain Antarctic treaty arrangements. After having ruled out a Union exclusive competence to submit documents to a Commission for the Conservation of Antarctic Marine Living Resources, the Court considered the possibility that the EU Council could decide to exercise a shared competence alone, without the participation of Member States. This possibility was ruled out, however, as the Court concluded that the existing Antarctic treaty regime required the participation of EU Member States and so, in this specific context, 'exercise by the European Union of the external competence at issue in the present cases that excludes the Member States would be incompatible with international law'.[68]

Why does the result appear to differ from the conclusion reached in Opinion 1/19? Three distinguishing factors should be noted. First, the Antarctic case arose from an action for annulment (Article 263 TFEU) while Opinion 1/19 followed the special procedure of Article 218(11) TFEU, which concerns the compatibility of draft international agreements 'with the Treaties'. Second, the former case was about competence and exercise of competence while Opinion 1/19 was about compatibility of the envisaged agreement with the Treaties. Third, in the Antarctic case, the Court appears to have been convinced that an exclusive role for the Union in submitting the documents in question would have contravened the applicable treaty regime while in Opinion 1/19, the future public international law problems arising from the fact that the Union adherence only covered some limited parts of the Istanbul Convention while some EU Member States refused to adhere (and thus to fill in the gaps caused by the limitations in Union adherence) seemed to be of a more speculative nature. That said, it should be recalled that public international law binding on the Union forms an integral part of Union law. Thus, the compatibility of an international agreement is, at the same time, a question of the compatibility of the agreement with the Union legal order. It should not be excluded that, at least in some instances, questions concerning the compatibility of draft agreements 'with the Treaties' could include issues relating to public international law problems. This possibility will be further discussed (subchapter 6.5.1) with respect to the problems caused by mixed agreements for the Union constitutional order and, in this context, the role played by national law in the overall architecture of a mixed agreement.

Without analysing the ECJ's approach to the status and role of public international law in any greater detail, a striking difference between how the Court treats the relationship between public international law and Union law on the one hand and between Union law and national

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[65] The problem under international treaty law arises from the fact that in such a scenario, the adherence of the EU and the Member States, taken together, does not cover the application of the whole agreement in those Member States that refuse to become contracting parties. Such a form of 'mixity'(some but not all Member States adhere to an agreement concluded by the Union) has been termed 'incomplete mixity', see, eg A Rosas, 'Mixity Past, Present and Future: Some Observations' in M Chamon and I Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity'* (Leiden, Brill Nijhoff, 2020), 8 at 10, 17-18. See further subchapter 6.5.1 below.

[66] A Rosas, 'Whither Are You Going, Mixity?' in C Barnard, A Lazowski and D Sarmiento (eds), *Pursuit of Legal Harmony in a Challenging World: Essays in Honour of 'Eleanor Sharpston* (Oxford, Hart Publishing) forthcoming 2024.

[67] Joined Cases C-626/15 and C-659/16 *Commission v Council (Antarctic MPAs)* EU:C:2018:925, para 127.

[68] Ibid, para 128. The Court referred, in particular, to the fact that the Canberra Convention on the Conservation of Antarctic Living Resources of 1980 only allowed EU accession if its Member States are members (para 129) and that the Convention does not grant the EU a fully autonomous status with the Commission (para 130).

law on the other should be recalled. Questions of direct applicability, direct effect, and primacy of public international law in the EU legal order are determined by the Union (and thus the geographically more limited entity) rather than by the international (global)) legal order, whereas these questions are determined by the geographically wider order (the Union legal order) rather than the national legal orders of Member States. It is true that, seen from the international (EU external) perspective, the Union may incur international responsibility for internationally wrongful acts stemming from the application of internal rules. Even the international legal order does not, as a general proposition, however, insist on direct applicability, direct effect, or primacy of its rules in the internal legal orders of States (including the EU). It is also true that national constitutional and supreme courts may approach the status of Union law in the national legal order somewhat differently from the CJEU. Such reservations will be discussed in the following chapter, notably subchapter 4.2.

4. THE PRINCIPLE OF PRIMACY AND NATIONAL CHALLENGES TO IT

4.1 The Principle of Primacy

As discussed in Chapter 2, the ECJ, notably in *Van Gend & Loos* and *Costa v ENEL*, asserted a marked distinction between international agreements in general and the EEC Treaty. Community law constituted 'a new legal order' and the law stemming from the Treaty was declared to constitute 'an independent source of law' which, because of its 'special and original nature', could not be overridden by domestic legal provisions, 'however framed'. By contrast with 'ordinary international treaties', the EEC Treaty had created 'its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States'. [69] The emerging constitutional order thus implied that Community rules, which prevailed over national rules, became 'on the entry into force of the Treaty'—that is, by the force of Community law—applicable also at national level and could in many cases be directly invoked before national courts and authorities and made to prevail over conflicting norms of national law.

These Community rules consisted not only of written rules of primary law (the basic Treaties with Protocols) and secondary law (regulations, directives, and decisions) but also general principles of Community law, including fundamental rights.[70] There is no need here to recall the subsequent and extensive written primary and secondary law as well as case law confirming and developing these features of the constitutional order. The direct applicability of Union law, and the direct effect of many Treaty provisions, regulations, and—in certain conditions— directives and decisions, have become a generally recognised attribute of the Union legal order.[71] Fundamental rights have been recognised, at a general level, in the basic Treaties and regulated in more detail in the EU Charter of Fundamental Rights, which, according to Article 6(1) TEU, 'shall have the same legal value as the Treaties'.[72]

The principle of the primacy of Union law over the laws of the Member States, and their constitutional law in particular, has been confirmed, over and over again, in ECJ case law.[73] This includes case law relating to the direct applicability and direct effect of Union law in the national legal orders, the obligation of national courts to set aside, and even declare null and void in exceptional cases, national law which is in contravention of Union law, and case law which leaves it to the ECJ to be the final arbiter of the validity of Union legal acts.[74] Primacy is an 'existential requirement' of the EU legal order necessary to ensure the uniform application

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[69] Case C-6/64 *Costa v ENEL* (n 13). See further at nn 11-18.

[70] To cite but three seminal judgments of the 1970s concerning fundamental rights, see Case 29/69 *Stauder* EU:C:1969:57; Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114; Case 4/73 *Nold* EU:C:1975:114. On direct effect and primacy se, eg Case 106/77 *Simmentahl* EU:C:1978:49).

[71] See, eg Rosas and Armati (n 1), 72-80. On the distinction between direct applicability and direct effect see ibid, 72.

[72] Ibid, ch 11, and S Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart Publishing 2014).

[73] Rosas and Armati (n 1), 62-68. For examples of recent judgments see, Joined Cases C-357/19 et al *Euro box Promotion and Others* EU:C:2021:1034, paras 244-252; Case C-430/21 *RS* EU:C:2022:99, paras 47-55; Joined Cases C-615/2020 and C-671/2020 *YP and Others* EU:C:2023:562, paras 61 and 62; Case C-204/21 *Commission v Poland* EU:C:2023:442, paras 75-80; Case C-107/23 PPU *Lin* EU:C:2023:606, paras 128-137.

[74] On a trend to go beyond the obligation to set aside national law see M Dougan, 'The Primacy of Union Law Over Incompatible National Measures: Beyond Disapplication and Towards a Remedy of Nullity?' (2022) 59 *Common Market Law Review*, 1301, and Case C-487/19 *WZ* EU:C:2021:798. On the monopoly of the CJEU to declare Union law invalid see Case 314/86 *Foto-Frost* EU:C:1988:471 and Rosas and Armati (n 1), 67, 278, 283.

of Union law and the equality of Member States.[75] At the political level, a Declaration annexed to the Final Act of the Intergovernmental Conference, which adopted the Lisbon Treaty, contains an unconditional reaffirmation of the principle of primacy.[76] It is noteworthy that the Conference here confirmed that 'in accordance with well settled case law of the [CJEU]', Union law has primacy over the law of Member States 'under the conditions laid down by the said case law'. The Conference moreover decided to attach as an Annex to the Final Act an Opinion of the Legal Service of the EU Council. This Opinion states that 'it results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law'. While it had been decided not to include any explicit reference to primacy in the TEU or TFEU, this fact 'shall not in any way change the existence of the principle and the existing case-law of the Court of Justice'.

The principle of primacy is also confirmed in the Agreement on a Unified Patent Court, signed by then 25 (now 24)[77] EU Member States in 2013 (entered into force on 1 June 2023).[78] According to Article 20 of the Agreement, the Unified Patent Court, which according to Article 1(2) of the Agreement shall be a court common to the Contracting Member States and subject to the same obligations under Union law as any national court of the Contracting Member States,[79] 'shall apply Union law in its entirety and shall respect its primacy'. According to a preambular paragraph, it is the task of the CJEU 'to ensure the uniformity of the Union legal order and the primacy of European Union law' while another preambular paragraph confirms that infringements of Union law by the Unified Patent Court, including the failure to request preliminary rulings from the CJEU, are attributable to the Contracting Member States, which means that infringement proceedings may be brought under Articles 258 to 260 TFEU 'to ensure the respect of the primacy and proper application of Union law'.[80] Last but not least, a further preambular paragraph provides a list of the norm categories which are covered by the principle of primacy, namely not only the TEU, the TFEU, and the Charter of Fundamental Rights but also 'the general principles of Union law as developed by the [CJEU]', 'the case law of the [CJEU] and secondary Union law'. The Agreement, thus, in line with the Declaration of the Intergovernmental Conference adopting the Lisbon Treaty, recognises the close connection which exists between primacy, uniformity, and the case law of the CJEU.

4.2. National Case Law

The unequivocal confirmations of the principle of primacy and the relevant case law of the CJEU by the Intergovernmental Conference which adopted the Treaty of Lisbon (or in the Agreement on a Unified Patent Court) have not prevented some national constitutional and supreme courts from calling into question, or at least asserting some limits to, the principle of

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[75] See, eg C Ladenburger, Y Marinova and J Tomkin, 'Institutional Report' in A Kornezov (ed), *Mutual Trust, Mutual Recognition and the Rule of Law: The XXX FIDE Congress in Sofia 2023 Congress Publications*, Vol 1 (Sofia, Ciela Norma, 2023), 149-150.

[76] Declaration No 17 concerning Primacy, [2008] OJ C115/344., [2013] OJ C175/2. The Declaration is cited in Joined Cases C-357/19 et al *Euro Box Promotion* (n 73), para 248, and Case C-430/21 *RS* (n 73), para 49.

[77] The United Kingdom signed the Agreement in 2013 but pursuant to its withdrawal from the EU ('Brexit') is since 20 July 2020 no longer a signatory.

[78] [2013] OJ C 175/1. The Agreement only entered into force when the instruments of ratification or accession included the three States in which the highest number of European patents was in force on a defined date.

[79] This legal construction follows from Opinion 1/09 of the ECJ (n 19), where the ECJ held a draft agreement providing for an international court, which would have overtaken some functions of national courts of Member States, to be incompatible with the Treaties.

[80] On the obligation to request preliminary rulings, and the applicability of the infringement procedure, see also Articles 21 and 23 of the Agreement.

primacy.[81] This line of case law usually seems to be based on the idea that, by virtue of the principle of conferral[82] and the national rules governing accession to the EU, and taking into account the principle of respect for the national identities of Member States, expressed in Article 4(2) TEU, the national courts may control whether certain actions by the Union, including the Union courts, go beyond what has been conferred (*ultra vires*).[83]

The case law of the German Federal Constitutional Court and the Polish Constitutional Tribunal offers the most well-known examples of such tensions and sometimes outright conflict between national and CJEU cases. It is not necessary to analyse here the whole range of relevant judgments of the German Constitutional Court, starting from *Solange I* of 1974 relating to the relationship between Union law and the German constitutional fundamental rights regime.[84] The perhaps most significant decisions are the judgments of the Court of 21 June 2016 and 5 May 2020 relating to the legality of monetary transaction programmes of the ECB, which followed the judgments of the ECJ in *Gauweiler*[85] and *Weiss* upholding the legality of the programmes.[86] While in *Gauweiler*, the Constitutional Court ruled that the ECB programme did not manifestly exceed the competences attributed to the ECB and that accordingly the ECJ judgment should not be declared inapplicable in Germany, the Court, with respect to another bond buying programme of the ECB, reached the opposite conclusion in *Weiss*, holding that both this ECB programme and the ECJ judgment upholding the legality of the programme were *ultra vires* and could not be applied in Germany. As the latter judgment purported to impose a particular German approach to the principle of proportionality and the distinction between monetary and economic policy, it seemed to go beyond a control of the principle of conferral and constituted an open challenge to the exclusive power of the CJEU to judge on the validity of acts of the Union institutions.[87]

After the ECB had provided additional information relating to the proportionality assessments underlying its programme, following a deadline set in the Constitutional Court's judgment, the original complainants before the German Constitutional Court requested an order of execution from the Court, inter alia, obliging the German government and Parliament to show how the information provided by the ECB after the 5 May 2020 judgment satisfied the requirements set forth in the judgment, and preventing the German Bundesbank from participating in the ECB programme. In an Order of 29 April 2021, however, the German Court dismissed the applications for an order of execution as inadmissible, also considering that the 5 May 2020 judgment had been sufficiently complied with.[88] The European Commission nevertheless initiated infringement procedures against Germany by sending a letter of formal notice of 9 June 2021, pursuant to Article 258 TFEU, arguing that the Order of 29 April did not reverse the

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81 Rosas and Armati (n 1), 66-67; Ladenburger, Marinova, and Tomkin (n 75) 149-150, and the National Reports in Kornezov (n 75), 157-654.

82 According to Article 5(1) TEU, '[t]he limits of Union competences are governed by the principle of conferral. According to Article 5(2), '[u]nder the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein'. The provision goes on to state that competences not conferred upon the Union in the Treaties remain with the Member States. The last provision is repeated in Article 4(1) TEU (which refers to Article 5).

83 See, eg the judgment of the German Constitutional Court of 30 June 2010 on the constitutionality of the Lisbon Treaty, BVerfGE, 2 BvE 2/08. For further examples see Rosas and Armati (n 1), 66-67.

84 BVerfGE 37, 271, 2 BvL 52/71.

85 Case C-62/14 *Gauweiler and Others* EU:C:2015:400. BVerfGE , judgment of 21 June 2016, 2 BvR 2728/13.

86 Case C-493/17 *Weiss and Others* EU:C:2018:1000. BVerfGE 154, 17, judgment of 5 May 2020, 2 BvR 859/15. See also F Kainer, 'Germany' in Kornezov (n 75), 367-370.

87 Rosas (n 8), 270-271.

88 BVerfGE 2 BvR 1651/15, 2 BvR 2006/15. See also, eg M Klamert, 'The Weiss/PSPP Story: Being Disproportional with Proportionality?' 7 June 2021, bridgeenetwork.eu

breaches concerning the primacy of Union law caused by the 5 May 2020 judgment.[89] But on 2 December 2021, the Commission decided to close the infringement procedure in view of the reply of the German government to the letter of formal notice. In its reply, the government declared, first, that it affirms and recognises the principles of autonomy, primacy, effectiveness, and uniform application of Union law as well as the values laid down in Article 2 TEU, and, second, that it recognises the authority of the CJEU and the final and binding nature of its judgments and that the legality of acts of Union institutions cannot be made subject to the examination of constitutional complaints before German courts but can only be reviewed by the CJEU.[90]

Apart from this marked difference in approach between the German Constitutional Court's judgment in *Weiss* and the position of the German government expressed in its reply to the Commission's formal notice, it should be noted that the case law of the German Constitutional Court itself does not seem to have been entirely consistent in its approach to the consequences of the European integration process for German constitutional law and the principles of primacy and uniform application of Union law and the exclusive jurisdiction of the CJEU to rule on the validity of acts of Union institutions. In this context, it may be added that, in two decisions of November 2019, the Court, for the first time, accepted the EU Charter of Fundamental Rights as a direct standard of German constitutional review for national measures that are completely determined by Union law.[91]

Another example of tension or conflict between national and Union case law is provided by the Danish Supreme Court's judgment in *Ajos*, holding that despite Article 6(1) and (3) TEU, the provisions of the EU Charter of Fundamental Rights and the general principles mentioned in Article 6(3) have not been made directly applicable in Denmark.[92] This view appears to be based on the assumption that the question as to whether direct effect exists should be judged on the basis of Danish law, a view which obviously cannot be reconciled with the ECJ case law since *van Gend & Loos* and *Costa v ENEL.* It is to be noted, on the other hand, that the *Ajos* case did not concern the principle of primacy in general but the alleged direct effect of fundamental rights (discrimination on the basis of age) in a horizontal situation, that is, litigation between private parties, and thus a question which is still open to debate also at Union level.[93]

Another example of possible tensions between national and ECJ case law is offered by the decision of the Italian Constitutional Court, in what has been referred to as the *Taricco* saga,[94] to ask the ECJ to clarify the meaning of its *Taricco I* judgment (concerning national limitation

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[89] Commission Press Release of 9 June 2021, June Infringement Package: Key Decisions. See also, eg F Fabbrini, 'Saving the BVerfG from Itself: The Commission Infringement Proceedings against Germany and Its Significance', 10 June 2021, bridgenetwork.eu.

[90] See, eg the Commission's observations on a petition to the European Parliament, Petition No 0634/2021, European Parliament, Committee on Petitions, Notice to Members, 3 March 2022.

[91] 1 BvR 16/13 and 1 BvR 267/17. See also C Rauchegger, 'The Charter as a Standard of Constitutional Review in the Member States' in M Bobek and J Adams-Prassl (eds) *The EU Charter of Fundamental Rights in the Member States* (Oxford, Hart Publishing, 2020), 483 at 493-495.

[92] Case 15/2014 (First Chamber), judgment of 6 December 2016. See also L Armati, 'Acts of Rebellion, or the Enemy Within? A Consideration of the Combative Ruling of the Supreme Court of Denmark and the Imperative of Genuine Judicial Dialogue' in K Lenaerts et al (eds), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (Oxford, Hart Publishing 2019), 145.

[93] With respect to the EU Charter, the ECJ has recognized the possibility of direct horizontal effect for Article 21 (prohibition of discrimination), see, eg Case C-414/16 *Egenberger* EU:C:2018:257, and 31(2) (paid annual leave), see, eg Joined Cases C-569/16 and C-570/16 *Bauer* EU:C:2018:871.

