THE RELATIONSHIP BETWEEN THE PRIMARY SOURCES OF EUROPEAN UNION LAW: IS THERE A 'HIERARCHY' WITHIN UNION PRIMARY LAW?

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Contents

Abstract

This thesis explores the interactions between the primary sources of European Union (EU) law. It examines the relations between the primary legal sources not only as they may emerge formally from the text of the Union Treaties, but also how they have been negotiated in practice by various constitutional actors, such as the Court, the Member States and the Union's political institutions. After all, the Treaties themselves do not reveal much about potential hierarchical orderings within Union primary law.

The relations between the different sources of Union primary law are important for *two reasons* which lead to the *two framing questions* of the thesis. First, the interactions between different values, principles, objectives and rules that have a place in the Union's primary legal framework are now more common. The first question therefore is *how* are the possible tensions resolved in practice? The thesis explores how the growing instances of tensions are (or should be) managed at the Union level. Second, significant constitutional implications arise from the way these tensions are managed and resolved in practice. Thus, the second question is *what* are the constitutional implications of the Union's approach to resolving such issues for the development of the Union legal order and the balance of powers therein?

In order to explore these questions, the thesis focuses on *three specific contexts* where the sources of Union primary law interact. The three contexts tell us interesting things about the relationship(s) between the primary sources of Union law. The first context is the *operationalization* of EU primary law by the Union's political institutions, and by the Court. The second context is the *enforcement* of EU primary law by the Member States. The final context is the *formulation and amendment* of EU primary law by the Member States.

There are *three key findings* of this thesis. The *first finding* is the absence of any real 'hierarchy of norms' within Union primary law, at least of the explicit or readily identifiable kind. This raises the question of whether it is necessary to establish a clearer 'hierarchy of norms' within Union primary law. The thesis argues that the absence of a 'hierarchy' *per se* is not intuitively problematic, given that it is not entirely necessary for the 'higher legal (or constitutional) sources' to be organised according to a set of 'meta-norms' or principles that function to guide the relationship between Union primary norms. But whilst a 'hierarchy of norms' is not necessary in

principle, the situation as regards the relationship between different Union primary norms at present reveals much uncertainty about how they ought to relate to one another, and the actor(s) responsible for making such choices. Indeed, the absence of a clear 'hierarchy' raises problems when combined with *the second finding:* the increasing breadth of Union primary law and its 'constitutionalisation' within the Union legal order. The fact that Union primary law comprises of numerous different (and sometimes competing) requirements is problematic for determining and identifying the appropriate relationship between the norms. This is evidenced by the *ad hoc* approach employed by the Court to addressing the challenges that interacting primary norms pose. In turn, this reinforces the *third and most important finding*: the central role of the Court in dealing with the relations between the primary sources of Union law vis-à-vis other constitutional actors. On the whole, both the uncertainty and the malleability of the present framework in the absence of a clear 'hierarchy of norms' afford a significant degree of discretion to the Court to organise and make choices about the relative value of Union primary law in practice. This is problematic due to the possible incursions into the competences of the Member States and the Union's political institutions set out in the Treaty that follow from the Court's choices.

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Preface

The law is stated as it stood on 27th February 2018.

However, owing to some relevant developments in the case law occurring after this date, reference is made to more recent judgments where necessary for the accuracy of the work.

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Cases 2 BvR 2134/92 & 2159/92 *Manfred Brunner and Others v The European Union Treaty*, judgment of 12 October 1993.

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Case 2 BvR 2661/06 *Re Honeywell*, judgment of 6 July 2010.

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3) **ITALY**

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4) **LITHUANIA**

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Introductory Chapter

This thesis examines the interactions between the different sources of primary law within the Union legal order. Its main aim is to assess whether, and to what extent, the idea of a 'hierarchy of norms' is a useful and accurate device to explain the relationship(s) between the Union's primary legal sources. In particular, the thesis looks to identify whether there are any 'meta-norms' or a set of principles that function to guide the relationship between the Union's primary norms. This is something one might expect to find in any legal system, either in the founding documents (i.e. the constitution, or Treaties) or through institutional practice (i.e. the courts.)[1]

The main argument of the thesis is that the sheer range and quantity of what constitutes Union primary law has led to a situation where the interactions between the primary sources of Union law have become so diverse that it is difficult to identify any clear patterns in the overall approach to managing the interactions between these sources. Indeed, the absence of a clear 'hierarchy' exposes certain tensions. The approach of the Court to addressing the challenges posed by interacting Union primary norms is *ad hoc*. The absence of any guiding framework to inform its approach affords the Court a considerable degree of discretion to exploit the flexibility of the overall framework so as to make choices about what Union primary law should look like and how it should be arranged. On the whole, the common experience across the different contexts where the primary sources of Union law interact highlights the centrality of the Court *vis-à-vis* the role of the Union's political institutions and the Member States. As a result, this reduces the role of *political actors* in the operationalisation, enforcement and amendment of Union primary law. The thesis is therefore linked to key debates in EU integration: particularly those concerning the limits of the Court's role and the vertical and horizontal distribution of powers.[2]