[94] See, eg M Bonelli, 'The *Taricco* Saga and the Consolidation of Judicial Dialogue in the European Union' (2018) 25 *Maastricht Journal of European and Comparative Law,* 357. See also F Munari and C Cellerino, 'Italy' in Kornezov (n 75), 443.

rules in the context of criminal proceedings).[95] The Constitutional Court implied that a given interpretation of the consequences arising from the application of Article 325 TFEU (combatting illegal activities affecting the financial interests of the Union) could lead the Constitutional Court to consider that that interpretation was incompatible with some overriding principles of the Italian constitutional order, the principle of legality in this case.[96] This request for a preliminary ruling led the ECJ to adjust its earlier judgment, stating that in the context as outlined by the Constitutional Court, there was not necessarily an obligation to disapply certain national provisions relating to limitation periods in the context of criminal proceedings.[97] There was no such obligation if disapplication of the national provisions would entail a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed. By taking heed of the principle of legality as a fundamental right, guaranteed under both Union and Italian constitutional law, the ECJ was able to avoid a clash between Union law primacy and overriding principles of the Italian constitutional order.

It has not proved possible, however, to avoid such a clash, and even one of a general and systemic nature, between Union law and the recent case law of the Romanian and Polish Constitutional Courts. In the case of Romania, the Constitutional Court, despite a clause on the primacy of EU law in the national constitution, has ruled that ordinary courts are not allowed to examine the compatibility with EU law of national legislation which the Constitutional Court has found to be consistent with the constitution.[98] The relevant ECJ case law confirms that this approach is not compatible with EU law. The ECJ has also held that EU law precludes national rules or a national practice under which a national judge may incur disciplinary liability if he or she has applied EU law, thereby departing from the national case law of the Constitutional Court incompatible with the principle of primacy. [99]

It is not necessary to give a full account of the well-known serious disagreement between the former Polish government, on the one hand, and the Union institutions and most other Member States, on the other, concerning respect for the rule of law, and judicial independence and impartiality in particular, in Poland.[100] Suffice it to note that the Constitutional Tribunal has considered some provisions of the EU Treaties, including Articles 1 and 19(1) TEU, incompatible with the Polish constitution.[101] The view of the Constitutional Tribunal on the primacy of the national constitution was shared by the then Polish government.[102] The European Commission accordingly, on 22 December 2022, launched infringement procedures against Poland for breach of the general principles of autonomy, primacy, effectiveness, and uniform application of Union law and the binding effect of rulings of the CJEU.[103] That said, the outcome of the Polish national elections on 15 October 2023 and the coming into power, in

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95 Case C-105/14 *Taricco and Others* ('Taricco I') EU:C:2015:656.

96 Decision of 23 November 2016.

97 Case C-42/17 *M.A.S. and M.B.* ('Taricco II') EU:C:2017:936.

98 Eg in Decision no 390/2021. See R-M Popescu and RH Radu, 'Romania' in Kornezov (n 75), 596.

99 See, in particular, Case C-430/21 *RS* (n 73).

100 The literature on what is often referred to as the 'rule of law crisis' of the EU is already extensive. For a recent contribution with references to legal doctrine and case law see A Rosas, J Raitio and P Pohjankoski (eds), *The Rule of Law's Anatomy in the EU: Foundations and Protections* (Oxford, Hart Publishing, 2023).

101 Decisions of 14 July and 7 October 2021

102 See, eg the government's position, as reported in the judgment in Case C-204/21 *Commission v Poland* (n 73), paras 60-61. See also Ladenburger, Marinova and Tomkin (n 75), 150-151.

103 Commission Press Release, 22 December 2021, ec.europa.eu. See also the judgment in Case C-204/21 *Commission v Poland* (n 73).

December 2023, of a new government has brought about a change in the approach of the government to the status of Union law in Poland. While there was tension, to say the least, between the recent case law of the Polish constitutional tribunal and the membership of Poland in the EU, [104] it is to be hoped that with the new Polish government, the principle of primacy will be once again recognised, also in the context of the Polish constitutional order.

These examples demonstrate that there may be tension, and potential conflict situations, between national constitutional law, as interpreted by constitutional or other national courts, and Union law, as interpreted and applied by the CJEU, implying that national courts are not always ready to adhere to an unconditional principle of primacy. Yet, the principle of uniform application of Union law, and thus also its primacy, are essential and necessary ingredients of the EU constitutional order and the principle of respect for the national identities of Member States, recognised in Article 4(2) TEU, may not thwart the obligation to respect the other provisions of the Treaties, such as Articles 2 and 19 TEU.[105]

With regard to the principal focus of this study, that is, the relevance of national law for the application of Union law, the instances where national courts have given pride of place to national law at the expense of Union law can be said to provide negative examples of the application of national law. It should be recognised, on the other hand, that with some exceptions, there does not seem to be any general and open challenge to the idea that Union law is directly applicable and may have direct effect at national level and that it prevails in principle over national law, however framed. In Declaration No 17 annexed to the Lisbon Final Act of 2007, the Member States' governments have acknowledged their unconditional adherence to the principle of primacy. The following discussion will focus on the role of national law as part of the overall EU legal framework, as a supplementary ingredient rather than obstacle to the effectiveness of Union law.

[104] As to the EU Treaty provisions found by the Polish Constitutional Tribunal to be incompatible with the Polish Constitution, Article 1 is about the very establishment of the EU and Article 19(1) refers to the jurisdiction of the CJEU and the need to provide for effective judicial protection at national level.

[105] Rosas and Armati (n 1), 64-68. On the relevance of the principle of respect for national identity see, eg Case C-204/21 *Commission v Poland* (n 73), paras 72-74.

5. THE RELEVANCE OF NATIONAL LAW FOR UNION LAW: GENERAL OBSERVATIONS

5.1. Introduction

It is generally assumed that while the national legal order is required to include Union legal rules and to recognise their primacy, direct applicability and, as the case may be, direct effect at national level, Union law does not include national law. Union institutions and bodies are supposed to interpret and apply Union law while national law belongs to the realm of national authorities. This constellation is particularly conspicuous in the context of the preliminary rulings procedure, regulated in Article 267 TFEU, Article 23 of the Statute of the Court of Justice of the European Union,[106] and Articles 93 to 118 of the Rules of Procedure of the Court of Justice.[107] The ECJ interprets Union law and rules on the validity of Union secondary law while the national court requesting a preliminary ruling, apart from applying Union law, as clarified, as the case may be, by the ECJ, interprets and applies national law.[108]

This does not mean, however, that the state of national law would be irrelevant for the preliminary ruling cases pending before the ECJ. For the latter it is necessary to understand the entire legal context of the case pending before the national court and that is why Article 94 of the Rules of Procedure of the ECJ requires that the request for a preliminary ruling contain, inter alia, 'the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law' as well as a statement of the reasons which prompted the national court to make a reference concerning the interpretation or validity of certain provisions of Union law and 'the relationship between those provisions and the national legislation applicable to the main proceedings'.

The preliminary ruling context is far from the only situation where national law may become relevant for Union law purposes.[109] In this chapter, four perspectives will be considered. First, some examples will be given of instances where national law has been a source of inspiration for Union law, which may imply that national legal traditions and solutions should be taken into account in the interpretation of Union rules. Second, consideration will be given to the requirement, following from the primacy, uniform application, and direct applicability of Union law, that national law be in conformity with Union law. Third, the relationship between Union law and national law in the context of infringement procedures as well as actions for annulment will be briefly considered. Fourth, the relevance of national law will be approached from the perspective of the role it should play in the implementation of Union legal rules at national level.

Following on this chapter, Chapter 6 will consider some examples of blending Union and national law, including hybrid bodies and frameworks as well as international agreements which are concluded either by the Union and Member States together (mixed agreements) or concluded by Member States alone even if the agreements cover matters of Union competence and Union law. Chapter 7 will look at instances where Union institutions and bodies are being exceptionally required even to apply national legal rules as the applicable law. Finally, some conclusions will be drawn in Chapter 8, which will also contain a short discussion of the nature and intensity of judicial review, including at the appeal stage before the ECJ.

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[106] The Statute is contained in Protocol No 3 annexed to the TEU, the TFEU and the Treaty establishing the European Atomic Energy Community.

[107] [2012] OJ L265/1 with subsequent amendments.

[108] See, eg Broberg and Fenger (n 3), 137-139.

[109] See, in particular, Prek and Lefèvre, (n 8**)**, 369-370.

5.2. National Law as a Source of Inspiration for Union Law

It should be recalled that Union law has, in many ways, been inspired by national law. European Community law did not start from scratch. Many of the concepts and principles used in Union law contexts (proportionality, equality, and non-discrimination, ne bis in idem, property, insolvency, to name but a few examples) have been directly or indirectly borrowed from, or at least inspired by, national legal traditions. This does not, on the other hand, prevent Union law from providing a specific Union law definition of a concept, which may then acquire a meaning which may be distinct from national definitions. The CJEU case law makes it clear that a Union law concept should be given an autonomous and uniform Union law meaning, unless the relevant Union norm contains an explicit reference to national law [110]

One of the most obvious examples of national law having served as a source of inspiration for Union law is offered by the relevance of the common constitutional traditions of the Member States for determining the fundamental rights which constitute general principles of Union law. This particular source of inspiration was originally formulated in ECJ case law, starting with *Internationale Handelsgesellschaft*.[111] In its earlier case law of the 1950s and early 1960s, the Court did not accept invitations to apply a national constitution, considering that such a move would have gone beyond its jurisdiction.[112] Arguably, the fact that the constitutions of the then six Member States were far from identical also played a role in this context. The reference to 'common constitutional traditions' was meant to provide a common denominator rather than a focus on one specific national constitution. It is not a question of 'applying' directly these traditions—and even less so, individual national constitutions—but rather using them as guidelines for the determination of general principles of Union law. The vagueness of the concept, as compared to the more explicit and comprehensive list of human rights contained in the ECHR and other international human rights conventions, or the EU Charter of Fundamental Rights, explains why there are not so many cases where the Court, with a view to 'finding' general principles of Community law, has relied on the common constitutional traditions.[113]

The reference to common constitutional traditions is now codified in Article 6(3) TEU, which refers to fundamental rights as general principles of Union law not only as guaranteed by the ECHR but also 'as they result from the constitutional traditions common to the Member States'. Article 52(4) of the EU Charter of Fundamental Rights adds that '[i]n so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.'[114] Also the Preamble to the Charter[115] refers to these traditions in stating that the Charter reaffirms rights as they result, inter alia, 'from the constitutional traditions and international obligations common to the Member States'. While Article 6(3) TEU recognises general principles of Union law as a source of law separate from the Charter (which is referred to in Article 6(1) TEU), Article 52(4) and the citation from the Preamble is based on the assumption that rights recognised in the Charter itself have been inspired by the common constitutional traditions of the Member States.

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110 To give but one example from an extensive case law, see Case C-510/10 *DR and TV2 Danmark* EU:C:2012:244, paras 33-37. See also Lenaerts and Van Nuffel (n 25), 768.

111 Case 11/70 (n 70).

112 See, eg Case 1/58 *Stork v High Authority* EU:C:1959:4. See also A Rosas, 'The European Court of Justice and Fundamentql Rights: Yet Another Case of Judicial Activism?' in C Baudenbacher and H Bull (eds), *European Integration Through Interaction of Legal Regimes* (Oslo, Universitetsforlaget, 2007), 33.

113 See, eg Case 44/79 *Hauer* EU:C:1979:290; Case C-387/02 *Berlusconi* EU:C:2005:270.

114 On Article 52(4) see Peers (n 72), 1503-1505.

115 See para 5 of the Preamble to the EU Charter of Fundamental Rights.

That said, it may be surmised that the ECHR and other international human rights conventions, which express human rights recognised in common at the European or universal level, have played a more important role as direct sources of inspiration for the Charter rights. This is confirmed by the Explanations relating to the Charter, which in commentaries to practically all provisions of the Charter refer to one or more internationally guaranteed human rights provision, and often also to EU instruments and/or case law, while the references to national constitutions are rare and do not identify any individual constitution.[116]

Another example of explicit references to national legal traditions is to be found in Article 340(2) TFEU, which states that the non-contractual liability of the Union shall be determined 'in accordance with the general principles common to the laws of the Member States'. Article 340(3) refers in a similar way to the liability of the ECB. The ECJ, in the context of the question of Member States' liability for breaches of Union law, has observed that the principle of non-contractual liability of the Union expressly laid down in Article 340 TFEU 'is simply an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused.'[117] The case law of the CJEU relating to the liability of the Union under Article 240(2) contains estimations of the state of national law with respect to the non-contractual liability of their public authorities, inter alia, with respect to the distinction between manifest and less serious breaches of the law.[118] As was the case with the common constitutional traditions previously discussed, such references to national law are normally of a fairly general nature, without mentioning examples of individual national law. Taking also into account the differences which may exist between Member States' national laws, the development of Union law in this area cannot be a simple reproduction of national legal principles.[119] Finally, as regards contractual liability, Article 240(1) refers to the 'law applicable to the contract in question'. This may entail the outright application of national law by the CJEU, as will be demonstrated in subchapter 7.3.

5.3. The Requirement that National Law Be Compatible with Union Law

If there are no Union law rules regulating a certain area, and especially if there is no Union competence concerning that area, the situation is perceived to fall under an exclusive national competence.[120] Such situations do not completely escape the reach of Union law, however, as there may be features of the national law in question which are found to contravene Union law rules. National law, even if it is based on an exclusive national competence, must be in conformity with Union law. If such issues come before the ECJ through a request for a preliminary ruling, the Court, while not being competent to annul the relevant national legal

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[116] See, eg the commentaries to Article 37 (Environmental protection): 'It also draws on the provisions of some national constitutions' and Article 49(1) (retroactivity of a more lenient penal law, 'which exists in a number of Member States', Explanations relating to the EU Charter of Fundamental Rights, [2007] OJ C 303/17. On the relevance of other international human rights conventions than the ECHR for the drafting of the EU Charter and EU law more generally see A Rosas, 'The Charter and Universal Human Rights Instruments' in Peers et al (n 72), 1685.

[117] Joined Cases C-46/93 and C-48/93 *Brasserie du Pécheur* EU:C:1996:79, para 29.

[118] See, eg Case 4/69 *Lüticke v Commission* EU:C:1971:40, para 10; Joined Cases 83 and 94/76 and 4, 15 and 40/77 *Bayerische HNL Vernehmungsbetriebe and Others v Council and Commission* EU:C:1978:113, para 5; Joined Cases C-120/06 P and C-121/06 P *FIAMM* EU:C:2008:476, paras 170-175. See also Lenaerts and Van Nuffel (n 25), 486.

[119] P Aalto, *Public Liability in EU Law: Brasserie, Bergaderm and Beyond* (Oxford, Hart Publishing, 2011), 62.

[120] See, eg Article 5(2) TEU, according to which competences not conferred upon the Union remain with the Member States and Article 2(2) TFEU, which provides that in areas of shared competence, the Member States shall exercise their competence to the extent that the Union has not exercised its competence.

rule, may find that Union law 'precludes' national law of a given content, in which case there may arise an obligation for a national court to set aside, or otherwise render non-applicable, national legal provisions which are in contravention of Union law.[121] As already noted, in order to arrive at the conclusion that national law is in contravention of Union law, the ECJ, while not being empowered to give an authoritative interpretation of national law, must necessarily have a certain understanding of the national rule at issue.[122] This is even more so in the context of infringement procedures, which will be considered in the following subchapter.

Even if the competence to enact such law rests with the Member States, there are many examples of areas where national law may come into conflict with Union law. For instance, a rule of national law which is not based on Union legal rules may nevertheless imply discrimination on grounds of nationality as prohibited by Article 18 TFEU.[123] To mention another example, Member States must exercise their tax powers in accordance with the Treaties, including Article 18 TFEU and the four economic freedoms recognised in the same Treaty.[124]

A further example of the requirement that national law be in conformity with Union law is provided by the question of criteria for the acquisition and loss of nationality. According to Article 20(1) TFEU, '[e]very person holding the nationality of a Member State shall be a citizen of the Union'. It is also stated that citizenship of the Union 'shall be additional to and not replace national citizenship'. Regulating the granting and deprivation of nationality thus belongs to a national competence. Yet, already in a judgment of 1992, the ECJ held that while, under international law, it is for each Member State to lay down conditions for the acquisition and loss of nationality, the exercise of this competence should be done 'having due regard to Community law'.[125] What this could entail more concretely was demonstrated in *Rottmann*, which concerned the withdrawal by a Member State of the nationality of a person who had acquired it by naturalisation, with the effect that the person concerned became stateless and thus lost his EU citizenship as well. The ECJ held that the exercise of the power to lay down the conditions for acquisition and loss of nationality, 'in so far as it affects the rights conferred and protected by the legal order of the Union' (in this case those following from Union citizenship), 'is amenable to judicial review carried out in the light of European Union law'.[126] In *Wiener Landesregierung*, even the withdrawal of an assurance to be granted nationality was held to be a matter also for Union law, as that assurance had made the person concerned renounce the nationality of another Member State and thus become stateless.[127]

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121 There is an abundance of case law using this formula, to cite but one recent example, see Case C-836/18 *Subdelegación del Gobierno en Ciudad Real* EU:C:2020:119, para 54. As to whether the CJEU can, in the context of a direct action, annul a national legal act will be considered in relation to the Case of *Rimšēvičs*, subchapter 7.9 below. On the obligation of a national court to set aside, and in some cases perhaps even declare null and void, national law which is in contravention of Union law see eg Case C-487/19 *WZ* (n 74) and Dougan (n 74).

122 As noted at nn 107 and 108, Article 94 of the Rules of Procedure of the Court hence requires that the request for a ruling contain an explanation of the relevant national law, including, if need be, national case law.

123 True, Article 18(1) TFEU only applies '[w]ithing the scope of application of the Treaties'. The ECJ has given this provision a wide scope, however, making it applicable, inter alia, to discrimination which may have effects on the EU internal market. See Lenaerts and Van Nuffel (n 25), 121-122.

124 Lenaerts and Van Nuffel (n 25), 122.

125 Case C-369/90 *Micheletti and Others* EU:C:1992:295, para 10.

126 Case C-135/08 *Rottmann* EU :C :2010 :104, paras 36-59, citation para 48. See also Case C-221/17 *Tjebbes and Others* EU:C:2019:189.