Section 1 of the introduction provides a brief explanation of the background to the thesis. The section aims to explain why the issue of a possible 'hierarchy' within Union

[1] E.g., Article 79(3) of the German Basic Law prohibits amendments to the constitution affecting the division of the Federation into Lander, human dignity, the constitutional order, or the basic institutional principles establishing Germany as a democratic and social federal state. Moreover, see Italian Constitutional Court, in its judgment 15-29 Dec. 1988 No. 1146 (Gazzetta Ufficiale No. 2 of 11 Jan. 1989, I Serie Spec., Corte Costituzionale, 11) stated that the fundamental principles of the system 'may not be subverted or modified in their essential content, not even by laws amending the Constitution or any other constitutional law.'

[2] Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 AJUL 1, Alter, *Establishing the Supremacy of European Law* (OUP, 2001), Stone Sweet, *The Judicial Construction of Europe* (OUP, 2004) and Rosas, Levits and Bot (Eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (Springer, 2013).

law is of interest with reference to the increasing number of interactions between the sources of Union primary law. It also provides an overview of the approach within the literature to a 'hierarchy of norms' within Union primary law. In so doing, it exposes a gap in the literature as regards a holistic approach to assessing the relations between Union primary norms from a constitutional perspective.

Section 2 introduces the theoretical framework for exploring the relations between the Union's primary legal sources. Two *framing* questions underpin the issues explored in the thesis: *how* are the Union's primary norms arranged in practice and *what* are the constitutional implications for the Union's institutional balance and allocation of powers? The section serves as an overview of the two main ideas explored throughout the thesis.

Section 3 provides an outline of the three (inter-related) findings of the exploration of the relationship between the primary sources of Union law. The first finding concerns the conceptual idea of a 'hierarchy of norms' within the Union legal order. It thus looks to assess - from the materials covered in the thesis - both the desirability and the feasibility of a 'hierarchy of norms' as a constitutional feature within the Union's primary law architecture. On the whole, the thesis argues that it is not an accurate device to explain the current primary law environment. The second key finding focuses on the expansion and 'constitutionalisation' of Union primary law.[3] The issues explored in the thesis expose the contemporary problems arising from the expanding scope of Union primary law, including the increased possibility for interactions between the Union's primary norms and the increased possibility that different norms envisage competing legal outcomes when they interact. These two findings reinforce the final key finding of the thesis: the Court's role in the Union's primary law framework vis-à-vis the Union's political actors and its apparent monopoly over determining the relations between the higher sources of Union law. Whilst its centrality may be understood as a *consequence* of the absence of a clear hierarchy within Union primary law, the thesis demonstrates that many issues posed by the interactions between the Union's primary legal sources are in fact *caused* by the Court's behavior.

[3] Mancini, 'The Making of a Constitution for Europe' (1989) 26 CMLRev 595, Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403, Shaw and Moore (Eds.), *The New Legal Dynamics of European Union* (OUP, 1996).

Section 4 provides a brief summary of the four chapters of the thesis. The central research question as to the relationship between the primary sources of Union law is explored across three different contexts which each illustrate the tensions inherent to the interactions between Union primary law. The first context concerns the operationalization of Union primary law and its elaboration by a variety of constitutional actors. The second context focuses on the enforcement of Union law within the national legal order. The third and final context addresses matters relating to the actual formulation and amendment of Union primary law.

1) Background to the inquiry

1.1) The interactions between the sources of Union primary law

This thesis takes its inspiration from the significant degree of constitutional uncertainty which arises from the complex and opaque nature of the relationship between the higher legal sources of Union law. Primary law can be distinguished from Union secondary law, and constitutes the Union's 'constitutional' law.[4] This categorisation relates to the origins of Union primary law – particularly from the Union Treaties - and its constraining effects on the adoption of secondary law which must 'comply' with the Union's higher law.[5]

For our purposes, it is not necessary to produce a definitive list of all sources of Union primary law. Suffice it to say, Union primary law includes the written sources, such as the Treaties (the TEU and the TFEU), the Charter of Fundamental Rights and Fundamental Freedoms, and Protocols which are annexed to the Treaties.[6] The TEU and the TFEU have the same legal value under Article 1(2) TEU; the Charter has the same legal status as the Treaties under Article 6(1) TEU; and Protocols form an integral part of the Treaties under Article 51 TEU. Perhaps more contentiously, Union primary law, as it presently stands, also includes unwritten sources created (or identified) by the Court. These unwritten sources primarily consist of the general principles of Union law, such as fundamental rights and legal certainty, and the foundational principles of the Union including primacy and direct effect. For the

[4] See generally, von Bogdandy & Bast (eds), *Principles of European Constitutional Law* (Hart, 2009)
[5] See, e.g. Article 263 TFEU and the grounds for an action for annulment including the breach of the Union's constitutional principles under Article 5 TEU or a breach of the Treaties or any rule relating to their application. See also that respect for Charter rights is a condition of the lawfulness of EU acts: Case C-299/95, *Kremzow*, C-299/95, EU:C:1997:254; and Case C-402/05 P, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, EU:C:2008:461
[6] Charter of Fundamental Rights of the European Union [2012] OJ C-326/02 (CFR)

Court, these unwritten sources have a 'constitutional' value within the Union legal order.[7] Although the Treaties are not explicit as to the value of the unwritten sources of Union primary law, the written text does not challenge their status in the case law nor does it generally seek to constrain the scope of such sources. Indeed, there is evidence to suggest that the value of such norms has been (at least passively) accepted by the Member States, for example: Declaration no 17 on the principle of primacy makes reference to primacy as established in the case law;[8] the general principles of Union law are commonly used to assess the validity of Union and national legislation and as regards fundamental rights protection the general principles of Union law are explicitly recognised in Article 6(3) TEU; and more specifically Article 6(2) TEU and Protocol no 8 on Accession to the ECHR indicate that accession must respect the 'specific characteristics' of Union law.[9]

This outline of the primary sources of Union law is significant as it is fair to say that, at least originally, the primary law of the Union included only the materials recognised in the Treaties.[10] Even then, insofar as the Treaties were understood as a form of international agreement between the contracting States through international law, and since the Treaties remained relatively brief in their scope, the contents were not particularly problematic in relation to the main issues of the thesis.[11] The problems that this thesis seeks to tackle all have some connection to the historical 'constitutionalisation' of the Treaties by the Court. Indeed, the Court invested the Treaties, and other principles developed through the case law, with a constitutional status within the new 'Union legal order.'[12] As a corollary to the constitutionalisation of the Treaties, the Court also embarked upon the establishment of a scheme of unwritten general principles of Union law.[13] Leaving aside the question of whether the Court created these principles or it merely 'found' the principles as they existed

[7] E.g. Case C-101/08, *Audiolux*, EU:C:2009:626, at 63: 'The general principles of Community law have constitutional status.' See also Opinion 2/13, re ECHR Accession, EU:C:2014:2454, particularly paras 157-177 where the Court details the 'essential characteristics' of the Union framework, including the principles of primacy, direct effect and mutual trust.
[8] See for further discussion Dougan, 'The Treaty of Lisbon 2007: Winning Minds Not Hearts' (2008) 45 CMLRev 617
[9] Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.
[10] See, the Opinion of AG Roemer in Case 62/32, *van Gend en Loos*, EU:C:1962:42, 'the primary and basic provisions of the Community Treaty which are imposed in the same way on all Member States.'
[11] See, implicit references in the current Treaties to the 'international' character of the EU such as Article 4(3) TEU.
[12] Case 6/64, *Costa v ENEL*, EU:C1964:66; Case 26/62, *van Gend en Loos*, EU:C:1963:1
[13] See, Case 11/70 *Internationale Handelsgesellschaft*, EU:C:1970:114.

implicitly within the Union legal order,[14] it is through this very process that the volume of Union primary law has become more difficult to manage over time.

It is clear that the various sources of Union primary law outlined above may envisage competing legal consequences should they interact with one another in practice. After all, the undetermined relationship(s) between the primary sources of Union law is evident in many different contexts. There are numerous instances where Union primary law norms either explicitly, or more subtly, interact. The emblematic examples are familiar to almost all EU lawyers, including: the possible clashes between the fundamental freedoms and fundamental rights;[15] and the tensions between ensuring mutual trust across the Member States and ensuring the protection of fundamental rights.[16] Consider also the interactions between the written sources of Union law: such as the free movement provisions within the Treaty and how they relate to and/or condition the regulatory competences of the Union's political institutions to facilitate the creation of the internal market. There are also tensions between the foundational principles of primacy and direct effect - which favour the enforcement of Union law - and the general principles of Union law, such as legal certainty - which may favour the non-enforcement of Union law to avoid a legal vacuum in the national legal order. Thus, in a variety of circumstances there has been a considered amount of discussion about possible 'conflicts,'[17] 'clashes,'[18] 'overlaps,'[19] and 'tensions'[20] between norms which find a place within the Union's primary law architecture.