127 Case C-118/20 *Wiener Landesregierung* EU:C:2022:34.

In such situations concerning the loss of nationality, the question of whether the loss will be accompanied by a loss of Union citizenship as well will depend on whether or not the person concerned retains the nationality of another EU Member State. There are many other situations where, for an analysis centred on Union law, it will be necessary to consider the national law and practice of at least two Member States, including the question of whether they are in conformity with Union law. Perhaps the clearest example is offered by situations involving mutual recognition and mutual trust.[128] These principles are based on the idea that certain decisions and judgments emanating from one Member State should be presumed to be in conformity with Union law and, notably, Union fundamental rights and should normally be recognised and enforced as such in other Member States. This constellation is particularly relevant in the areas of asylum and immigration as well as in judicial cooperation in civil and criminal matters. Mutual trust does not imply blind trust, however, and a Member State may, in exceptional situations, refuse to enforce a decision made under the national law of another Member State.[129] Without analysing mutual recognition and mutual trust further, for the purposes of the present study, it should be noted that under these principles, certain national decisions, while remaining just that, if taken in accordance with certain Union law requirements (for instance, that a European arrest warrant be a 'judicial decision'[130]), acquire a kind of Union law *imprimatur*. A national decision-maker is supposed not only to act in conformity with Union law but also, in a context of horizontal rather than vertical cooperation, recognise and execute decisions taken by national authorities of another Member State.

5.4. National Law in Infringement Procedures and Actions for Annulment

In infringement procedures, the Commission (Article 258 TFEU) or a Member State (Article 259 TFEU) may initiate an action before the ECJ against a Member State for alleged failure to fulfil a Union law obligation. Such failure may stem from not only the behaviour of national authorities but also the content of rules and decisions of national law.[131] For instance, national legislation aimed at transposing a directive may constitute an incorrect implementation of the directive or it may, independently of the existence of a directive, contain a rule violating Union primary or secondary law. In such cases, while the ECJ does not have the competence to annul or amend a national rule or decision found to contravene Union law, not even to decide what specific measures the Member State should take with a view to implementing the judgment,[132] a judgment finding that a given national rule constitutes in itself non-fulfilment may require that the Member State in question repeal or amend the national rule or decision. A non-fulfilment of that obligation again may lead to financial sanctions, in accordance with Article 260 TFEU.[133] At the initiative of the Commission, the Court may impose a lump sum (a kind of fine for past non-fulfilment) and/or a penalty payment (a sum to be paid for each day or other period of time that the failure to fulfil a Union law obligation continues).

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[128] The principle of mutual recognition is referred to in Articles 67(3) and (4), 81(1) and 82(1) TFEU. See also L Bay Larsen, 'Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice' in P Cardonnel, A Rosas and N Wahl (eds), *Constitutionalising the EU Judicial System* (Oxford, Hart Publishing, 2012), 139; Rosas and Armati (n 1), 180-182.

[129] K Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (Yet Not Blind) Trust' (2017) 54 *Common Market Law Review*, 805.

[130] See Article 1 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2002] OJ L190/1.

[131] See, eg Prek and Lefèvre (n 8), 383-384.

[132] Case C-104/02 *Commission v Germany* EU:C:2005:219, paras 42 and 49-50. See also T Materne, *La procédure en manquement d'État* (Bruxelles, Larcier, 2012), 339.

133 See Materne (n 132), eg 348-405.

In order to assess whether the national rule is in itself in contravention of Union law, the ECJ must necessarily determine the meaning to be given to the national rule and cannot then be bound by the interpretation eventually put forward by the defendant government. If there is established national case law on the issue, the Court will normally follow that case law.[134] But in situations where there is no, or conflicting, guidance provided by national case law, the ECJ may have to determine the scope and meaning of the national rule at issue. Whilst such determination does not in itself bind the national courts, an interpretation followed by them which would be at odds with the one determined by the ECJ could give rise to a new infringement procedure. A similar assessment of national law may be called for in the context of a decision of the Commission as to whether changes in national law have secured putting an end to an infringement as determined in a judgment of the ECJ under Article 260 TFEU.[135] While the CJEU may be said to deal with national law as a question of fact rather than law,[136] it is still the case that national law is a normative rather than purely factual phenomenon. In any case, the distinction between questions of law and questions of fact is far from clear-cut.[137]

Likewise, in the context of actions for annulment under Article 263 TFEU, the content of national law may become an issue.[138] Such a situation has arisen, inter alia, in the context of the question of whether a national tax regime provides for a selective advantage and thus constitutes state aid. To resolve that question, it will normally be necessary to determine the structure and content of the relevant national tax legislation. The ECJ has held that 'with respect to the assessment in the context of an appeal of the General Court's findings on national law, which, in the field of State aid, constitute findings of fact, the [ECJ] has jurisdiction only to determine whether that law was distorted'.[139]

The Court has added, nonetheless, that the 'legal classification of national law on the basis of a provision of EU law' (such as Article 107 TFEU relating to the definition of State aid) is a question of law which can be reviewed by the ECJ on appeal.[140] In a recent Opinion in another case relating to the relationship between state aid and national tax law, the Advocate General confirmed the distinction between, on the one hand, findings on the content and scope of national law and its application in the case at hand (which constitute findings of fact) and, on the other hand, findings relating to the classification given to national law for the purpose of delimiting a concept used in EU state aid law, that is the so-called reference system in the context of applying Article 87(1) TFEU (which constitute findings of law). He added, however, that the boundary between findings of fact and their legal classification is a 'delicate issue' and that the dividing line between admissible complaints on appeal and inadmissible complaints, as regards the General Court's findings relating to national law, 'remains fluid' and should be

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134 Case C-382/92 *Commission v United Kingdom* EU:C:1994:233, para 36; Case C-129/00 *Commission v Italy* EU:C:2003:656 para 30. See also Materne (n 132), 195.

135 Prek and Lefèvre (n 8), 386-387.

136 Ibid, 383-384, 391-392.

137 According to Article 256(1) TFEU and Article 58 of the Statute of the Court, decisions of the General Court may be subject to a right of appeal to the ECJ 'on points of law only'. On the distinction between points of law and points of fact see C Naomé, *Appeals before the Court of Justice of the European Union* (Oxford University Press, 2018), 83-109.

138 Prek and Lefèvre (n 8), 385-387.

139 Case Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe v Commission* EU:C:2022:859, para 82. See also Case C-203/16 P *Andres v Commission* EU:C:2018:505, para 78. On the concept of distortion of facts see Naomé (n 137), 93-99.

140 Case Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe v Commission* (n 139), paras 83-85.

clarified by the Court.[141] In a judgment of 5 December 2023, relating to Luxembourg tax law, the ECJ confirmed that '[t]he question whether the General Court adequately defined the relevant reference framework and, by extension, correctly interpreted the constituent provisions, is a question of law which can be reviewed by the Court of Justice on appeal'. Thus, the arguments of the appellant calling into question the choice of reference framework or its meaning in the first step of the analysis of the existence of a selective advantage were admissible, 'since that analysis derives from a legal classification of national law on the basis of a provision of EU law'.[142]

5.5. Implementing Union Law through National Law

While national law must be in conformity with Union law, the latter also relies on Member States and their national law to achieve its own purposes. Article 4(3), second subparagraph, TEU, in the context of the principle of sincere cooperation, instructs Member States to 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'. And Article 291(1) TFEU contains an obligation specifically related to the implementation of Union law: 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts'. The main principle is thus that implementation takes place within the framework of the national legal order. Only where uniform conditions for implementation are needed, the Union legal act (normally a legislative act) shall, by virtue of Article 291(2), confer implementing powers on the Commission or, in some cases, the Council. The system, which is thus highly decentralised, can be seen as a manifestation of 'executive federalism'.[143] Generally speaking, it is up to each Member State to designate the national, regional, or local authorities which are charged with the implementation of Union law.[144]

The need to adopt national implementing acts is particularly obvious with respect to directives, but regulations may also be in need of national implementing measures.[145] With respect to directives whose period of transposition has not yet expired, Member States, while not yet under a strict obligation to adopt implementing measures, have a general obligation to refrain from taking measures which may seriously comprise attainment of the objectives pursued by the directive.[146] The obligation of Member States to adopt measures necessary to implement legally binding Union acts is supplemented by the obligation, provided for in Article 19(1), second subparagraph, TEU to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.[147] As has already been indicated,[148] national courts play an important role as EU courts and parts of the EU judicial system, including in the implementation of Union legal acts.

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141 Case C-465/20 P *Commission v Ireland and Apple and Others,* Opinion of Advocate General Pitruzzella of 9 November 2023, EU:C:2023:840, paras 44 and 45.

142 Joined Cases C-451/21 P *Luxembourg v Commission* and C-454/21 P *Engie Global Holding and Others v Commission* EU:C:2023:948, para 78.

143 Lenaerts and Van Nuffel (n 25), 565.

144 Ibid, 512, 564. Concerning more specific requirements for the national bodies which may be charged by Union law with applying and implementing Union law, see subchapter 6.2.

145 See Article 289 TFEU and Rosas and Armati (n 1), 59-61.

146 Case C-129/96 *Inter-Environnement Wallonie* EU:C:1997:628, paras 43-47. See also Lenaerts and Van Nuffel (n 25), 726-727.

147 This requirement of effective legal protection has been held to include the requirement of independent and impartial judicial bodies, see notably Case C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117; Case C-619/18 *Commission v Poland* EU:C:2019:531.

148 See at nn 2 and 3 and 107 and 108.

The basic Treaties contain numerous other obligations incumbent on the Member States and some provisions refer to quite specific obligations to take measures, including measures to implement Union acts. To mention but one example, Article 325 TFEU refers to various obligations of the Member States and the Union to combat illegal activities affecting the financial interests of the Union, including in Article 325(3) an obligation for Member States to coordinate their actions and organise, together with the Commission, close and regular cooperation between the competent authorities. It goes without saying that Union secondary law abounds in specific obligations relating to its implementation at national level. The following chapter will discuss some instances where Union legal acts contain more specific and detailed obligations by requiring Member States to designate special authorities, including courts, to perform particular tasks as specified in the Union act.

6. BLENDING UNION AND NATIONAL RULES, BODIES, AND PROCEDURES

6.1. Introduction

The previous chapter recalled some of the instances where national law becomes relevant for Union law purposes, including the general requirement that national law be compatible with Union law and the role national law plays generally in the implementation of Union law. These observations apply generally and are not limited to certain areas or contexts of Union law. In the present chapter, examples will be given of some more specific solutions which imply an even closer relationship between Union and national bodies and procedures and thus between Union law and national law.

At least three distinct situations may be noted in this regard, although it must be recognised that the borderlines between them are not clear cut. First, there is the case of national regulatory and other bodies which are specifically designated to perform Union objectives and whose status and tasks are largely determined by Union law, although they remain, in principle, national bodies. Second, regardless of the extent to which the status and tasks of a national body are specifically regulated by Union law, many administrative procedures consist of so-called composite procedures in which the final act is adopted by a Union body but with obligatory procedural steps leading to that act being undertaken by a national body. Third, some institutions or instruments have a hybrid character, implying that they have a mixed status, combining elements of a Union and a national body or instrument. A separate subchapter will look at a particular area of hybrid instruments: the so-called mixed international agreements concluded by the Union together with some or all of its Member States, and some international agreements, concluded by Member States only, which assume a Union law relevance going somewhat beyond their status as national law.

6.2. Specially Designated National Authorities to Perform Union Tasks

Apart from general references to the obligations of national authorities in the implementation of Union law, as previously outlined, Union secondary law may contain more specific rules obligating Member States to designate national bodies charged with the application and implementation of Union law and containing requirements on their status and tasks. Such bodies remain part of the national administrative or judicial structure but, as Union law vests them with a special status as well as specific tasks with a view to attaining Union objectives, they may appear as formally national but functionally quasi-Union bodies. In such cases, Union law may be said to intervene in the national administrative or judicial apparatus while, at the same time, national law and national bodies become vehicles for the application and implementation of specific Union law purposes. Such national regulatory and other bodies should be distinguished from Union agencies, which formally belong to the Union administrative structure.[149]

To begin with specially designated national bodies which form part of the judicial system, an example of such a specially designated national court is to be found in Article 123(1) of the Union Trade Mark Regulation,[150] entitled ‘EU trade mark courts’. According to this provision, the Member States ‘shall designate in their territories as limited a number as possible of

[149] M Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, 2016); M Scholten and A Brenninkmeijer (eds), *Controlling EU Agencies: The Rule of Law in a Multi-Jurisdictional Legal Order* (Cheltenham, Edward Elgar, 2020).

[150] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1.

national courts and tribunals of first and second instance, which shall perform the functions assigned to them by this Regulation'. These functions include infringement actions and counterclaims for revocation or for a declaration of invalidity of the EU trade mark.[151] National trade mark courts apply the Trade Mark Regulation and national law to the extent that a matter is not covered by the Regulation.[152] The ECJ has held that the decision of a national trade mark court which, in the context of a counterclaim for a declaration of invalidity, declares a Union trade mark invalid, necessarily has effects *erga omnes* throughout the Union.[153] In a recent case, the ECJ has ruled that a trade mark court hearing an action for infringement and being faced with such a counterclaim for a declaration of invalidity retains jurisdiction to rule on the validity of the trade mark, even if the main infringement action has been withdrawn.[154]

In the context of European competition law, Member States are required to designate national competition authorities responsible for the application of Articles 101 and 102 TFEU. According to Article 35 of the basic Regulation on the implementation of the rules of competition,[155] which instigated a decentralised system for the implementation of competition law, these authorities may be administrative authorities but may also include courts, in which case the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial. The Regulation contains several provisions on the powers of national competition authorities, their close cooperation with the Commission, information exchange both vertically with the Commission and horizontally with other national authorities, and the relationship between Articles 101 and 102 TFEU and national competition laws.[156]

As to national administrative bodies—often referred to as 'national regulatory authorities' (NRAs)—harnessed for specific Union law purposes, examples are to be found in the areas of energy, telecommunications, audiovisual media services, postal services, railways, airport slots for flights, and data protection.[157] There is an abundance of ECJ case law notably on the question as to whether such NRAs are, under national law, sufficiently independent from other parts of the administration, as required by Union law.[158]

An example of an NRA which forms part of an extremely complex system of application and implementation of Union law is offered by the NRAs to be designated pursuant to the Union legislation relating to the internal electricity market. This system is built on a combination of the powers principally of the European Commission, the EU Agency for the Cooperation of Energy Regulators (ACER),[159] the European network of transmission system operators in electricity

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151 See notably Articles 124 to 128 of Regulation 2017/1001.

152 Article 129 of Regulation 2017/1001.

153 Case C-425/16 *Raimund* EU:C:2017:776, para 29.

154 Case C-256/21 *TV and Gemeinde Bodman-Ludwigshafen* EU:C:2022:786.

155 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101} and [102] of the Treaty, [2003] OJ L 1/1; Consolidated Version of 1 July 2009.

156 See, in particular, Articles 3, 5, 6, 11, 12, 14, 15, 16, 22 and 35 of Regulation 1/2003.

157 A Rosas, 'Europeiska unionen – ett federativt förbund' in *Oikeus, vero, talous. Juhlajulkaisu Kauko Wikström 1943 – 21/12 – 2013* (University of Turku, 2013), 283-295; Rosas and Armati (n 1), 82, 106-107; Rosas (n 8), 276.

158 For a list of cases see Rosas and Armati (n 1), 107, n 104. For examples of recent judgments see Case C-578/18 *Energiavirasto* EU:C:2020:35 (which concerns the Finnish electricity market and the status of the national energy agency as an NRA); Case C-378/19 *Prezidente Slovenskej republiku* EU:C:2020:462; Case C-767/19 *Commission v Belgium* EU:C:2020:984; Case C-718/18 *Commission v Germany* EU:C:2021:662.

159 Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (recast), [2019] OJ L 158/22.

(ENTSO for Electricity),[160] the European entity for distribution system operators (EU DSO entity)[161] as well as transmission and distribution operators and regulatory authorities at national level (NRAs). As well as the Commission and ACER, the NRAs also possess real decision-making powers.[162] As a rule, each Member State shall designate a single regulatory authority at national level. There are specific and detailed requirements relating to their independence.[163] As confirmed by ECJ case law, their tasks may not be transferred to political or other non-independent bodies.[164] As to their tasks, they shall, inter alia, ensure the compliance not only of transmission and distribution system operators but also, in close coordination with other NRAs, of the ENTSO for Electricity and the EU DSO with their obligations under Union law and ACER decisions.[165] There are also detailed provisions relating to the vertical and horizontal cooperation and coordination between these different actors at Union and national level. Without going into the organisation and tasks of the electricity NRAs in more detail, it is specifically prescribed that their decisions must be fully reasoned and justified to allow for judicial review and that the Member States shall ensure that 'suitable mechanisms' exist at national level under which a party affected by a decision[166] has a right of appeal 'to a body independent of the parties involved and of any governments'.[167]

To take another example with a somewhat more simplified structure, the EU Audiovisual Media Services Directive (AVMSD)[168] contains rules on the status and tasks of NRAs. These authorities shall be 'legally distinct from the government and functionally independent of their respective governments and of any other public or private body' and they shall exercise their powers 'impartially and transparently' and 'shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them under national law implementing Union law'.[169] There are also provisions, inter alia, on the appointment and dismissal of heads of NRAs and on the existence of effective appeal mechanisms at national level as well as on informational exchange and cooperation between NRAs. In May 2022, the Commission referred five infringement cases to the ECJ concerning the alleged failure of Member States to

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160 Regulation (EU) of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast), [2019] OJ L 158/54, Article 28 and following.

161 Ibid, Article 52 and following.

162 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012(27/EU (recast), [2019] L 158/125, Article 57 to 64.

163 Ibid, Article 57.

164 Case C-718/18 *Commission v Germany* (n 158). This case was decided on the basis of legislation preceding the legislative acts mentioned in nn 159, 160 and 162. See also L Kaschny and S Lavrijssen, 'The Independence of National Regulatory Authorities and the European Union Energy Transition' (2023) 72 *International and Comparative Law Quarterly*, 715.

165 Directive 2019/944, Article 59.

166 On the concept of 'party' see Case C-578/18 *Energiavirasto* (n 158). See also Case C-378/19 *Prezidente Slovenskej republiku* (n 158).