[14] In so doing, the Court referred to the Treaty – however effectively – to justify its findings. See, e.g. *Case 26/62, Van Gend en Loos*, EU:C:1962:42 where the Court referred to the objective of the Treaty – to establish a common market – to establish that Treaty is more than an agreement which creates mutual obligations between the contracting states. It also referred to the Treaty preamble and its reference to the 'peoples' and not merely governments.
[15] See, Case C-112/00 *Schmidberger*, EU:C:2003:333 and Case C-36/02, *Omega*, EU:C:2004:614
[16] See, Joined Cases C-411 & 493/10, *N.S.*, EU:C:2011:865 and Case C-399/11 *Melloni*, EU:C:2013:107.
[17] See, Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (OUP, 2009); Anagnostaras, 'Balancing conflicting fundamental rights: the *Sky Osterreich* paradigm' (2014) 39 ELRev 111: 'Conflicts between different fundamental rights constitute a rather common occurrence at national level… However, this is not problematic in practice since there is no overlap between the national systems of fundamental rights protection. On the contrary, collisions of rights are particularly contentious when they arise in the context of the EU legal order.'
[18] See, Reynolds, 'Explaining the Constitutional Drivers Behind a Perceived Judicial Preference for Free Movement over Fundamental Rights' (2016) 53 CMLRev 643: 'The expansion of the scope and reach of the free movement provisions… has resulted in a quantitative explosion in the volume of clashes between free movement and fundamental rights.'
[19] See, Trstenjak, Beysen, 'The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case-Law of the CJEU' (2013) ELRev 293: '…the broadening of the respective scopes of application [of the fundamental freedoms and fundamental rights provisions] has led to a steep increase in the areas of overlap...'
[20] See, Becker 'Application of Community Law by Member State's Public Authorities: Between Autonomy and Effectiveness' (2007) 44 CMLRev 1035: 'there is an obvious tension between effectiveness and autonomy. If autonomy leaves it to Member States to make (non-discriminatory) procedural rules about the application of Community law, it might well be the case that rules on the finality of an administrative decision would have a detrimental effect on the effectiveness of Community law in a given case.'

The examples provided above, along with many others, share in common the fact that they raise imperative practical questions about how any possible tensions between the sources of Union primary law are reconciled in individual circumstances. And as a result of the way in which the sources are understood to relate to one another at the Union level, important constitutional questions arise about the organisation of the Union's primary law architecture and the balance of powers therein. The research question as to the possible 'hierarchical' ordering within Union primary law is therefore important for a number of reasons, due to: the gaps in the current literature on the 'hierarchy of norms' within Union primary law; and the practical, constitutional and contextual implications of the research question.

1.2) The existing literature on the 'hierarchy of Union norms'

The thesis focuses on the 'hierarchy of norms' in Union primary law, and can be distinguished from other 'hierarchy of norms' debates within the Union.

The idea of a 'hierarchy' within the Union has often been explored in relation to the competing claims to ultimate legal authority between the Union and its Member States: on the one hand, the Union claims autonomy from, and authority over, the Member States; and, on the other hand, the Member States claim primacy in the creation, direction and implementation of Union law.[21] The uncertainty about the locus of ultimate authority within the Union has prompted commentators to embrace the idea of 'constitutional pluralism,' such that there are competing claims of constitutional authority within a single system of governance.[22] In other words, the process tends to be understood as a dialogue between the domestic and European authorities, and there is no strict hierarchy between the two levels. The fact that this fundamental constitutional issue is far from settled forms a characteristic of the Union system and how it works in practice. This point is interesting for the purposes of this thesis, particularly in relation to an underlying assumption that a 'hierarchy of norms'

[21] See Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006). See also the case law from the Court about the Union's 'new legal order' which can create independent effects within the national legal system, cited supra n.12. By contrast, consider the domestic acceptance of the principle of supremacy in Union law, and the domestic courts explanation of the authority for the ultimate review of Union actions. See particularly the judgments of the German Constitutional Court in Case 2 BvR 197/83 *Re the Application of Wünsche Handelsgesellschaft* Bundesverfassungsgericht (2nd Senate) [1987] 3 C.M.L.R. 225; *Brunner v European Union Treaty (Maastricht) BVerfG, 2 BvR 2134/92 and 2159/92* [1994] 1 C.M.L.R. 57 and *Gauweiler Die Linke v Act of Approval of the Lisbon Treaty (Lisbon) BVerfG, 2 BvE 2/08*; judgment SK 45/09 of the Polish Constitutional Tribunal; Decision Pl. ÚS 19/08 of the Czech Constitutional Court (*Lisbon*); judgment of the Lithuanian Constitutional Court in Joined Cases 17/02-24/02-06/03-22/04

[22] See, MacCormick 'The Maastricht Urteil: Sovereignty Now' (1995) 1 ELJ 259. See, also, Avbelj, Komárek, *Constitutional Pluralism in the European Union and Beyond*, (Bloomsbury, 2012).

is a desirable constitutional feature within the Union.[23] Quite the contrary, the absence of any clear 'hierarchy' may actually contribute to how the system works in practice and thus is not necessarily as problematic as perhaps it is understood to be.

A 'hierarchy of norms' within the EU also resonates with the intersection between Union primary and Union secondary law.[24] There is a strong body of literature on the relations between primary law (specifically the free movement provisions within the Treaty) and secondary legislation introduced by the Union legislature in the internal market.[25] The logical question is whether this means that all sources of Union primary law are of equal value. The focus of the literature suggests that there are two principal levels of the legal order comprising of: primary law created by the Member States, and secondary law adopted by the Union's political institutions under their 'derived' powers conferred to them under the Treaties.

The thesis does not contend that the focus of such research is misplaced, as it is indeed important to understand the relations between such sources in a variety of contexts. The central premise is that the debate about the 'hierarchy of norms' in this context is limited, and is by no means all-encompassing as to the possible ways in which a 'hierarchy' manifests itself within the sources of Union primary law. Indeed, the focus of the existing literature seems to lie with a 'procedural' hierarchy of norms, in the sense that (secondary) norms derived from a 'higher' source of primary law are automatically inferior, since they derive their validity (and existence) from the 'higher' source.[26] The main issue in this thesis, however, is associated with a 'substantive' or 'content-based' 'hierarchy of norms' within a set of primary law sources that, at least formally, share the same legal status. Thus, the primary contribution is to consider whether there is a more nuanced hierarchical ordering within the EU legal order. Is

[23] This is not the assumption of this thesis – but a 'hierarchy of norms' is supported due to the assumed level of clarity a clearly structured framework may bring. Consider, e.g. the discussions during the Convention on the Future of Europe and the proposals to separate the core constitutional provisions in the TEU from the less important, more operational, provisions of the TFEU. Discussed further pgs.

[24] Syrpis, 'The Relationship between Primary and Secondary law in the EU' (2015) 52 CMLRev 461, Davies, 'Legislative Control of the European Court of Justice' (2014) 51 CMLRev 1579, Sørensen, 'Reconciling secondary legislation with the Treaty rights of free movement' (2011) 36 ELRev 339. There is also discussion about the hierarchy within Union secondary law, particularly since the introduction of the distinction between 'delegated' and 'implementing' non-legislative acts under article 289 TFEU. See, Curtin, 'Legal Acts and Hierarchy of Norms in EU Law' in Chalmers and Arnull, *The Oxford Handbook of European Union Law,* (OUP, 2015.)

[25] Syrpis (Ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press, 2012)

[26] See, the theoretical work on the distinction between constitutional and ordinary law: Kelsen, *The Pure Theory of Law* (University of California Press, 1967): 'The difference consists in that the creation, and that means enactment, amendment, annulment, of constitutional laws is more difficult than that of ordinary laws.'

there any possibility that *within* Union primary law there might be refinements as regards the status of certain norms when they interact with others?

At present, if the idea of a 'hierarchy' amongst the sources of Union primary law is considered at all in the literature, there is no holistic approach to exploring the relationship between the various sources when they interact. Many of the possible interactions between these sources have been approached sporadically on a case-by-case basis, and the 'hierarchy' issue is often not directly explored: it comes across as a mere by-product of the central inquiry. For example much of the commentary on the interactions between the fundamental freedoms and fundamental rights, and mutual trust and fundamental rights, takes the view that (at least implicitly) there is a clear hierarchy emerging amongst the provisions that enjoy a place in the Union's primary law architecture.[27] One of the implications of this appraisal is that the different sources of Union primary law are not treated as though they are of equal value at the Union level, and, thus, as though they deserve equal consideration and/or respect. This is particularly true when the subject of the interaction between the Union's primary law sources includes fundamental rights. For the most part, the prevailing view is that the EU seems structurally to prioritise certain norms that are integral to the foundations of the Union: the economically-oriented free movement provisions, and mutual trust which rests on the premise that all Member States have an equivalent level of fundamental rights protection.[28] To some, such a structural preference is inappropriate given the innate 'special status' of fundamental rights, which ought to acquire an elevated standing within the Union legal order.[29] It is important to note that such sentiments expressed in the literature presuppose relationships of a normative

[27] Consider the literature on mutual trust within the EU, given that the Court has been reluctant to allow for exceptions to the mutual trust; see, Besselink, 'The Parameters of Constitutional Conflict after *Melloni'* (2014) 39 ELRev 531. By contrast, see Lenearts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust' (2017) 54 CMLRev 805. It is also true of the literature on the interactions between fundamental rights and the fundamental freedoms, see, Reynolds, *Tipping the scales: exploring structural imbalance in the adjudication of interactions between free movement and fundamental rights,* (University of Liverpool, PhD thesis, 2015), pg.12, who argues that the 'two-stage approach [in the free movement assessment] does not 'merely' treat free movement as equivalent to a fundamental right but as *more* fundamental.'

[28] See, the responses to Opinion 2/13 on the Union's accession to the ECHR. As the Court held that the draft accession agreement contained no provisions accommodating the principle of mutual trust, some scholars argue that the Court accorded greater value to the principles of mutual trust than it did to fundamental rights. See: Eeckhout, 'Opinion 2/13 on EU accession to the ECHR and judicial dialogue: Autonomy or autarky' (2015) 38 Fordham International Law Journal 970; Peers, 'The EU's accession to the ECHR: The dream becomes a nightmare' (2015) 16 GLJ 213; and, Spaventa, 'A very fearful Court?' (2015) 22 MJ 35, (who argues that since 'there is no effective way to monitor fundamental rights compliance in the EU… mutual trust [should not] be elevated to a 'supreme' interest/principle in human rights-sensitive areas.')