167 Directive 3019/13, Article 60(7) and (8).

168 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 administratve action in Member States concerning the provision of audiovisual media services (Audiovisual Media Service Directive), [2010] OJ L 95/1, as amended by Directive (EU) 2018/1808 of 14 November 2018, Consolidated Version, 18.12.2018.

169 Article 30 of Directive 2010/13. See also J-F Furnémont, 'Independence of Audiovisual Media Regulatory Authorities and Cooperation between Them: Time for the EU Lawmaker to Fill the Gaps', Opinion on the EC Proposal for Amending the AVMS Directive and the EP CULT Committee Draft Report (Wagner Hatfield 2016), www.die-medieanstalten.de.

transpose the revised Directive.[170] More generally, the Commission is assisted by a Contact Committee composed of representatives of competent national authorities. In addition, the NRAs have their own cooperation framework with the name of the European Regulators Group for Audiovisual Media Services (ERGA).[171]

6.3. Composite Procedures

Mixing procedures at Union and national level is a frequently occurring phenomenon.[172] It should be recalled that the EU legal order is highly decentralised in the sense that, as has been explained, the application and implementation of Union law is largely taking place at national level. This often implies various forms of interaction between Union and national authorities, and horizontally between national authorities, which often imply what has been referred to as 'composite or combined' administrative procedures.[173] I shall focus on so-called vertical composite procedures, involving both Union and Member State bodies, and particularly those where a national measure is a prerequisite for a Union act. Horizontal composite procedures involving two or more Member States will be bypassed, but some words will be said about 'diagonal' composite procedures, involving a combination of vertical and horizontal procedures.[174]

Sometimes the powers of a national body are circumscribed by Union law so that the national body is required to apply Union law rather than national law and can be said to be empowered to take part in the adoption of a Union decision. An example is provided by Article 4(5) of Regulation 1049/2001 regarding access to documents,[175] according to which a Member State may request a Union institution not to disclose a document held by the institution but originating from the Member State without its prior agreement. The ECJ has held that this provision does not confer on the Member State 'a general and unconditional right of veto, so that it could in a discretionary manner oppose the disclosure of documents originating from it . . . , with the effect that access to such documents would cease to be governed by the provisions of that regulation and would depend only on the provisions of national law'. [176] The exercise of the power conferred by Article 4(5) on the Member State is, according to the Court, delimited by the substantive exceptions set out in Article 4(1) to (3). The prior agreement of the Member State 'resembles not a discretionary right of veto but a form of assent confirming that none of the grounds of exception under Article 4(1) to (3) is present'.[177] The Court also observed that in this case the implementation of rules of Union law 'has been confined jointly to the Union institution and the Member State' in question and that there should be a 'genuine dialogue' between them, in accordance with the duty of loyal cooperation.[178]

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170 Commission Press Release of 19 May 2022, digital-strategy.ec.europa.eu.

171 See Articles 29 and 30b of the Directive.

172 See, eg H Hofmann, 'Multi-Jurisdictional Composite Procedures: The Backbone to the EU's Single Regulatory Space' *Law Working Paper* Series No 2019-003 (Faculty of Law, Economics and Finance, University of Luxembourg, 2009).

173 Opinion of AG Campos Sanchez-Bordona of 27 June 2018, EU:C:2018:502, paras 57-59, in Case C-219/17 *Berlusconi* EU:C:2018:1023. See also A de Leon, *Composite Administrative Procedures in the European Union* (Madrid, Instel, 2017); Hofmann (n 172), with references to literature and case law.

174 Hofmann (172), 21-23.

175 Regulation (EC) No 1949/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] OJ L 145/43.

176 Case C-64/05 *Sweden v Commission* EU:C:2007:802, para 75. See also Hofmann (n 172), 9.

177 Case C-64/05 *Sweden v Commission* (n 176), para 76.

178 Ibid, para 85.

While under Article 263 TFEU the Court has no jurisdiction to rule on the lawfulness of a measure adopted by a national authority and while this principle may apply also to national decisions which form part of a Union decision-making procedure if they aim at establishing a division between a national and a Union power, with different purposes, Article 4(5) of Regulation 1091/2001 creates a procedure the sole object of which is to determine whether access to a document should be refused under one of the exceptions listed in Article 4(1) to (3) of the Regulation.[179] In the latter case, the CJEU rather than a national court has jurisdiction to review whether the refusal has been validly based on those exceptions, 'regardless of whether the refusal results from an assessment of those exceptions by the [Union] institution itself or by the relevant Member State'.[180]

The same outcome (CJEU rather than national jurisdiction) is present in the seminal case of *Berlusconi*, which concerned a composite procedure in the context of the Banking Union and more specifically the prudential supervision of credit institutions.[181] In a vertical composite procedure, involving an application of investors for prior authorisation of certain acquisitions of, or increase in, a qualifying holding in a credit institution, a national authority (in this case the national central bank) had to make an assessment and submit to the ECB a proposal for a decision, which was not binding on the ECB. The ECJ held that the Union Courts alone have jurisdiction not only to review the final ECB decision but also 'to determine, as an incidental matter, whether the legality of the ECB's decision … is affected by any defects rendering unlawful the acts preparatory to that decision'.[182] The judgment in *Berlusconi* makes it clear that the jurisdiction of the CJEU is exclusive, i.e. national courts are precluded from reviewing the national preparatory act (this aspect was not at issue in *Sweden v Commission*). It should be added that, according to one of the applicable Union legal acts, the national authority to which an intention to acquire a qualifying holding in a credit institution is notified shall assess whether the potential acquisition 'complies with all the conditions laid down in the relevant Union and national law'.[183] It cannot therefore be excluded that compliance with national law also becomes an issue before the CJEU in its assessment of whether there are defects rendering the national preparatory act unlawful.

As discussed by the Advocate-General in *Belusconi*,[184] there are other examples of composite procedures where the CJEU has found that the main competence belongs to Union institutions and that the role of national authorities is limited to such an extent that an input from a national authority does not affect the nature of the decision at issue as a Union act.[185] Other cases have involved a more complex combination of national and Union competences and a certain role also for national courts, albeit not to determine the invalidity of Union acts.[186] In yet other types of composite procedures, the decision-making power, at least for one separate phase of the composite procedure, lies with national authorities and accordingly the acts adopted by

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179 Ibid, paras 91 and 92 (citing Case C-97/91 *Oleifico Borelli v Commission* EU:C:1992:491, para 9), 93.

180 Ibid, para 94.

181 Case C-219/17 (n 173).

182 Ibid, para 57.

183 Article 86(1) of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities, [2014] OJ L 141/1.

184 Opinion of AG Campos Sanchez-Bordona (n 173), paras 57-79.

185 Case C-478/93 *Netherlands v Commission* EU:C:1995:324, paras 34-41.

186 Case C-6/99 *Greenpeace France and Others* EU:C:2000:148.

them cannot be reviewed by the CJEU but by national courts.[187] On the other hand, findings by national courts of the illegality of the national act do not always in themselves affect the legality of Union acts.[188]

Finally, in what has been referred to as 'diagonal' composite procedures, two or more national authorities and one or more EU bodies are involved in a complex cooperative procedure. A telling example is offered by the system for handling complaints under the General Data Protection Regulation (GDPR).[189] The procedure may involve two or more national data protection supervisory authorities,[190] the European Data Protection Board (a Union body)[191] and/or the Commission. By virtue of a complex set of procedural rules, complaints may be submitted to more than one supervisory authority[192] and judicial proceedings brought before more than one national court.[193] In some instances, a 'lead' authority may prepare a draft decision and circulate the draft among national authorities and the Data Protection Board, the latter being empowered to adopt binding decisions addressed to the national authorities.[194]

6.4. Hybrid Bodies and Frameworks

6.4.1. General

Subchapter 6.2. has dealt with national regulatory and other bodies which, while enjoying an independent status and having at least a part of their tasks and powers spelled out in Union legal acts, are formally speaking part of the national administrative structure. In subchapter 6.3., some examples have been given of so-called composite procedures, where national and Union bodies interact in various ways so that a national act constitutes a prerequisite for the adoption of a Union act. In the present subchapter, I shall look at bodies and institutional frameworks which combine, in one single body or framework, elements of Union and national law. The focus will be on five examples in particular: 1) the European System of Central Banks (ESCB) and, within this framework, the national central banks; 2) the European Border and Coast Guard; 3) the EU Agency for Law Enforcement Cooperation (Europol) and the EU Agency for Criminal Justice Cooperation (Eurojust); 4) the EU Public Prosecutor's Office (EPPO).

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187 The Opinion of AG Campos Sanchez-Bordona in Case C-2019-17 *Berlusconi* (n 173) refers to Case C-97/91 *Borelli* EU:C:1992:491; Case C-269/99 *Carl Kühne and Others* EU:C:2001:659; Joined Cases C-393/07 and C-9/08 *Italy and Donnici v Parliament* EU:C:2009:275; Case C-562/12 *Liivimaa Lihavets* EU:C:2014:2229.

188 For an example of a case where the CJEU (in this case the General Court) held that the quashing of a national act by a national court affected the legality of a Commission decision see Case T-43/15 *CRM v Commission* EU:T:2018:208, paras 71-93.

189 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, [2016] OJ L 119/1. See Hofmann (n 172), 22-23.

190 The Regulation contains detailed rules on the status, including independence, and tasks and powers of the national supervisory authorities and their cooperation with each other and Union bodies, Articles 51 to 62. On independent national authorities in general see subchapter 6.2.

191 See, in particular, Articles 64 and 65, 68 to 76 of Regulation 2016/679.

192 See, eg Article 77 ibid.

193 Articles 78 to 82 ibid.

194 See, eg Hofmann (n 172), 22-23.

6.4.2. The ESCB

The ESCB consists of the ESB, a Union institution with legal personality listed in Article 13(1) TEU, and the national central banks of the Member States. The conduct of monetary policy is limited to that part of the ESCB which consists of the ECB and the national central banks of the Member States whose currency is the euro. While the ESBC is governed by the decision-making bodies of the ECB, that is the Governing Council and the Executive Board, it is provided that the Governing Council shall comprise the members not only of the ECB Executive Board but also the governors of the national central banks whose currency is the euro.

As to the status of the national central banks, not only are their governors members of the Governing Council,[195] but the Statute of the ESCB and of the ECB contains some provisions relating to the status and tasks of the central banks.[196] They 'are an integral part of the ESCB and shall act in accordance with the guidelines and instructions of the ECB'. There are specific guarantees concerning the independence not only of the ECB but also of the national central banks, including members of their decision-making bodies.[197] Their right to perform functions other than those specified in the Statute may be curtailed by the Governing Council.[198] Member States are specifically instructed to ensure that their national legislation, including the statutes of its central banks, is compatible with the Treaties and the Statute.[199] The 'hybrid' nature of the ESCB, and of the national central banks in particular, is further illustrated by the fact that infringement proceedings may be brought by the ECB against a national central bank before the ECJ and the national decision to relieve a governor from office may be referred to the ECJ either by the governor concerned or the Governing Council.[200] In ***Rimšēvičs***, the ECJ interpreted the latter action as an action for annulment similar to the one foreseen in Article 263 TFEU. While this case will be further discussed in subchapter 7.9, the following passage of the judgment deserves to be quoted here:[201]

> *[The ESCB] represents a novel legal construction which brings together national institutions, namely the national central banks, and [a Union] institution, namely the ECB, and causes them to cooperate closely with each other, and within which a different structure and a less marked distinction between the EU legal order and national legal orders prevails.*

6.4.3. The Border and Coast Guard

The germ of the institutional framework of the European Border and Coast Guard was provided by the European Agency for the Management of Operational Cooperation at the External Borders (Frontex).[202] In 2016, this agency was not only renamed but made the backbone of a broader institutional framework called the European Border and Coast Guard and consisting of the European Border and Coast Guard Agency (a Union agency) and the national authorities responsible for border management and the national authorities responsible for

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[195] See Article 13(1) TEU and Articles 127 to 130 and 282 to 284 TFEU.

[196] Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank annexed to the TEU and the TFEU. See Article 14 and following Articles.

[197] Article 130 TFEU and Article 7 of the Statute.

[198] Article 14.4 of the Statute.

[199] Article 131 TFEU and Article 14.1 of the Statute.

[200] Articles 14.2 and 35.6. of the Statute. The action referred to in Article 35.6 is similar to the one regulated in Article 258 TFEU (infringement actions brought by the Commission against a Member State).

[201] Joined Cases C-202/18 and C-238/18 ***Rimšēvičs v Latvia and ECB v Latvia*** EU:C:2019:299, para 69.

[202] Council Regulation (EC) No 20072004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders, [2004] OJ L 349/1.

return.[203] As part of efforts at strengthening the powers and resources of Frontex, including the establishment of a European Border and Coast Guard standing corps, with the target of reaching a capacity of 10,000 operational staff in the future, a new legislative act was passed in 2019.[204]

The Border and Coast Guard 'shall implement European integrated border management as a shared responsibility of the Agency and the national authorities responsible for border management'.[205] The cooperation and coordination between the Agency and the national authorities shall include the adoption, by the Commission, of a multiannual strategic policy, an integrated planning process consisting of various plans adopted by Member States and the Agency as well as detailed provisions on the exchange of information and operational cooperation, including the EUROSUR system.[206] There are a number of mechanisms to enhance cooperation and joint action, such as national contact points, liaison officers, joint operations, and rapid border interventions. With a new legislative act introduced in 2019, there is a standing corps, which, while being 'part of the Agency', is composed of not only the statutory staff of the Agency deployed as members of the teams in operational areas but also staff seconded from Member States to the Agency for a long term (normally 24 months), staff from the Member States who are ready to be provided to the Agency for a short-term deployment, and staff from the Member States who are ready to constitute a reserve for rapid reaction for the purposes of rapid border interventions.[207]

Especially with respect to the staff seconded or deployed by Member States, there are numerous references to the application of national law, including concerning the right to bear arms and questions of civil and criminal liability. Compliance with not only Union and international law but also the national law of the host Member State (the Member State in which a joint or other operation takes place) is required of the members of the teams, including of the Agency statutory staff.[208] Complaints concerning alleged breaches of fundamental rights shall be submitted to the fundamental rights officer of the Agency but if they concern national staff, they shall be forwarded to the relevant home Member State (from which a staff member is seconded or deployed to the standing corps) for further action.[209]

6.4.4. Europol and Eurojust

After having been established through Council decisions in the then intergovernmental area of justice and home affairs, Europol became more fully integrated into the Union agency structure in 2016.[210] Its powers are limited, however, (in particular, coercive measures are explicitly

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[203] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard [and amending or repealing three regulations], [2016] OJ L 251/1.

[204] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, [2019] OJ L 295/1.

[205] Article 7(1) of Regulation 2019/1896.

[206] Articles 8 to 9 and 11 to 23 of the Regulation.

[207] Article 54(1) of the Regulation.

[208] See, in particular, Articles 82, 84 and 85 of the Regulation.

[209] Article 111 of the Regulation.

[210] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/955/JHA, 2009/936/JHA and 2009/968, [2016] OJ L 135/53. The Regulation has been amended by Regulation (EU) 2022/991 of the European Parliament and of the Council of

excluded[211]) and are mainly focused on cooperation and coordination with national law enforcement authorities. It shall 'support and strengthen action by the competent authorities of the Member States and their mutual cooperation' in preventing and combating certain forms of crime.[212] This, as such, does not make it a hybrid organisation. There are, however, some institutional arrangements which display a more hybrid character. For instance, Europol can participate in joint investigation teams. In this case, Europol staff may assist in all activities and exchanges of information with all members of the team but only 'within the limits of the laws of the Member States in which a joint investigation team is operating'.[213]

The Europol national units as well as the national data protection supervisory authorities are operating under national law but their tasks are listed in Union law and Member States have an obligation to ensure that their national units are competent under national law to fulfil the tasks designed to such units in Union law.[214] Each national unit shall moreover designate at least one liaison officer to be attached to Europol. They shall be subject to the national law of the designating Member State but are also required to comply with relevant Union law, and the Management Board of Europol shall determine their rights and obligations in relation to Europol. The costs of their activities shall be shared between the Agency and Member States according to a formula laid down in Union law but the European Parliament and the Council may decide otherwise on the recommendation of the Management Board.[215] In a recent case, the ECJ has ruled that Article 50(1) of Regulation 2016/794 relating to liability 'creates, in accordance with the intention of the EU legislature to favour an individual who has suffered damage, a set of rules under which Europol and the Member State concerned are jointly and severally liable for the damage suffered as a result of [the unlawful processing of data in the context of cooperation between them'.[216]

The activities of the EU Agency for Criminal Justice Cooperation (Eurojust) are also focused on cooperation and coordination with national investigating and prosecuting authorities. [217] To the extent that Eurojust has competence, it shall act through one or more of the national members and, particularly for some operational matters, as a College. Each Member State shall second one national member to Eurojust and shall grant them at least the powers referred to in the Eurojust Regulation.[218] They may, inter alia, participate in joint investigation teams. [219] The College is composed of all the national members. It shall elect a President and two Vice-Presidents from among the national members. The President shall represent Eurojust and preside over the meetings of both the College and the Executive Board.[220] Costs for the national members, including the President, are again shared between Eurojust and the respective Member State.

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8 June 2022, [2022] OJ L 169/1. For a consolidated text of Regulation 2016/794 see [2022] OJ L 169/1. See also Article 88 TFEU.

211 Article 88(3) TFEU and Article 4(5) of Regulation 2016/794.

212 Article 1(1) of Regulation 2016/794.

213 Article 5(2) of the Regulation.

214 Articles 7 and 42 of the Regulation.

215 Article 8 of the Regulation.

216 Case C-755/21 *P Kočner v Europol* EU:C:2024:202, para 62.

217 Article 85 TFEU and Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust) and replacing and repealing Council Decision 2002/187/JHA, [2018] OJ L 295/137.

218 Article 7(4) of Regulation 2018/1727.

219 Articles 7 and 8 of the Regulation.

220 Articles 10 to 12 of the Regulation.

While both Europol and Eurojust are Union agencies, they seem to display somewhat more hybrid elements than most other Union agencies. In both Europol and Eurojust, the joint investigation teams seem to offer examples of institutional arrangements of a hybrid character. In Eurojust, the central role played by the national members, the College, and the President in the decision-making process of the Agency, while they are largely subject to national law, likewise points to a hybrid solution.