[29] See, Brown, 'Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria*. Judgment of 12 June 2003, Full Court' (2003) 40 CMLRev 1499. See, also, Lindfelt, *Fundamental Rights in the European Union – Towards higher law of the Land? A study of the status of fundamental rights in a broader constitutional setting* (Åbo Akademi University Press, 2007.)

hierarchy, and thus implicate some form of objective moral order as to the manner in which the Union legal order is (or ought to be) organised.[30]

The limited discussion in the literature about the 'hierarchy' within Union primary law could be due to the fact that there is no clear or easily identifiable *internal* benchmark in the Treaties through which to approach any analysis of, or indeed through which to identify, the correct relationship between the sources of Union primary law. To a certain extent, this is attributable to their formally 'equal' status in the Union legal order.[31] This also stands in contrast to the relations between primary and secondary law which can be determined by identifying the 'superior' norm from which secondary norms derive their authority. Although there is no formal benchmark, it is fair to say that some of the existing analysis of the relations between Union primary law is informed by ideas about which values or norms should (or should not) be prioritised in certain situations. Indeed, one of the recurring patterns in this literature is the need to ensure that an 'elevated' level of protection attaches to fundamental rights within the Union, over and above other sources of Union primary law.[32] In light of such sentiments, an inquiry into a substantive or content-based 'hierarchy of norms' should follow (and expand upon) the path set by the existing literature. The thesis therefore explores the constitutional practice within the Union, instead of basing the main analysis on normative prescriptions.

Overall, the thesis intends to operate as a complement to the body of literature which tackles particular interactions between the sources of Union primary law. But it also addresses a gap in the literature, since it scrutinises the approach of the Union to managing the primary law materials more universally from an overarching constitutional perspective. The broader purpose is to reframe the discussion about the 'hierarchy of norms' from an exclusive Union primary law-Union secondary law lens to the level of Union primary law and the interactions between primary norms *inter*

[30] See, Koskenniemi, 'Hierarchy in International Law: A Sketch' (1997) 8 EJIL 566.
[31] Reference to a formal 'equal' value can be derived from the Treaty materials themselves. E.g., Article 6(1) TEU provides that the Charter has the same legal value as the Treaties.
[32] This is by no means unique to the Union context, as there is a strong line of thought in domestic constitutional arrangements that fundamental rights ought to be situated at the apex of the 'hierarchy of norms.' See, the idea of common law constitutionalism in the UK context which is motivated by the idea of 'constitutional rights:' Allan, 'Justification of Judicial Review' (2003) 23 OJLS 563. See, also, German Basic Law which includes an 'eternity clause' Article 79 of the Constitution which determines that certain amendments are inadmissible if 'basic principles' are affected: one 'principle' is the acknowledgement of fundamental rights.

se. It does so by exploring a set of constitutionally important interactions between the Union's primary sources of law.

1.3) Practical, constitutional and contextual implications of the research question

In addition to the limited treatment of the main research question in the broader literature, there are obvious practical implications for the resolution of disputes which hinge upon how the Union's primary law materials are organised within a given case. For instance, the question of whether the rights to free movement may trump the protection of the fundamental rights of other individuals across the Union has arisen in numerous cases.[33] In the *Viking* and *Laval* line of case law, the Court had to deal with the clash between the freedoms of establishment and services enjoyed by economic operators and the fundamental rights of workers to take collective action.[34] Another area where there is a clear potential for tensions between the primary sources of Union law - with very real practical implications for individuals - concerns the field of cross-border judicial co-operation. The question here is whether the principle of mutual trust always outweighs the need to ensure that the fundamental rights of individuals are safeguarded effectively in practice. For example, *Melloni* concerned a possible clash between the obligation to execute a European Arrest Warrant (EAW) and the Member States' own domestic commitments to the protection of fundamental rights.[35]

Moreover, from a constitutional perspective, the organisation of Union primary law has a bearing on the allocation of powers within the Union: the balance of powers between the Union and its Member States, and the balance of powers within the Union's institutional framework. First, the locus of responsibility for organising the primary sources of Union law is important. There are few *internal* benchmarks which function to guide the relations between Union primary norms from the Treaties. Thus, in the absence of formal benchmarks one might question whether a 'hierarchy' is desirable at all. In particular, would this inevitably mean that the role of constructing 'hierarchical' orderings between certain norms is a matter of institutional practice and,

[33] For a detailed overview, see, Reynolds, 'Explaining the Constitutional Drivers Behind a Perceived Judicial Preference for Free Movement over Fundamental Rights' (2016) 53 CMLRev 643.
[34] Case C-438/05 *Viking Line*, EU:C:2007:772; Case C-341/05 *Laval*, EU:C:2007:809.
[35] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. 2002, L 190/1 (as amended by Council Framework Decision 2009/299/JHA of 26 Feb. 2009, O.J. 2009, L 81/24.) Under the EAW the only conditions to which the executing judicial authority may make the execution of an EAW subject are those set out in Article 5 of the FD, such that the primary responsibility for protecting the fundamental rights of persons subject to an EAW rests with the judicial authorities of the issuing Member State.

possibly more accurately, a task for the Court? The inquiry may therefore tell us something about *who* controls the Union's constitutional settlement and *where* the locus of constitutional authority lies within the Union. The thesis thus explores which actor(s) assume(s) the responsibility for organising and perhaps also ordering Union primary norms in practice. Second, the organisation of the primary materials could tell us interesting things about the degree of control the Court reserves for itself in relation to the enforcement, operationalisation and the amendment of Union primary law vis-à-vis the Union's political institutions and the Member States.

As a final point, the issues explored in the thesis can be linked to broader political and contextual developments within the Union. The main research question about the relations between the Union's primary legal sources has a direct bearing on the 'legitimacy crises' of the EU. This is true, for example, of the judicial development of the directly effective free movement provisions in a way which reduces the options for intervention on the part of the Union's political institutions.[36] This issue is explored since it implicates questions about the relations between the free movement provisions in the Treaty and the provisions on regulatory competences allocated to the Union's political institutions under the Treaty. Furthermore, the discussion in the thesis about what is possible through the amendment of Union primary law, and any possible constraints to amendment arising from 'higher' primary law principles, feed into the current debates about what Eurozone reform should and could look like.[37] Questions concern whether it is necessary for separate amendment procedures to be included within the Treaty for the Eurozone Member States to make important changes to the constitutional framework affecting the euro.[38] After all, the Eurozone Member States had to adopt the TCSG outside of the formal Treaty framework, due to the possibility of the UK's veto over Treaty amendments.[39] And the Union's response to the migrant crisis across Europe sheds light on the role of the Commission apparently arrogating for itself 'soft' powers beyond any authority laid down in the Treaty, albeit with the

[36] For instance, in the lead-up to the referendum on the UK's membership of the EU the development of Union citizenship rights, without the full support of domestic political actors was raised as a concern. See, similar sentiments discussed in Dougan, 'The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens.' In Adams, de Waele, Meeusen, & Straetmans *(Eds.), Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing, 2013)

[37] Furthermore, the most recent ideas for Eurozone reform including possible Treaty amendments, or more informal changes to the constitutional structure. See, the changes to the Eurozone envisaged by Macron and Schäuble through treaty changes or pragmatically though agreements: http://www.politico.eu/article/wolfgang-schauble-welcomes-emmanuel-macrons-eurozone-reforms/

[38] See Piris, *The Future of Europe: Towards a Two-Speed EU?* (CUP, 2011)

[39] See Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 2 March 2012, available at http://www.eurozone.europa.eu/media/304649/st00tscg26_en12.pdf.

willingness (and/or complicity) of the Member States in such an endeavour.[40] This perhaps suggests that there are few formal constraints as to what can be achieved under Union primary law by the Union's political actors where political will so compels. It also exposes one of the thematic variables of the thesis about the role of different constitutional actors the management of the primary law framework.

2) Theoretical framework of the thesis

Two broad questions frame the thesis and provide the medium through which to explore the nature of the relationship between the sources of Union primary law across the substantive chapters. A brief outline of the two questions that underpin, and are common to, the chapters is therefore useful at this point. The first framing question that permeates the thesis asks *how* the sources of Union primary law are organised in practice. This part therefore is looking for – but not expecting to find – coherence. The second framing question concerns *what* impact the organisation of Union primary law has on the institutional balance of powers within the Union, and the balance of powers between the Union and its Member States.

2.1) How are the primary sources of Union law arranged?

The main doctrinal purpose of this thesis is to identify how Union primary law is arranged within the Union legal order, and how the relations are understood at the Union level by a variety of constitutional actors. The thesis aims to explore whether the sources of Union primary law are of equal value, or whether certain 'meta-norms' guide the management of the interactions between Union primary norms.

2.1.1) The interactions between the sources of Union primary law: possible ways to frame the debate

It is common for there to be conflicts, or tensions, between norms within a legal system: for example, two norms may address the same issue but envisage different legal consequences. In legal discourse, the 'hierarchy of norms' is one of the main criteria for managing such interactions and it consists in giving prevalence to one norm over another due to its alleged superiority.[41] It is common for the relations between

[40] See e.g., Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration, COM(2015) 240 final
[41] See, Shelton, 'Normative Hierarchy in International Law' (2006) 10 The American Journal of International Law 291.

different norms to be governed by a set of 'internal' benchmarks either from the constitutional document or through established institutional practice. Legal systems usually establish a 'hierarchy of norms' based on the source from which the norms derive. For example, in the UK, secondary legislation (or delegated legislation) is subject to judicial review, whereas the primary legislative basis is not susceptible to judicial review.[42] More broadly, in national legal systems, it is common for fundamental values to enjoy formal constitutional status and be afforded precedence in the event of a conflict. This is true in German Basic Law for example, with the primary underlying idea being that 'unlike ordinary legislation which is governed by the majoritarian principle, human rights alone are not subject to the will of the majority.'[43] Norms of equal status must be balanced and reconciled to the extent possible. The mode of legal reasoning applied in practice is naturally hierarchical, establishing relationships between normative statements and levels of authority.[44] One means of choosing between norms of equivalent status is to designate one norm or subject matter as hierarchically superior to others.[45]