6.4.5. The EPPO

Such a hybrid construction is even more obvious with respect to EPPO. Established in the context of enhanced cooperation[221] in 2017, the agency has obtained a more robust status and real powers as compared to Eurojust, albeit for the time being limited to crimes affecting the financial interests of the Union.[222] According to Article 86(2) TFEU, EPPO 'shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate, in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests'. While the agency 'shall be an indivisible Union body operating as one single Office', it shall 'exercise the functions of prosecutor in the competent courts of the Member States'[223] and have 'a decentralised structure'.[224] According to an Advocate General of the ECJ,[225]

> *[…], the EPPO is indeed a single and indivisible body, but functions without a common substantive or procedural criminal law. Those issues depend largely on the laws of the Member States, which might diverge in terms of the solutions they adopt. Both the unitary nature of the EPPO, on the one hand, and its dependence on national laws, on the other, are important factors in interpreting the EPPO Regulation.*

This combination of an indivisible Union body operating as one single office and a decentralised structure implies organs at two levels: a Union Chief Prosecutor, Deputy Chief Prosecutors, European Prosecutors, a College, and Permanent Chambers at a central Union level, and European Delegated Prosecutors at a decentralised level. The College is composed of the Chief Prosecutor and 22 European Prosecutors (one for each participating Member State appointed by the Council)[226] and each Permanent Chamber (of which there are 15) by a Chair and two permanent Members.[227] In addition, the European Prosecutor who is supervising

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[221] See Article 86/1) TFEU. There are 22 participating Member States.

[222] Article 86 TFEU and Article 4 of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), [3027] OJ L 283/1. According to Article 86(49 TFEU, the European Council may adopt a decision amending paragraph 1 of Article 86 in order to extend the powers of EPPO to include serious crime having a cross-border dimension. On the establishment and status of EPPO see eg W Geelhoed et al (eds), *Shifting Perspectives on the European Public Prosecutor's Office* (The Hague, TMC Asser Press, 2018).

[223] Article 86(2) TFEU.

[224] Article 8(1) of Regulation 2017/1939.

[225] Opinion of AG Caputa of 22 June 2023 in Case C-281/22 *GK and Others* EU:C:2023:510, para 20.

[226] On the appointment procedure concerning European Prosecutors and the margin of appreciation of the Council in this regard see Case T-647/20 *Verelst v Council* EU:T:2022:5. See also the Order of 13 June 2022 in Case T-334/21 *Mendes de Almeida v Council* EU:T:2022:375 and the Order of 20 October 2022 in Case C-576/21 P *Mendes de Almeida v Council* EU:C:2022:826. The latter dispute was not considered as a dispute between the Union and its civil servants falling under Article 270 TFEU (jurisdiction of the CJEU). The request of the European Chief Prosecutor, addressed to the European Parliament, to lift the immunity of a Member of Parliament is not capable of being challenged by means of an action for annulment under Article 263 TFEU, Case T-46/23 *Kaili v Parliament and EPPO*, Order of the General Court of 16 January 2024, paras 11-32.

[227] Articles 8 to 12 of the Regulation.

an investigation or a prosecution shall participate in the deliberations of the Permanent Chamber, with, as a general rule, a right to vote. The European Prosecutor shall, in compliance with the instructions given by the relevant Permanent Chamber, supervise the investigations and prosecutions for which the European Delegated Prosecutors handling the case in their Member State of origin are responsible.[228]

The actual handling of cases is entrusted to the European Delegated Prosecutors (unless this task is exceptionally conferred on a European Prosecutor), who shall be located in the Member States and have the same powers as national prosecutors, in addition and subject to the specific powers and status conferred on them, and under the conditions set out in the EPPO Regulation. There shall be at least two European Delegated Prosecutors in each Member State.[229] They shall be responsible for investigations and prosecutions but shall then follow the direction and instructions of the Permanent Chamber in charge of a case as well as the instructions from the supervising European Prosecutor.[230] Police and customs investigation measures will be handled by national authorities, however,[231] and as will be elaborated in subchapter 7.8, national courts will play an important role in authorising and reviewing EPPO procedural acts. There may be cross-border investigations involving a handling European Delegated Prosecutor in one Member State and an assisting European Delegated Prosecutor in another Member State.[232]

The Regulation contains many references to the application of national law. National law shall apply to the extent that a matter is not regulated by the Regulation. The applicable national law shall be the law of the Member State whose European Delegated Prosecutor is handling the case. Where a matter is governed by both national law and the Regulation, 'the latter shall prevail'.[233] It is specifically provided that the competent Permanent Chamber may in specific cases give instructions to the European Delegated Prosecutor 'in compliance with applicable national law'.[234] Likewise, the supervising European Prosecutor may give such instructions, providing that they are in compliance not only with the instructions given by the competent Permanent Chamber but also 'with applicable national law'.[235] As to the procedural safeguards of the suspects and accused persons, they shall, 'as a minimum', have the procedural rights provided for in Union law and without prejudice to this requirement, all the procedural rights available to them under the applicable national law.[236]

While the European Delegated Prosecutors 'shall act on behalf of the EPPO in their respective Member States'[237] and are appointed (but after having been nominated by the Member

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[228] Articles 10(9) and 12(1) of the Regulation. The European Prosecutor who is responsible for the supervision and investigations and prosecutions in his/her Member State of origin may in certain cases be replaced by another European Prosecutor.

[229] Article 13 of the Regulation.

[230] Article 13(1) of the Regulation.

[231] H-H Herrnfeld, 'The EPPO's Hybrid Structure and Legal Framework' *eucrim – The European Criminal Law Associations Forum* 2/2018, 117.

[232] On such cross-border investigations see the Opinion of 22 June 2023 of AG Caputa in Case C-281/22 *GK and Others* (n 225) and the ECJ judgment of 21 December 2023, EU:C:2023:1081.

[233] Article 5(3) of the Regulation.

[234] Article 10(5) of the Regulation.

[235] Article 12(3) of the Regulation.

[236] Article 41 of the Regulation.

[237] Article 17(1) of the Regulation.

States)[238] and may be dismissed by the College, they shall from the time of their appointment 'be active members of the public prosecution service or judiciary of the respective Member State which nominated them'.[239] Their hybrid status is accentuated by the fact that in addition to their tasks as European Delegated Prosecutor, they may exercise functions as national prosecutors, to the extent that this does not prevent them from fulfilling their obligations under the EPPO Regulation. There are rules to settle situations where the functions as national prosecutor affect their obligations as European Delegated Prosecutors.[240] Member States may dismiss, or take disciplinary action against, national prosecutors who have been appointed European Delegated Prosecutor for reasons not connected with their responsibilities under the EPPO Regulation. This may even happen for reasons connected to their responsibilities under the Regulation but requires in this case the consent of the Chief Prosecutor or, as the case may be, the College.[241]

Procedural acts of EPPO, or failure of the Office to act, that are intended to produce legal affects vis-à-vis third parties shall be subject to judicial review by the competent national court 'in accordance with the requirements and procedures laid down by national law'. The decisions of EPPO to dismiss a case, in so far as they are contested directly on the basis of Union law, shall however be subject to review before the CJEU. The latter shall also have jurisdiction, inter alia, in disputes relating to compensation for damage caused by EPPO. Moreover, the CJEU shall have jurisdiction to give preliminary rulings concerning a) the validity of procedural acts of EPPO if this question is raised before a national court directly on the basis of Union law, b) the interpretation or validity of provisions of Union law, and c) the interpretation of Articles 22 and 23 of the Regulation in relation to any conflict of competence between EPPO and the competent national authorities.[242]

6.5. Mixed Agreements and Agreements Concluded by Member States

6.5.1. Mixed Agreements

While a number of international agreements are concluded by the EU alone ('Union-only' agreements), many agreements are concluded by the Union together with some or all of its Member States (mixed agreements). The conclusion of mixed agreements can be seen as creating a specific normative framework of a hybrid character. Moreover, some agreements, while being concluded by one or more Member States, without the Union as a Contracting Party, obtain a special role going somewhat beyond their status as national law. The main focus of this subchapter will be on mixed agreements.

Mixed agreements have become part and parcel of the external relations of the EU, despite the fact that the TEU and TFEU are silent on this phenomenon.[243] While it is not necessary here to analyse all the legal intricacies and practical problems connected with mixed

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238 The procedure for appointing European Delegated Prosecutors was an issue in Case T-603/21 *WO v EPPO*, see Order concerning interim measures of 23 February 2022 in Case T-603/21 R and Order of 25 October 2022 dismissing the action based on Article 270 TFEU (jurisdiction of the CJEU in staff cases). See also Case T-368/21 *Di Taranto* EU:T:2022:92, which was declared inadmissible as it concerned the relevant national procedure and national law.

239 Article 17(2) of Regulation 2017/1939.

240 Article 13(3) of the Regulation.

241 Article 17(4) of the Regulation.

242 Article 42 of the Regulation.

243 But see Article102 of the Treaty establishing the European Atomic Energy Community (Euratom), which refers to agreements 'to which, in addition to the Community, one or more Member States are parties'.

agreements,[244] something should be said about the implications they may have for the relationship between Union law and national law. International agreements concluded by the Union are deemed to become an integral part of Union law and according to Article 216(2) TFEU they are binding on both the institutions of the Union and their Member States. Agreements concluded by Member States, on the other hand, are in principle only part of the national law of each concluding Member State.[245]

A mixed agreement thus has the double effect of constituting both Union law and national law. The problem is that it is in most cases difficult, to say the least, to determine what parts of the agreement is covered by Union law and what parts by national law. There should, in principle, be no complete overlap, since in that case the entire agreement would be covered by Union law and would then, taking into account the principle of primacy of Union law, be binding on the Member States as Union law. That said, as Member States are often insisting on 'mixity' for political rather than legal reasons, agreements are sometimes concluded as mixed even if there is a Union exclusive competence covering the whole area of the agreement ('false' mixity).[246]

If the competence is shared between the Union and the Member States, EU practice and ECJ case law allow for two basic options: Either the agreement is concluded by both the Union and some or all Member States ('facultative' mixity[247]) or the EU Council (which normally is the institution concluding agreements on behalf of the Union) decides to exercise a Union competence for the whole agreement (which then becomes a so-called Union-only agreement).[248] It is arguable that in situations where the Union has competence over the entire agreement, even if the competence is not of an exclusive character, the agreement should be concluded by the Union alone.[249] As established institutional practice allows for mixity also in such situations, it is here assumed that some agreements are concluded as mixed, even if the Union would have competence to conclude the agreement as a Union-only agreement.

In the context of the conclusion of mixed agreements, the Council has sometimes tried to simplify matters by adopting a single decision, covering both the signing or the conclusion of an agreement on behalf of the Union and the provisional application of the agreement by not only the Union but also the Member States. The ECJ has ruled out such hybrid Council decisions, inter alia, because they may render the application of qualified majority voting for the Union law part of the decision to become hostage to the requirement of consensus applying

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[244] There is an abundance of literature on the legal problems arising from the conclusion of mixed agreements, see, eg A Rosas, 'The European Union and Mixed Agreements' in A Dashwood and C Hillion (eds), *The General Law of EC External Relations* (London, Sweet & Maxwell, 2000) 200; J Heliskoski, *Mixed Agreements as a Technique for Organizing the External Relations of the European Community and Its Member States* (The Hague, Kluwer Law International, 2001); C Hillion and P Koutrakos (eds*), Mixed Agreements Revisited: The EU and Its Member States in the World* (Oxford, Hart Publishing, 2010); M Chamon and I Govaere, *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Leiden, Brill-Nijhoff, 2020); Rosas (n 66).

[245] A Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (2011) 34 *Fordham International Law Journal*, 1304.

[246] Rosas (n 244) ('The European Union and Mixed Agreements' 2000), 205.

[247] Chamon and Govaere (n 244).

[248] In Case C-600/14 *Germany v Council* ('COTIF I') EU:C:2017:935, the ECJ confirmed that also the existence of a shared competence may lead to a Union-only agreement. The situation would be different if there is an exclusive national competence for a part of the agreement. In this case, mixity would become legally necessary.

[249] See, eg Rosas (n 61), 105.

to the decision of the representatives of the governments of the Member States meeting within the Council.[250]

This insistence on two separate Council decisions does not, however, change the fact that the agreement itself may be of a hybrid nature. First of all, international agreements normally contain common provisions of a horizontal (and often procedural) nature which are applicable across the board irrespective of how the distinction between the Union and national parts of the agreement is to be drawn. Second, while in some agreements, the making of this distinction may be easier because of the existence of an exclusive Union and/or national competence and a sufficient separation of that part of the agreement from the rest, it is more common that there is no clear-cut line of demarcation between the Union and the national parts either in the Council decision, a so-called declaration of competence (if there is one)[251] or by any other means. Third, even if it were possible to draw up a list of provisions which belong to either the Union law or national law part of the agreement, for instance, by an ECJ judgment or opinion, the interpretation and application of, say, the Union law part of the agreement may make sense only in the broader context of the provisions which have been determined to be part of national rather than Union law. It should be recalled that international agreements normally form a whole, where each and every provision may be relevant for the application and interpretation of its other provisions.

The situation may become even more confusing if the mixed agreement belongs to the field of 'incomplete' mixity, i.e. a mixed agreement concluded by some but not all Member States.[252] If an agreement is deemed to contain a national law part, that part would not seem to become applicable to those Member States which have chosen not to adhere to the agreement. That again would probably constitute an unlawful reservation,[253] assuming that the gaps in the applicability of the agreement on the EU territory would not be of such a minor scope and character that they could be considered lawful reservations or that it has been agreed among all parties to the agreement (including third States) to conclude an agreement not fully applicable in some of the EU Member States (such a scenario may become relevant if the agreement is only relevant for a sub-region of the EU territory such as the Alpine region or the Baltic Sea). While serious doubts can thus be raised about the practice of incomplete mixity,[254] it would seem that the ECJ has accepted this practice in a recent Opinion.[255] The question then arises of whether the Council, at least in some instances, can be deemed to have exercised a Union competence over the whole agreement with respect to those Member States that have chosen not to become Contracting Parties (to avoid a situation where only some provisions of the agreement would be applicable to those Member States). That scenario

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[250] C-28/12 *Commission v Council* EU:C:2015:282. See also J Heliskoski, 'Hybrid Acts of the EU and its Member States Concerning International Agreements: Commission v Council' in Butler and Wessel (n 61), 787.

[251] While by declarations of competence an effort is made to establish a distinction between Union and Member States' competence, such declarations often leave many questions unanswered and some of them are obsolete in view of subsequent developments in Union legislation. See, eg Case C-240/09 *Lesoochnárske zoskupenie* EU:C:2011:125, paras 39-40. For examples of judgments which point to the difficulties in drawing a distinction between the Union law and national law part of the agreement see Case C-53/96 *Hermès International* EU:C:1998:292; Case C-431/05 *Merck Genéricos* EU:C:2007:496; Case C-66/18 *Commission v Hungary* EU:C:2020:792, paras 69 and 213; Case C-655/21 *G. St. T* EU:C:2023:791, paras 38-44.

[252] Rosas (n 244) ('The European Union and Mixed Agreements' 2000), 206.

[253] Reservations to treaties, if allowed, normally have to be specific and not go against the object and purpose of the treaty in question, see, eg F Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (The Hague, TMC Asser Instituut,1986), 111-120.

[254] A Rosas, 'Mixity Past, Present and Future: Some Observations' in Chamon and Govaere (n 244), 8 at 17-18.

[255] Opinion 1/19 (Istanbul Convention) EU:C:2021:198.

would make the distinction between the Union law part and the national law part of the agreement even more blurred.

6.5.2. Agreements Concluded by Member States

Finally, while international agreements concluded by Member States, without the Union joining as a Contracting Party, constitute in principle national law and are not binding on the Union, some Member States' agreements assume a particular role making them relevant to Union law. A special category consists of agreements concluded between the EU Member States with a connection to fields of Union competence. Such agreements, which were encouraged under the then Article 293 of the ECT, could provide for the jurisdiction of the ECJ to interpret the agreement in question.[256] Although they were not considered to constitute Union legal acts, new Member States could be required to accede to such agreements.[257] Article 293 ECT does not appear in the TFEU and most of these agreements have subsequently been replaced by Union legal acts.

One example of such conversion is offered by the 1968 Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters,[258] which has been replaced by the Brussels Ia Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[259] This Regulation, again, offers an example of an instance where EU legislation contains an explicit reference to agreements concluded by Member States, providing for a concurring application of EU law and the agreements. The ECJ has recognised that while such a clause contained in the Brussels Ibis Regulation enables the application of Member States' agreements rather than the Regulation under certain conditions, such derogations should not only be in conformity with the conditions set out in the clause but should also respect the Union law general principles of legal certainty and the sound administration of justice.[260]

At least in one case, the ECJ has held that references to the application of an international agreement concluded by Member States instead of a Union regulation, combined with the fact that the agreement had been concluded by the Member States 'in the interest of and on behalf of the [Union]', had as a consequence that the agreement formed part of Union law and that the Court thus had jurisdiction to interpret it.[261] Exceptionally, the EU could also become party to an agreement originally concluded by Member States through succession.[262] The ECJ has also accepted that at least in the area of foreign direct investment, which became a Union

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256 Lenaerts and Van Nuffel (n 25), 760-761.

257 Ibid, 760-761. In 56/84 *von Galler* EU:C:1984:136, para 4, the ECJ confirmed that the then Article 177 ECT (now Article 267 TFEU) did not apply to a case concerning such an agreement concluded between the Member States and that consequently only the ECJ jurisdiction clause of the agreement was applicable.

258 Questions on the interpretation could be referred to the ECJ pursuant to the Luxembourg Protocol of 3 June 1971, [1978] OJ L 304/36.

259 Article 71 in Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L 351/1, Consolidated Version, 26 February 2015.

260 Case C-533/08 *TNT Express Nederland* EU:C:2010:243, para 49. See also Case C-352/12 *Nipponkoa Insurance Co (Europe)* EU:C:2013:858, para 36; Case C-230/15 *Brite Strike* EU:C:2016:560, para 65. See also V Lazic and S Stuij, 'Brussels Ibis in Relation to Other Instruments on the Global Level' in Lazic and Stuij (eds*), Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme* (The Hague, Asser Press/Springer, 2017), 119 at 121-126.

261 Case C-439/01 *Cipra and Kvasnicka* EU:C:2003:31, paras 23-24.

262 The best and most well-known example is the General Agreement on Tariffs and Trade (GATT), Joined Cases C-21/72 to 24/72 *International Fruit Company* EU:C:1972:115 and Rosas and Armati (n 1), 260-261.

exclusive competence at the entry into force of the Treaty of Lisbon (Article 207 TFEU), a Union agreement may terminate Member States' investment agreements, which are replaced and superseded by the Union agreement.[263]

In some instances, the Union authorises Member States to conclude an agreement 'in the interest of the Union'. Such authorisation comes into play if the EU is unable to join an international agreement (for instance, because a multilateral convention is open to States only) despite the fact that there is a Union exclusive competence covering at least a part of the agreement.[264] While such authorisations to conclude 'in the interest of' but not 'on behalf of' the Union do not seem to make the agreement in itself an integral part of Union law, its application and interpretation should take place in the framework of Union law and the CJEU arguably has jurisdiction to rule on the Union law parameters that should be taken into account in the application of the agreement.

[263] Opinion 2/15 (Free Trade Agreement between the European Union and the Republic of Singapore) EU:C:2017:376, paras 246-256.

[264] The possibility of such authorisation is foreseen in Article 2(1) TFEU. See A Rosas, 'Exclusive, Shared and National Competence in the Context of EU External Relations: Do Such Distinctions Matter?' in I Govaere et al (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Leiden, Martinus Nijhoff, 2014), 17 at 32-33. See also Rosas (n 245).

7. APPLICATION OF NATIONAL LAW BY UNION INSTITUTIONS AND BODIES

7.1. Introduction

The previous discussion has purported to demonstrate the various ways in which national law may become directly or indirectly relevant for Union law purposes. In some instances, notably in the case of hybrid bodies and frameworks, including mixed international agreements and some agreements concluded by Member States, it may be difficult to draw a clear distinction between Union law and national law. Taking into account that, while national law does not generally form part of Union law, Union law does form part of national law, it is obvious that a strictly dualist conception of the relationship between Union law and national law does not hold water.

There are even some—albeit not yet very frequent—instances when a Union institution or body may be deemed to apply national law as a question of law rather than of fact. Some cases which seem to come fairly close to such a scenario have already been considered.[265] An example is offered by infringement proceedings which may be initiated by the European Commission against a Member State for alleged failure to fulfil a Union law obligation pursuant to Article 258 TFEU. This provision, in combination with the relevant rule of primary or secondary Union law that the Member State is alleged to have violated, constitute the legal basis of the Court's judgment. In some instances, the violation stems from the existence of a rule of national law of the Member State concerned. As was already noted in subchapter 4.5, the ECJ may sometimes, then, be called upon to opt for a certain understanding of the national rule, for the sole purposes of the infringement case. That said, it would seem that, in the context of infringement procedures, national law is to be seen as a question of fact rather than law, implying that the determination of the scope and content of national law may be approached as a question of burden of proof.

Similarly, in the context of actions for annulment under Article 263 TFEU, the General Court may be faced with issues concerning the classification, scope, and content of national law. As also noted in subchapter 4.5, the case law of the ECJ has so far characterised the question of the scope and content of national law as a question of fact but, on the other hand, has recognised that issues concerning the classification of national rules for the purpose of determining criteria relevant for the application of Article 107(1) TFEU may become questions of law. An Advocate General has recently held that the borderline between questions of fact and of law is fluid and would benefit from clarification.[266]

Infringement proceedings will not be further considered, and actions for annulment will be further considered only to the extent that there is an ongoing discussion concerning the extent of judicial review of findings relating to national law in the context of state aid.[267] Instead, I shall turn to some specific situations which may involve the direct application and, if need be, interpretation of national law performed by Union institutions and bodies.

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[265] See subchapter 5.4.

[266] Case C-465/20 P *Commission v Ireland and Apple and Others* (n 141), Opinion of Advocate General Pitruzzella of 9 November 2023. See also the discussion at nn 141 to 142, including the reference to Joined Cases C-451/21 P *Luxembourg v Commission* and C-454/21 P *Engie Global Holding and Others v Commission* (n 142), paras 75-80.

[267] See subchapter 8.2.

7.2. Gaps in Union Law which Necessitate a Reference to National Law

Let me start with a situation which is not related to a particular area of law but which may be of general horizontal relevance. According to well-established CJEU case law**,** clauses and concepts of Union law which contain no reference to national law should normally be given an independent and uniform interpretation under Union law.[268] This approach is required by the need for uniform application of Union law and respect for the principle of equality of Member States. There may be situations, however, where it is not possible to identify in Union law, including in a general principle of Union law, criteria enabling the judge to define the meaning and scope of a Union law rule by way of independent and uniform interpretation. In such situations, the Union Courts and other bodies may have to turn to national law, as a complement to the applicable Union law framework. The CJEU has held that in such situations it may be necessary to refer to an understanding of a relevant national law rule of a Member State.[269] The Court has also observed that while the implementation of Union law may, in the absence of common Union rules on the subject, necessitate the application of the procedural and substantive rules of national law, this can take place only in so far as the application of rules of national law 'does not jeopardise the scope and effectiveness of that Union law, including its general principles'.[270]

To provide but one example of a situation where such a scenario could materialise: In *Diaz Garcia v Parliament*, which concerned the right of an EU official to receive a dependent child allowance for the children of his cohabitant,[271] the issue arose as to the meaning of the expression 'legal responsibility to maintain' in a clause in the EU Staff Regulations.[272] According to that clause, any person whom an official has a legal responsibility to maintain may exceptionally be treated as a dependent child for the purposes of the dependent child allowance. The Court of First Instance (now General Court) considered that '[n]either [Union] law nor the Staff Regulations provide the [Union] Court with any guide as to how it should define, by way of independent interpretation, the meaning and scope of the concept of a legal responsibility to maintain'. Consequently, it was necessary 'to determine the national legal system to which the applicant is subject and to ascertain whether that system imposes on him a legal responsibility to maintain, within the meaning of the Staff Regulations, in relation to the children of his partner.[273] The Court, on the other hand, declined to determine which of two national legal orders (in this case Belgian or Spanish law) was applicable, since it was common ground that neither Belgian nor Spanish law provided for a legal obligation to maintain the children of a cohabitant.

Lastly, it should be noted that while it is perhaps not appropriate to speak of 'gaps' in the EU fundamental rights system, notably the Charter, the ECJ has held that this system does not exclude the application of supplementing national standards of fundamental rights. The Court has, however, formulated the general reserve that the application of the national standards

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[268] See, eg Case 327/82 *Ekro Produktschap voor Vee en Vlees* EU:C:1984::11, para 11; Case T-172/01 *M v Court of Justice* EU:T:2004:108, para 70; Case C-510/10 *DR and TV2 Denmark* EU:C:2012:244, para 33. See also Prek and Lefèvre (n 8), 378-383; Lenaerts and Van Nuffel (n 25), 631. 768.

[269] See, eg Case T-43/90 *Diaz Garcia v European Parliament* EU:T 1992:120, para 36 ; Case T-172/01 *M v Court of Justice* (n 268), para 71.

[270] Joined Cases C-80/99 to 82/99 *Flemmer v Council and Commission* EU:C:2001:525, para 55 and case law cited.

[271] Case T-43/90 *Diaz Garcia v European Parliament* (n 269). See also Case 24/71 *Meinhardt v Commission* EU:C:1972:37, para 6; Case T-172/01 *M v Court of Justice* (n 268), paras 71-76.

[272] Article 2(4) of Annex VII of the Staff Regulations.

[273] Case T-43/90 *Diaz Garcia v Parliament* (n 269), para 37.

should not compromise 'the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law'.[274]

7.3. Contracts Concluded by the EU

The EU regularly concludes contracts governed by public or private law, often with private parties in the context of EU-funded projects and programmes. According to Article 272 TFEU, the CJEU 'shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law'. This option to provide for the jurisdiction of the CJEU may be seen as an exception to the principle stated in Article 274 TFEU, according to which, 'save where jurisdiction is conferred on the [CJEU] by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States'.[275] As to applicable law, Article 340(1) TFEU provides that '[t]he contractual liability of the Union shall be governed by the law applicable to the contract in question' (whilst according to Article 340(2) TFEU, referred to in Article 268 TFEU, the non-contractual liability of the Union shall be governed by 'the general principles common to the laws of the Member States').

In a case concerning compensation to be paid in the context of a Union agricultural scheme, the ECJ had to determine whether the dispute at issue was of a contractual or non-contractual nature, whether jurisdiction was bestowed on the Union Courts or national courts, and whether the applicable law was the general principles common to the legal systems of the Member States or national law. The Court concluded that the dispute was of a contractual nature because the legal basis for the claims of the applicants was a contract and as the contract in question did not provide for the jurisdiction of the CJEU, the jurisdiction of the Union Courts did not arise.[276] The Court then considered the law to be applied by the national courts. In that context, its observed that Article 340(1) TFEU 'refers, as regards the law applicable to the contract, to the Member States' own laws and not to the general principles common to the legal systems of the Member States'.[277] That said, the national courts could, with a view to ensuring the uniform application of Union law, request preliminary rulings from the ECJ if specific problems of Union law arose (such as the question of CJEU versus national jurisdiction).

If a contract concluded by or on behalf of the Union contains a clause providing for the jurisdiction of the CJEU, the Union Courts do indeed have jurisdiction by virtue of Article 272 TFEU. As the parties may have submitted their contractual relationship to a national law (which is often Belgian law), and if there is disagreement as to the terms of the contract or the applicable law, the Union Courts (at first instance, the General Court, whose decisions may be appealed before the ECJ) may have to apply, and if need be interpret, the applicable national law. True, it has been observed that in the case law relating to Articles 272 and 340, the CJEU, in addition to national law as such, has referred not only to the relevant contractual clauses but also some general principles of contract law.[278] The fact remains, nevertheless, that if the content of the contract does not provide a sufficient basis for a judgment, the CJEU should

[274] Case C-107/23 PPU *Lin* EU:C:2023:606, para 110 and case law cited.

[275] Prek and Lefèvre (n 8), 374.

[276] Joined Cases C-80/99 to C-82/99 *Flemmer v Council and Commission* (n 270), para 43.

[277] Joined Cases C-80/99 to C-82/99 *Flemmer v Council and Commission* (n 270), para 54.

[278] Prek and Lefèvre (n 8), 374-378, with references to relevant case law.

turn to national law if that is the applicable law as referred to in the contract.[279] This situation thus offers an example of Union institutions, more specifically the CJEU, rather than national courts, being called upon to interpret and apply national law.

7.4. The Union Trade Mark Regulation

To move now to more specific substantive areas of Union law, a further example of national law as applicable law before the CJEU seems to be offered by the Union trade mark legislation. Article 8 of Regulation 2017/1001[280] lists a number of relative grounds for refusal to register a trade mark, in other words grounds which are only triggered by opposition by the proprietor of an earlier trade mark. This possibility to oppose the registration of a trade mark includes, as the case may be, invoking a non-registered trade mark or another sign used in the course of trade of more than mere local significance. The rights of proprietors of such non-registered trade marks or other signs are regulated in Article 8(4) of Regulation 2017/1001, which provides that the trade mark applied for shall not be registered to the extent that, 'pursuant to Union legislation or the law of the Member State governing that sign', rights to the sign were acquired earlier and the sign confers on the proprietor the right to prohibit the use of a subsequent trade mark. Article 60(1) extends the relative grounds for refusal, including the ground mentioned in Article 8(4), to relative grounds for invalidity. A similar reference not only to Union legislation but also national law is to be found in Articles 8(6) and 60(1) (d) of the Regulation concerning certain designations of origin and geographical indications.

ECJ and General Court case law seems to be based on the idea that, in such situations, national law may become applicable and hence its contents has to be determined.[281] The ECJ, in referring to the 'application of national law', has observed, inter alia, that even if, according to Article 7(2) (d) of Commission Delegated Regulation 2018/625,[282] it falls on the opposing party to provide 'a clear indication of the content of national law relied upon by adducing publications of the relevant provisions or jurisprudence', lacunae in the documents submitted as evidence of the applicable national law cannot prejudice an effective judicial review to be conducted by the General Court and that, to that end, the General Court 'must therefore be able to confirm, beyond the documents submitted, the content, the conditions of application and the scope of the rules of law relied upon by applicant for a declaration of invalidity'.[283] True, the Court has referred to the relevance of national case law and literature and seems to consider that, on questions of interpretation, national case law, if it is unambiguous, should be relied upon in particular. On the other hand, the Court, in *National Lottery Commission*, stated that it does *not* follow from an earlier judgment[284] that a relevant rule of national law, 'made applicable' by a reference in the Trade Mark Regulation, 'should be treated as a purely factual matter, the existence of which [the EU Intellectual Property Office] and the Court merely

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279 Ibid, 376.

280 Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification), [2017] OJ L 154/1. See also Prek and Lefèvre (n 8), 380.

281 Cases C-263/09 P *Edwin v EUIPO* EU:C:2011:452; C-530/12 P *EUIPO v National Lottery Commission* EU:C:2014:186; C-598/14 P *EUIPO v Szajner* EU:C:2017:265. For recent examples of General Court judgments see Case T-35/20 *Monster Energy v EUIPO* EU:T:2020:579 and Case T-284/20 *Bertholb Besitzgesellschaft v EUIPO* EU:T:2021:218. See also Prek and Lefèvre (n 8), 380, 393-394.

282 Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark, and repealing Delegated Regulation (EU) 2017/1430, [2008] OJ L104/1.

283 Case C-530/12 P *EUIPO v National Lottery Commission* (n 281), para 44; Case C-598/14 P *EUIPO v Szajner* (n 281), para 38.

284 Case C-263/09 P *Edwin v EUIPO* (n 281), paras 50-52.

establish on the basis of the evidence before them'.[285] The content and scope of the relevant rule of national law must if necessary be determined ex officio and the judicial review be conducted by the General Court in accordance with the principle of effective judicial protection.

That the CJEU is not supposed to sidestep national case law for the purposes of the interpretation and application of those provisions of the Trade Mark Regulation is further illustrated by the case of *Szajner*. In this judgment, the ECJ, on appeal, ruled that while the General Court may not annul or alter decisions of the Board of Appeal of the European Union Intellectual Property Office (EUIPO) by taking into account facts which came into existence after a decision of the Board of Appeal, this limitation does not apply to situations where, in disputes concerning the application of Article 8(4) of the Trade Mark Regulation, there has been an evolution in the interpretation, by national courts, of the rule of national law examined by the Board of Appeal.[286] That national case law subsequent to a decision of the Board of Appeal should be taken into account is a further illustration of the fact that the interpretation and application of national law is here to be seen as a question of law rather than one of fact. On the other hand, national case law should not be ignored but, to the extent that it exists, it should be explored to the full.

There are some decisions of the General Court which seem to suggest that the determination of the existence of a national law applicable by virtue of Article 8(4) of Regulation 2017/1001 is a question of fact rather than law.[287] In appeal proceedings as to whether an appeal should be allowed to proceed,[288] a party argued that such a finding by the General Court was in contravention of the earlier ECJ case law previously referred to. The ECJ held that, even if that argument held water, the General Court had conducted a full legality review of the earlier decisions relating to national law, as required by the ECJ's case law, and that accordingly the appeal did not raise an issue that was significant with respect to the unity, consistency, or development of Union law and should therefore not be allowed to proceed.[289] The conclusion one can tentatively draw is that the ECJ has not reversed its earlier finding in *National Lottery Commission,* according to which national law should not be treated as a 'purely factual matter', the existence of which [the EU Intellectual Property Office] and the Court merely establish on the basis of the evidence before them. Furthermore, the overall impression is that issues of national law, while not being 'purely factual' matters, should not be approached in exactly the same way as questions of the interpretation of Union law proper.

The previous paragraph referred to the judicial review of EUIPO decisions to be conducted by the General Court, as interpreted by the ECJ. In *Edwin*, the ECJ held that on appeal from the General Court, the ECJ only has jurisdiction to determine whether the General Court 'distorted' the wording of national law or the national case law or academic writings relating to it, whether the General Court made findings as regards those particulars that were 'manifestly inconsistent' with their content, and whether the General Court attributed to one of those particulars a significance which is not appropriate in the light of the other particulars, 'where that is manifestly apparent from the documentation in the case file'.[290] As to whether the review

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[285] Case C-530/12 P *EUIPO v National Lottery Commission* (n 281), para 37.

[286] Case C-598/14 P *EUIPO v Szajner* (n 281), paras 44-45.

[287] See, eg Case T-535/18 *Peek & Cloppenburg v EUIPO* EU:T:2020:189, para 75.

[288] According to Article 58a of the Statute of the Court of Justice of the European Union (Protocol No 3 annexed to the TEU and the TFEU), an appeal against a decision of the General Court concerning a decision of, inter alia, EUIPO, shall not proceed unless the ECJ first decides otherwise.

[289] See, eg Order of 29 October 2020 in Case C-308/20 P *Peek & Cloppenburg v EUIPO* EU:C:2020:880, paras 19-20.

[290] Case C-263/09 P (n 281), para 53.

of General Court judgments interpreting national law to be conducted on appeal by the ECJ should be of such a limited character will be considered in subchapter 8.2.

7.5. The Banking Union

An even more clear-cut obligation to apply national law at Union level is to be found in the Union legislation relating to the Banking Union, which consists notably of rules and mechanisms for the supervision of financial institutions and the resolution of failing banks. [291] According to Article 4(3) of Regulation 1024/2013 concerning policies relating to the prudential supervision of credit institutions,[292] the ECB shall apply, apart from the relevant Union legislation, and where that legislation consists of directives, 'the national legislation transposing these Directives'. Where the relevant Union law takes the form of regulations and where those regulations 'explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options'. In Article 15 of the Regulation, there is also, in the more specific context of the assessment of acquisitions of qualifying holdings, mention of Article 4(3) and its reference to national law.

Article 4(3) of Regulation 1024/2013 has been considered quite exceptional and also problematic.[293] The proposal of the Commission was based on the idea of using national authorities as intermediaries in the application of national law, coupled with the objective of a gradual harmonisation of national law with a view to enabling the ECB to apply a more comprehensive and precise Union legislation. Member States which are not part of the euro area did not like the prospect of further harmonisation, so the end result was to give to the ECB the task to apply national law, even if divergent.[294]

There is already a fairly extensive case law relating to Article 4(3) of Regulation 1024/13. The provision became relevant, inter alia, in a case concerning the refusal of the ECB to approve the appointment of four persons who were appointed as chairmen of the board of directors of regional banks belonging to a French banking group to simultaneously carry out the function of 'effective director'.[295] The Central Bank based its decisions on relevant provisions not only of EU regulations but also of the French monetary and financial code (Code monétaire et financier français), observing that, pursuant to Article 4(3) of Regulation 1024/2013, it was required 'to apply' a given provision of the French Code.[296]

In the proceedings before the General Court, the interpretation of provisions of not only Union legislation but also the French Code became relevant, the Court accepting the interpretation of the Code given by the Central Bank.[297] With respect to one provision of the national code in particular, the Court cited 'settled case-law' according to which 'the scope of national laws,

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[291] On the Banking Union in general, see, eg Rosas and Armati (n 1), 240-242; Lenaerts and Van Nuffel (n 25), 310-311.

[292] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, [2013 OJ L 287/63.

[293] European Banking Union, in *FIDE XXVII Congress, Budapest, Congress Proceedings* Vol. 1 (Walters Kluwer 2016), 109-110, 178-179, 182-183. See also Prek and Lefèvre (n 8), 380-381; S Grundmann and H W Micklitz (eds), *The European Banking Union and Constitution: Beacon for Advanced Integration or Death-Knell for Democracy?* (Oxford, Hart Publishing, 2019), notably ch 1.

[294] European Banking Union (n 293), 178-179.

[295] Joined Cases T-133/16 to T-136/16 *Caisse régionale de crédit agricole mutuel Alpes Provence et al v European Central Bank* EU:T:2018:219.

[296] Joined Cases T-133/16 to 136/16 *Caisse régionale de crédit agricole mutuel Alpes Provence et al v European Central Bank* (n 295), para 8.

[297] Ibid, para 50.

regulations or administrative provisions must be assessed in the light of the interpretations given to them by national courts'.[298] In that regard, the Court cited a judgment of the French Conseil d'État and held that that judgment was 'sufficient to establish the scope of the rules of national law that the ECB was required to apply on account of the reference made in Article 4(3) of Regulation No 1024/2013, that is, the second paragraph of Article l. 511-13 of the CMF'.[299] It should, however, be noted that the 'settled case-law' cited by the General Court concerned preliminary rulings and infringement procedures,[300] while the Banking Union case was an action for annulment, in a situation where national law, alongside Union law, was specifically designated as the applicable law.

There are many other judgments of the CJEU discussing the content of national law as referred to in Article 4(3) of Regulation 1024/2013. The General Court has held, inter alia, that the obligation of national courts to interpret national law in conformity with EU law also applies to the CJEU and that it 'has the same duty to interpret national law in the light of a directive' when it is led under Article 4(3) of Regulation 1024/13 to apply national law.[301] The Court added that, according to settled case law, 'the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts'.[302] For the eventuality that consistent interpretation is not possible but would become an interpretation *contra legem*, however, the General Court observed that it follows from Article 4(3) that where EU law involves directives, 'it is the national law transposing those directives that must be applied'. It could *not* be accepted that the two types of instrument are binding on the ECB 'as separate legislative sources' as that would be contrary to Article 288 TFEU and as directives cannot of themselves impose an obligation on an individual (in this case a bank placed under temporary administration).[303] As the ECB had made an error in the application of a national provision transposing a directive, its decision was annulled. An appeal is pending before the ECJ.[304] The problem of discrepancies between the provisions of a directive and those of national law will be further discussed in Chapter 8.

In another recent case the General Court stressed the need for an autonomous and uniform EU-wide interpretation of concepts appearing in certain provisions of Union legislative acts which make no reference to national law for the purpose of determining their meaning and scope. The general reference to national law in Article 4(3) TFEU could not in this case prejudice the need for an autonomous and uniform of the concept in question.[305] The same judgment contains a detailed discussion about the relation between a directive and provisions of national law, the content of the latter, and whether it constituted a transposition of the directive.[306] It should also be noted that in this case, one of the pleas of the applicant alleged that Article 4(3) and Article 15 of Regulation 1024/2013 are unlawful, in that the reference to national law in those articles and the exclusive jurisdiction of the CJEU to review the legality

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[298] Ibid, para 84. The provision in question was Article L. 511/13 of the French Code. The cases cited by the General Court were C-240/95 *Schmit* EU:C:1996:259 and C-433/13 *Commission v Slovakia* EU:C:2015:602.

[299] Joined Cases T-133/16 to T-136/16 (n 295), para 92.

[300] On the relevance of national law in preliminary rulings and infringement proceedings, see subchapters 5.3 and 5.4.

[301] Case T-502/19 *Corneli v European Central Bank* EU:T:2022:627, para 103.

[302] Ibid, para 194.

[303] Ibid, para 112.

[304] Cases C-777/22 P and C-789/22 P.

[305] Case T-913/16 *Fininvest and Berlusconi v European Central Bank* EU:T:2022:279, paras 44-49.

[306] Ibid, paras 111-143, 175-177. See also Case T-797/19 *Anglo Austrian AAB v European Central Bank* EU:C:2022:389, paras 31-32, 93-107, 114 and following.

of preparatory national acts (which follows from an earlier ECJ judgment[307]) give rise to a breach of the right to effective judicial protection. As the plea had been submitted only after the application had been lodged, it was dismissed as inadmissible.[308] A similar plea alleging the illegality of Article 4(3) raised the interesting question as to whether the Union legislator has the competence to transform national law into Union law by giving a Union institution (in this case the ECB) the power to apply national law, thus depriving national courts and, in particular, constitutional courts of the possibility of exercising judicial review as regards such a special type of national law. However, the plea was dismissed as having been raised only at the stage of the reply.[309] Both cases involving an alleged illegality of Article 4(3) are pending on appeal before the ECJ.[310] This issue of a constitutional character will be further addressed in subchapter 8.2.

Finally, while some of the General Court cases referred to are currently pending on appeal before the ECJ, some other appeals have already led to an ECJ judgment.[311] Of particular interest is the judgment in *PNB Banka,* which deals, inter alia, with the question of the intensity of judicial review at the appeal stage.[312] Citing a case in the field of state aid,[313] the ECJ ruled that it has jurisdiction, on appeal, 'only to determine whether that law was distorted, and the distortion must be obvious from the documents on its file'.[314] Whilst mentioning Article 4(3) of Regulation 1024/2013, the Court, in insisting on a limited review akin to that applied for questions of fact rather than of law[315], does not seem to have paid attention to the special circumstance that Article 4(3) instructs the CJEU 'to apply' national law, which would seem to make the interpretation and application of national law a question of law. Admittedly, the state aid judgment cited does refer not only to another state aid case[316] but also to *Edwin*, discussed earlier in the context of the Union trade mark legislation, which concerns a Union law provision referring explicitly to national law as a source to be applied.[317] The question as to whether *Edwin* continues to be good law on this point will be further discussed in subchapter 8.2.

7.6. The Border and Coast Guard

The overall hybrid nature of the European Border and Coast Guard (Frontex) is already apparent from its general institutional setup, as outlined in subchapter 6.4.3: It is constituted by the national authorities of Member States responsible for border management, the national authorities responsible for return, and the European Border and Coast Guard Agency.[318] Under

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[307] Case C-219/17 *Berlusconi and Fininvest* EU:C:2018:1023.

[308] Case T-913/16 *Fininvest and Berlusconi v European Central Bank* (n 305), paras 259-266.

[309] Case T-698/16 *Trasta Komercbanka v European Central Bank* EU:T:2022:737.

[310] Cases C-512/22 P and C-513/22 P; C-90/23 P and C-103/23 P.

[311] See Cases C-803/21 P *Versobank v European Central Bank* EU:C:2023:630 and C-389/21 P *European Central Bank v Crédit lyonnais* EU:C:2023:368.

[312] Case C-326/21 P *PNB Banka v European Central Bank* EU:C:2022:693.

[313] Case C-524/14 P *Commission v Hansestadt Lübeck* EU:C:2016:971, para 20.

[314] Case C-326/21 P *PNB Banka v European Central Bank (*n 312), para 71.

[315] In the Case of C-559/12 P *France v Commission* EU:C:2014 :214, paras 78-80, which was cited in Case C-524/14 P *Commission v Hansestadt Lübeck* (n 312), para 20, questions of national law are expressly equated with questions of fact.

[316] Case C-559/12 P *France v Commission* (n 315), paras 79 and 80.

[317] Case C-263/09 *Edwin v OHMI* (n 281), para 53.

[318] See subchapter 6.4.3**.**

the Frontex Regulation of 2019,[319] there is a standing corps, which, while being 'part of the Agency', is composed of not only the statutory staff of the Agency but also staff seconded from Member States to the Agency, staff from the Member States who are ready to be provided to the Agency for a short-term deployment, and staff from the Member States who are ready to constitute a reserve for rapid reaction for the purposes of rapid border interventions.[320]

Especially concerning the staff seconded or deployed by Member States, there are numerous references in the Frontex Regulation to the application of national law, including concerning the right to bear arms and questions of civil and criminal liability.[321] Compliance with not only Union and international law but also the national law of the host Member State (the Member State in which an operation takes place) is also required of the Agency statutory staff.[322] Where members of the teams are operating in a host Member State, that Member State shall normally be liable, 'in accordance with its national law', for any damage caused by them during the operations.[323] In some instances, the host Member State may request the home Member State or the Agency, as the case may be, to reimburse it for any sums paid to the injured persons. Disputes concerning these civil liability rules may be submitted to the CJEU.[324] With regard to criminal liability, the rules of the host State apply. Complaints concerning alleged breaches of fundamental rights shall be submitted to the fundamental rights officer of the Agency but if they concern national staff, be forwarded to the relevant home Member State (from which a staff member is seconded or deployed to the standing corps) for further action.[325] Especially in the context of liability and staff cases,[326] the CJEU may be confronted with issues of national law and could arguably then be required to assess the scope and content of national rules in a way which would seem to come close to their application. It has not been possible to find case law concerning the particular question of application of national law by the Border and Coast Guard Agency.

7.7. Europol and Eurojust

As outlined in subchapter 6.4.4, Europol involves some institutional arrangements which display a hybrid character. For instance, Europol can cooperate directly with Member States in joint investigation teams while the Europol national units shall designate at least one liaison officer to be attached to Europol. The latter shall be subject to the national law of the designating Member State but are also required to comply with relevant Union law and the Management Board of Europol shall determine their rights and obligations in relation to Europol, while the costs of their activities shall be shared between the Agency and Member States.

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[319]. Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, [2019] OJ L 295/1.

[320] Article 54(1) of Regulation 2019/1896.

[321] On the right to bear arms, see Article 82(7) to (9) of the Regulation.

[322] See, in particular, Articles 82, 84 and 85 of the Regulation.

[323] Article 82(1) of the Regulation.

[324] Articles 82(2) and (4).

[325] Article 111 of the Regulation.

[326] There are a number of judgments of the (now defunct) Civil Service Tribunal and the General Court, especially relating to the rights and duties of members of temporary staff of Frontex, see, eg Case F-117/13 *Wahlström v Frontex* EU:F:2014:215; Case T-686/16 P *Possanzini v Frontex* EU:T:2017:734. These and other similar cases mostly concern Frontex staff and do not seem to have any bearing on the issues discussed in the present study.

The Europol Regulation contains numerous references to national law, for instance a requirement that an activity shall be exercised 'in accordance with the national law' of a certain Member State.[327] Generally speaking, the Regulation is based on the idea that national law is applied by national authorities and Union law by Europol and other Union bodies. [328] In some instances, however, Europol may be specifically called upon to respect national law. This concerns, inter alia, its participation in joint investigating teams[329] and its access to, and use of, data received from national information systems.[330] There is thus a general obligation for Europol and its staff to respect, and in that sense, to apply, national law. It would seem that at least in some instances, for example in liability or Europol staff cases, the CJEU may then be called upon to assess national rules in a way which could come close to their interpretation or application. It has not been possible, however, to identify any provision of Regulation 2016/794 that would explicitly require the direct application, by the Union Courts, of national legal rules.

The organisation and activities of Eurojust, which are focused on cooperation and coordination with national investigating and prosecuting authorities, including the Eurojust national correspondents and the national coordination system,[331]also display some hybrid elements. To the extent that Eurojust has competence, it shall act through one or more of the national members and for some matters as a College, which is composed of all the national members.[332] They may, inter alia, participate in joint investigation teams. [333] Costs for the national members are again shared between Eurojust and the respective Member State.

As is the case for Europol, the Eurojust Regulation, apart from the rather detailed requirements contained in the Regulation itself, contains numerous references to national law. National members are seconded by each Member State 'in accordance with its legal system'.[334] More specifically, it is for instance provided that national members may order, request or execute certain investigative measures '[w]ith the agreement of the competent national authority', and 'in accordance with their national law'.[335] Also access to national registers such as criminal records should be granted 'in accordance with national law'.[336] The Eurojust Data Protection Officer should ensure the compliance of Eurojust with not only Union regulations but also 'other Union or national data protection provisions'.[337] Apart from rules on the division of responsibility

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[327] See, eg Article 42(4) of Regulation 2016/794 (concerning requests to be submitted to national data protection supervisory authorities).

[328] See, eg Article 50 of Regulation 2016/794, which purports to draw a distinction between Europol and national liability and the jurisdiction of the CJEU and that of national courts. On this distinction see Case T-436/21 *Veen v Europol* EU:T:2022:261. However, in Case C-755/21 P *Kočner v Europol* (n 216), the ECJ ruled that in the context of data processing cooperation between Europol and national authorities, there is joint and several liability.

[329] See Article 5 of Regulation 2016/794.

[330] See Article 17(3) of the Regulation.

[331] Article 85 TFEU and Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust) and replacing and repealing Council Decision 2002/187/JHA, [2018] OJ L 295/137. See also subchapter 6.4.4.

[332] Article 7(4) of Regulation 2019/1727.

[333] Articles 7 and 8 of Regulation 2018/1727.

[334] Article 7(1) of the latter Regulation.

[335] Article 8(3) of the Regulation. In urgent cases, national members may, by virtue of Article 8(4), take such investigative measures without the prior consent of the Member State concerned, but also then 'in accordance with their national law'.

[336] Article 9 of the Regulation.

[337] Article 38(1) (a) of the Regulation.

and liability between Eurojust and Member States (and between Eurojust and other Union bodies) in data protection matters,[338] there is a general provision on liability, providing, inter alia, that Eurojust shall incur non-contractual liability for damage caused not only by Eurojust staff but also through the fault of a national member. That said, with respect to the exercise of most of the powers bestowed upon national members, the Member State shall reimburse Eurojust the sums which Eurojust has paid to make good the damage.[339] While no provision in the Regulation has been identified providing explicitly for the direct application of national legal rules by the CJEU, it cannot, as is the case also with respect to Europol, be excluded that such rules could become directly relevant for instance in liability or staff cases.[340]

7.8. The EPPO

In subchapter 6.4.5., an account was already given of the hybrid and complex nature of the organisation of the EPPO. It should be recalled here, in particular, that the actual handling of cases is entrusted to the European Delegated Prosecutors (unless this task is exceptionally conferred on a European Prosecutor), who shall be located in the Member States, 'be active members of the public prosecution service or judiciary of the respective Member State which nominated them'[341] and have the same powers as national prosecutors, in addition and subject to the specific powers and status conferred on them, and under the conditions set out in the EPPO Regulation.[342] At the same time they 'shall act on behalf of the EPPO in their respective Member States'[343] and are appointed (but after having been nominated by the Member States) and may be dismissed by the College. They shall follow the direction and instructions of the EPPO Permanent Chamber in charge of a case as well as the instructions from the supervising European Prosecutor.[344] The 'staff of EPPO' includes the personnel at the central level who support, inter alia, the European Delegated Prosecutors.[345] On the other hand, the latter may, in addition to their tasks as European Delegated Prosecutor, exercise functions as national prosecutors, to the extent that this does not prevent them from fulfilling their obligations under the EPPO Regulation.

Especially with respect to the European Delegated Prosecutors, the EPPO Regulation contains many references to the application of national law. National law 'shall apply' to the extent that a matter is not regulated by the Regulation. The 'applicable national law' shall be the law of the Member State whose European Delegated Prosecutor is handling the case. Where a matter is governed by both national law and the Regulation, 'the latter shall prevail'.[346] It is specifically provided that the competent Permanent Chamber may in specific cases give instructions to the European Delegated Prosecutor 'in compliance with applicable national law'.[347] Likewise, the supervising European Prosecutor may give such instructions, providing that they are in compliance not only with the instructions given by the competent Permanent

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338 Articles 45 and 46 of the Regulation.

339 Article 78(4). The obligation to reimburse concerns the powers of national members as listed in Article 8.

340 For examples of Eurojust staff cases (but which do not seem to be relevant for the purposes of the present study) see Case C-160/03 *Spain v Eurojust* EU:C:2005:168; Case T-61/22 *OD v Eurojust* EU:T:2023:201.

341 Article 17(2) of the Regulation.

342 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (the EPPO) [2017] OJ L283/1.

343 Article 17(1) of Regulation 2017/1939.

344 Article 13(1) of the Regulation.

345 Article 1(4) of the Regulation.

346 Article 5(3) of the Regulation.

347 Article 10(5) of the Regulation.

Chamber but also 'with applicable national law'.[348] As to the procedural safeguards of the suspects and accused persons, they shall, 'as a minimum', have the procedural rights provided for in Union law and without prejudice to this requirement, all the procedural rights available to them under the applicable national law.[349]

Procedural acts of EPPO, or failure of the Office to act, that are intended to produce legal affects vis-à-vis third parties shall be subject to judicial review by the competent national court 'in accordance with the requirements and procedures laid down by national law'. The CJEU, however, shall have jurisdiction to give preliminary rulings concerning a) the validity of procedural acts of EPPO if this question is raised before a national court 'directly on the basis of Union law', b) the interpretation or validity of provisions of Union law and c) the interpretation of Articles 22 and 23 of the Regulation in relation to any conflict between EPPO and the national authorities concerning the material, territorial, or personal competence of EPPO.[350] Moreover, the decisions of EPPO to dismiss a case, in so far as they are contested 'directly on the basis of Union law', shall be subject to review before the CJEU. Actions for annulment under Article 263 TFEU may concern, inter alia, decisions of EPPO dismissing European Delegated Prosecutors. The Court shall also have jurisdiction, inter alia, in disputes relating to compensation for damage caused by EPPO as well as in staff cases.

It is obvious that in the situations where the CJEU would have jurisdiction, issues of national law, which is referred to as the 'applicable law' could arise. For instance, as noted, instructions to European Delegated Prosecutors should be 'in compliance' with national law. While the Court is not empowered to review, under Article 263 TFEU, the legality of EPPO procedural acts (and even less so, decisions of European Delegated Prosecutors acting as purely national prosecutors), the validity of EPPO procedural acts may become an issue in the context of preliminary rulings. True, this is the case only if the question of the validity of such acts has been raised before a national court 'directly on the basis of Union law'. Likewise, the CJEU's jurisdiction over actions for annulment under Article 263 TFEU against decisions to dismiss a case is limited to decisions 'contested directly on the basis of Union law'. This limitation, however, does not seem to rule out the possibility that issues of applicable national law could arise alongside the reliance on Union law. In preliminary ruling procedures, the national court would be expected to provide the authoritative interpretation of relevant national norms[351] but in other types of cases, such as actions for annulment, there may be no relevant national case law. One cannot exclude that a judgment holding an EPPO procedural act invalid, or annulling a decision to dismiss a case, could be partly based on an infringement of applicable national law.

7.9. Rimšēvičs

In subchapter 6.4.2, the hybrid nature of the ESCB, and notably of the national central banks, was already explained. This hybrid nature is illustrated not only by the fact that infringement proceedings may be brought by the ECB against a national central bank before the ECJ but also by the possibility that a national decision to relieve the governor of a national bank from office may be referred to the ECJ.[352] In *Rimšēvičs*, at issue was a decision of the Latvia Anti-Corruption Office to temporarily prohibit the governor of the Latvian Central Bank from

[348] Article 12(3) of the Regulation.

[349] Article 41 of the Regulation.

[350] Article 42 of the Regulation.

[351] On this role of national courts in preliminary ruling procedures see subchapter 5.3.

[352] Articles 14.2 and 35.6. of the Statute. The action referred to in Article 35.6 is similar to the one regulated in Article 258 TFEU (infringement actions brought by the Commission against a Member State).

performing his duties as governor. According to Article 14.2. of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, such a decision 'may be referred to the Court of Justice' either by the governor or by the ECB Governing Council on grounds of infringement of the Treaties or of any rule of law relating to their application. The ECJ interpreted the latter action as an action for annulment similar to the one foreseen in Article 263 TFEU.[353] The Court annulled the national decision in so far as it prohibited Mr Rimšēvičs from performing the duties as governor of the Central Bank of Latvia.

This was arguably the first time the CJEU assumed the competence to review the legality and annul the decision of a national authority of a Member State. This possibility goes further than the mere application of national law. It is, in fact, an application of a rule of Union law (Article 14.2. of the ESBC Statute) but interpreting it as enabling an action for annulment and a legality review relating to a national decision. While the legal basis of the action appears in Union law, it is noteworthy that it has been considered legally permissible to enact such a legal basis. True, this legal basis is provided by an act of primary law, a Protocol annexed to the TEU and the TFEU. Could such a legal basis be provided in an act of secondary law as well? The question will be further considered in the next, final chapter.

[353] Joined Cases C-202/18 and C-238/18 ***Rimšēvičs v Latvia and ECB v Latvia*** (n 201), para 69.

8. CONCLUDING REMARKS

8.1. A Common Legal System

As the original Community Treaties of the 1950s were not constructed and drafted as comprehensive constitutional instruments but rather formed a patchwork of some general principles of constitutional relevance and a host of fairly detailed provisions of a more technical nature, the task of making sense of it all, including clarifying the relationship between Community law and national law, fell upon the ECJ.[354] With *van Gend & Loos* (1963) and *Costa v ENEL* (1964),[355] the idea gained ground that Community law can be applied and invoked directly in the legal orders of the Member States and, when being so applied, enjoys primacy over 'purely' national rules. These principles are not dependent on national constitutional principles but follow directly from Union law, which is in this sense to be seen as forming part of national law. It is true that some constitutional or other national courts have formulated certain reservations in this respect, usually linked to the idea that there is an 'ultimate' national control mechanism which can verify whether the Union has acted within the confines of its competence, in accordance with the principle of conferral. With the exception of the former Polish Government and the Polish Constitutional Tribunal,[356] these reservations are rarely brought to an open conflict, however, and do not upend the fact that under normal circumstances the direct applicability, direct effect, and primacy of Union law are generally accepted also at national level.

Already for these reasons it is obvious that there is a close link between Union law and national law. This close link becomes even more obvious when the application of Union law at national level is supplemented by shifting the focus to the relevance of national law in Union law contexts. As hopefully demonstrated by the discussion in Chapters 4 to 7, the national law of the Member States has many different functions in the broader context of the Union legal order, ranging from its role as a source of inspiration for Union law to its status, albeit only in exceptional circumstances so far, as a direct source of law also for Union institutions and bodies. The Union legal order draws upon, harnesses, instrumentalises, and its institutions sometimes even applies national law, which is an indispensable component of the overall system. Especially in the case of hybrid bodies and frameworks, including mixed agreements concluded by the Union and Member States, it is difficult to draw a clear borderline between Union law and national law.[357]

As the direct applicability of national law by Union institutions is still quite exceptional, it would go too far to equate the status of national law in the Union legal order with that of Union law in the national legal order. And if the notion of legal order is reserved for systems which are bestowed with a norm hierarchy according to which norms of a lower hierarchical order shall be invalidated if they are found to be incompatible with norms of a higher order, then the Union and national legal systems may still be considered as two distinct legal orders[358]. As Union institutions are not normally empowered to annul national legal acts[359] but at most to determine

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354 On the early days of Community developments from a constitutional point of view see Rosas and Armati (n 1), 9-12. See also Chapters 2 and 4.

355 Cases 26/62 (n 11) and 6/64 (n 13).

356 See subchapter 4.2.

357 See, in particular, subchapters 6.4 and 6.5.

358 Cf Dougan (n 74), 1303, who in the context of Case C-573/17 *Poplawski* EU:C:2019:530 refers to the 'idea that the Union and national legal systems form distinct, albeit closely interlinked, legal orders'.

359 With the obvious exception of the Joined Cases C-202/18 and C-238/18 *Rimšēvičs v Latvia and ECB v Latvia* (n 201).

that there is an incompatibility with Union rules, I prefer to speak of the primacy rather than supremacy of Union law over national law.[360]

That said, it is undeniable that there is a close interrelationship between Union law and national law. A well-known commentator has argued that they form a common legal space.[361] I would go somewhat further and say that one can speak of a *common legal system* made up of two historically distinct legal orders.[362] It is in this sense that one can also speak of two sides of the same coin. As was noted in section 1, the ECJ has referred to '[t]he autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law'.[363] While the notion of autonomy is entirely appropriate when it comes to the relationship between Union law and public international law,[364] it is much less obvious that it is the best way of characterising the relationship between Union law and national law. Nor is it, in my view, propitious to speak of the 'procedural autonomy' of Member States, as in view of a well-established principle of Union law, now codified in Article 19(1) second subparagraph TEU, there is an *obligation* of Member Status to provide remedies with a view to ensuring effective judicial protection rather than any autonomous right of Member States to maintain their own procedural system, regardless of Union law.[365]

The increasing interrelation between Union law and national law and the various functions Union law assigns to national law raises the question as to the place of national law in the broader constitutional framework made up of the Union and its Member States. The basic Treaties are still international treaties and are not dressed up as a federal basic law in the same sense as the US, or to take EU Member States, Austrian, Belgian, or German constitutions. The principle of conferral limits the Union's sphere of action to the competences 'conferred upon it by the Member States in the Treaties to attain the objectives set out therein' (Article 5(2) TEU). But the principle of conferral does not tell us the extent to which competences have been conferred. The nature of the Treaties, a collection of general and often quite indeterminate values, principles, and objectives coupled with more precise or detailed provisions, and the duty of the CJEU, according to Article 19(1) TEU, to 'ensure that in the interpretation and application of the Treaties, the law is observed', allow for considerable dynamism and leeway for institutional practice and case law. This legal regime, 'a new legal order', has taken on a constitutional nature and has in this sense started to take on a life of its own.[366] The increasing reliance of Union law on national law as part of a broader constitutional edifice is one of many indications of such a development. Union law and national law have not become amalgamated but there is an increasing interrelation and interspersion between the two. Many of the functions of national law, as discussed, receive, as it were, their legitimacy from the tasks Union law bestows upon national rules.

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360 Rosas and Armati (n 1), 64-65.

361 A von Bogdandy, 'The Transformation of European Law: The Reformed Concept and its Quest for Comparison', *Max Planck Institute for Comparative Public Law & International Law Research Paper* No 2016-14.

362 Rosas and Armati (n 1), 15, 51, 63.

363 See, eg Opinion 2/13 (Accession of the EU to the European Convention on Human Rights) (n 10), para 170.

364 See, eg Joined Cases C-402/05 and C-415/05 *Kadi and Al Barakaat Foundation v Council and Commissi* (n 32), paras 281 to 285.

365 Rosas and Armati (n 1), 280. This is not to say that Member States may not maintain their own procedural law, especially if there are no relevant Union law rules. But this observation applies to material law as well. According to Article 2(2) TFEU, Member States may exercise a shared competence to the extent that the Union has not exercised its competence, and in situations of parallel and supplementary competences, the competence of Member States to maintain their national law is even more obvious. This provision does not make any distinction between material and procedural law.

366 See, eg Rosas and Armati (n 1), notably 48-49.

8.2 Issues of Jurisdiction and Judicial Review

This characterisation seems to be relevant in assessing to what extent the Union legislator has the competence to provide, in secondary law, for national law to be applied, as a source of law, by Union institutions and bodies, including providing for judicial review of national legal acts at Union level. In the *Rimšēvičs* scenario discussed in subchapter 7.9., the jurisdiction of the CJEU to review the legality of, and, if need be, annul national decisions, follows from a provision of primary law, contained in Protocol No 6 annexed to the TEU and TFEU on the Statute of the ESCB and of the ECB, and thus arguably poses no problem from the point of view of EU constitutional law. To extend, by acts of secondary law, the remit of actions for annulment, as provided for in Article 263 TFEU, to the legality review, by the CJEU, of national legal acts would seem to go too far, however.[367]

That said, there seems to be a trend towards strengthening the obligation of national courts to set aside provisions of national law deemed incompatible with Union law (especially in cases where Union law has direct effect) by instructing the national judge to declare null and void such national legal provisions.[368] Moreover, as has been discussed in Chapter 7, in particular, and is illustrated by the judgment in *Berlusconi*, the CJEU may, in different contexts, be called upon to apply, and if need be, interpret, national law, including national legal acts. In infringement procedures, it seems still possible to regard the assessment of national law as a question of fact rather than law, with a clear burden of proof resting on the Commission.[369] The same observation seems to apply to actions for annulment, although there is a trend in the context of state aid law to consider some aspects of General Court findings relating to national law as questions of law and thus subject to legality review also on appeal. [370] Especially in areas such as contract law, the Banking Union, the Union Trade Mark Regulation, and the EPPO, however, where Union law refers explicitly to national law in a way which makes it the law to be applied by Union institutions and bodies (albeit within the confines of Union legal rules), it is difficult to view the determination of the content of national law as a question of fact. That determination process cannot be completely different in nature from that of Union law.

That the determination of the content of national law is regarded as a question of law rather than of fact does not imply that the interpretation of national law would follow exactly the same methods as are common with respect to Union law. While in the interpretation of Union law *stricto sensu*, the arguments of the parties as well as national case law play a less important—though not non-existent[371] —role, it is appropriate that the arguments of the parties as well as national case law be given more weight in the interpretation of national law. As stated by *Prek* and *Lefèvre*, with respect to the allocation of roles between the parties and the CJEU, 'since the EU judiciary is not deemed to be expert on national law, it appears logical that the parties

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[367] In the same vein, eg A Hinarejos, 'The Court of Justice Annuls a National Measure Directly to Protect ECB Independence: *Rimšēvičs* (2019) 56 *Common Market Law Review,* 1649; T Tridimas and L Lonardo, 'When Can a Narional Measure Be Annulled by the ECJ?' (2020) 45 *European Law Review*, 732; Dougan (n 74), 1317.

[368] See subchapter 4.1 and the seminal article by Dougan (n 74), analysing, in particular, the judgment in C-487/19 *WZ* (n 74).

[369] See subchapter 5.4.

[370] See subchapter 5.4, at nn 139-142.

[371] With regard to national case law, see, eg Article 94 of the ECJ Rules of Procedure of 25 September 2012, [2012] OJ L 265, Consolidated version 2019, according to which, in preliminary rulings proceedings, the referring national court is instructed to explain, inter alia, not only the tenor of any national applicable provisions but also, 'where appropriate, the relevant national case law' and the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings of 8 November 2019, [2019] OJ C 380/1, para 18, where the ECJ observes that the referring national court 'may also briefly state its view on the answer to be given to the questions referred for a preliminary ruling. That information may be useful to the Court, particularly where it is called upon to give a preliminary ruling in an expedited or urgent procedure'.

play a more important role in the determination of its precise content than would be required of them in relation to EU law'.[372] Similarly, as recognised by the ECJ in the context, inter alia, of Article 8 of the Union Trade Mark Regulation, national case law should play an important role in the interpretation of national law.[373] That said, national case law may be non-existent on a certain issue, it might be ambiguous or be of a rather ancient date and have been devised for circumstances which have changed subsequently. Especially in such situations, the methods of interpretation followed by the CJEU should arguably not differ very much from those applied in the interpretation of Union law proper.

This observation is of relevance also for the question of the nature and intensity of judicial review to be exercised by the ECJ, on appeal, viz-à-vis the decisions of the General Court. In *Edwin*, the ECJ held that the ECJ only has jurisdiction to determine whether the General Court 'distorted' the wording of national law or the national case law or academic writings relating to it, whether the General Court made findings as regards those particulars that were 'manifestly inconsistent' with their content, and whether the General Court attributed to one of those particulars a significance which is not appropriate in the light of the other particulars, 'where that is manifestly apparent from the documentation in the case file'.[374] These formulations suggest that the Court based its findings on the assumption that questions of national law are questions of fact. In a more recent appeal case about whether an appeal should be allowed to proceed, the ECJ also referred to the alleged 'distortion' of facts committed by the General Court.[375] This was done in the particular context of the question of whether the appeal raised an issue that was significant with respect to the unity, consistency, or development of Union law and should therefore be allowed to proceed and thus does not as such concern the question of judicial review at the appeal stage more generally.

It is submitted that the limited review on appeal followed in *Edwin* should be reconsidered in the light of what the Court subsequently held in *National Lottery Commission*, namely that national law should not be treated as a 'purely factual matter'.[376] This observation seems to be relevant for all situations where Union law refers to national law as the applicable law, to be applied also by Union institutions and bodies. True, according to Article 58 of the Statute of the CJEU,[377] appeals to the ECJ shall lie on, inter alia, 'the infringement of Union law by the General Court'. As has been argued by *Prek* and *Lefèvre*, however, whenever Union law explicitly entrust the Union Courts with the function of applying national law or whenever EU legislation refers to national law, 'then arguments based on the violation of such law should be understood as relating to the "infringement of Union law by the General Court" for the purpose of Article 58 of the Statute'.[378]

At the end of the day, if national law, according to Union law, is to be directly 'applied' (and then, if need be, interpreted) by Union institutions and bodies, including the CJEU, does not national law in that case become, as it were, Union law? At any rate, a large interpretation of

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372 Prek and Lefèvre (n 8), 393.

373 See subchapter 7.4, where reference is made, inter alia, to the judgments in C-530/12 P *National Lottery Commission* (n 281) and C-598/14 P *Szajner* (n 281).

374 Case C-263/09 P (n 281), para 53.

375 Order of 29 October 2020 in Case C-308/20 P *Peek & Cloppenburg v EUIPO* (n 289), para 21. According to Article 58a of the Statute of the Court of Justice of the European Union (Protocol No 3 annexed to the TEU and the TFEU), an appeal against a decision of the General Court concerning a decision of, inter alia, EUIPO, shall not proceed unless the ECJ first decides otherwise.

376 Case C-530/12 P (n 281), para 37.

377 Protocol No 3 annexed to the TEU and TFEU.

378 Prek and Lefèvre (n 8), 401.

Article 58 of the Statute is called for, also taking into account the principle of effective judicial protection.[379]

To the extent that national law plays such a role, the question arises as to its specific normative weight as compared to 'Union law proper' on the one hand, and 'national law proper' on the other. If the relevant Union legal act is a regulation, it should in cases of conflict arguably prevail over an incompatible rule of national law, also implying that the national rule should be interpreted in the light of the regulation. This principle is expressed in the EPPO Regulation[380] and should probably be applied in other contexts as well, at least unless the regulation provides otherwise. With regard to directives, the situation may be more complex, taking into account Article 288(3) TFEU and the more important role national implementing measures play in this context, as well as the principle, stemming from well-established case law, that a directive, unlike a regulation, cannot of itself impose obligations on individuals. In the context of the Banking Union, the General Court has held that while a national legal rule implementing a directive should be interpreted in the light of the directive, the situation is different if that interpretation would be *contra legem*. In that case, it would be the national law imposing an obligation on a bank that should be applied.[381] To what extent this ruling will be upheld on appeal remains to be seen. In any case, the situation may be different if the directive provides for an individual right which should be recognised as having direct effect.

As to the relation between national law to be directly applied by Union institutions and bodies and other parts of national law, it is arguable that in case of conflict, the former should prevail. Whether that effect would come about by virtue of the *lex specialis* or the *lex superior* principle merits further consideration. If it was the latter, the question would arise as to its implications for the national constitution. Could the national rule to be applied directly by Union institutions and bodies prevail over the constitution? It would seem that such an effect cannot be brought about by Union secondary law. A *lex specialis* approach seems a safer bet.

As can be seen from this paper, the applicability of national law by Union institutions and bodies raises a number of interesting questions, partly of a constitutional nature. The answers given here are only tentative. This evolving area of EU law merits further study and consideration.

379 Ibid, 400.

380 Article 5(3) of Regulation 2017/1939 (n 342).

381 Case T-502/19 *Corneli v European Central Bank* (n 301), paras 103 and 112. See further, subchapter 7.5. at nn 301 – 304.