In the Union context however there are few *internal* Treaty-based benchmarks to deal with possible tensions between primary norms. Nevertheless, it is possible to explore the relationship between the primary sources of Union law in a number of different ways. Indeed, *external* benchmarks – i.e. techniques and academic theories - may function as appropriate reference points for reconciling tensions between different legal norms. One technique is to make rules derived from a particular source prevail over rules derived from that source; *lex superior derogat inferiori.* A second technique is to make later rules prevail over earlier rules; *lex posterior derogat priori.* A third technique (which operates in practice as a rebuttable presumption) is to make a specific rule prevail over a more general rule; *lex specialis derogat generali.*

Weiler and Paulus, 'The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?' (1997) 8 EJIL 545; Salcedo, 'Reflections on the Existence of a Hierarchy of Norms in International Law' (1997) 8 EJIL 583.

[42] For a topical example of delegations of authority in primary legislative acts to adopt statutory instruments (or secondary legal measures) see the UK's European Union (Withdrawal) Act 2018.

[43] Following WWII, the protection of fundamental rights gained popularity in constitutions seeking to prevent any amendments to such principles. See, *inter alia*, Bosnia and Herzegovina, 1995 (art. 10); Greece, 1975 (art. 110); Moldova, 1994 (art. 142); Portugal, 1976 (art. 288); Romania, 1991 (art. 152); Ukraine, 1996 (art. 157). See Beck, 'The Idea of Human Rights Between Value Pluralism and Conceptual Vagueness,' (2006-2007) 25 Pennsylvania State International Law Review 615.

[44] Koskenniemi, cited supra n.30.

[45] See, the doctrine of the supremacy of Union law over conflicting national law in Case 6/64, *Costa v ENEL.*

In relation to this latter technique, it is possible to identify some explicit and indeed implicit orderings between primary norms from the Treaty.[46] For instance, in circumstances where two or more provisions apply to the same set of facts, the Treaty can be interpreted as dictating that the *lex specialis* provision should apply. So, in terms of the interrelations between the competences of the Union, the 'flexibility' clause contained in Article 352 TFEU is of a residual character compared to other competence provisions. This is due to the fact that the provision enables the institutions to adopt measures to attain one of the objectives set out in the Treaties, where the Treaties *have not provided the necessary powers*. In this sense the legal basis is *lex generalis,* whereas *lex specialis* competence provisions take priority if and when they are available. Also, in the context of legal basis disputes where two objectives are equally associated such that the Court cannot ascertain the 'predominant aim' of the measure, the Court employs a test in which it operates a formal hierarchy between different legal bases. In so doing, the Court looks to the relationship specified in the Treaties between the legal bases. For the Court, Article 114(1) TFEU on the internal market only applies where a more specific legal basis does not apply, or where the Treaty provides otherwise.[47] Thus, if the Treaty contains a more specific provision that is capable of constituting the legal basis for the measure in question, the measure must be based on that provision.[48]

Likewise, there is some form of a textual ordering amongst the fundamental freedoms. For example, the provisions on the free movement of citizens pursuant to Article 21 TFEU have been acknowledged by the Court to contain residual obligations, which are to be applied only in circumstances where the economic free movement provisions have not been triggered.[49] As a result, a number of Union primary law orderings can

[46] See, also, the rights and principles distinction in Article 52(5) of the Charter. From the text it seems as though principles need to be concretised in Union or national legislation in order to be rendered cognisable before the Court. The formulation of Article 52(5) therefore suggests that Charter principles do not lay down any directly applicable rule and are therefore of a 'lower' value than rights. See, for further discussion, Case C-176/12, *AMS*, EU:C:2014:2.

[47] Article 114 TFEU enjoys a precedence over Article 192(2) TFEU – the provision governing environmental action on measures primarily of a fiscal nature – because the latter explicitly indicates that it is 'without prejudice' to Article 114 TFEU.

[48] See, Case C-338/01, *Commission v Council (Recovery of Indirect Taxes)* ECLI: 2004:4829 where Article 113 TFEU on the harmonisation of indirect taxation was the correct legal basis for Directive 2001/44/EC which provided for the mutual assistance between Member States in the recovery of unpaid indirect taxation.

[49] The Court's preference is to apply economic freedoms before turning to the citizenship provisions. In Case C-291/12, *Schatwtz*, EU:C:2013:670 the Court examined whether education could qualify as service within meaning of article 56 TFEU. The Court then considered whether tax relief for education undertaken in German schools could be regarded as a restriction on citizen's free movement. See also Case C-137/09, *Josemans* EU:C:2010:774 where the Court stated that citizen's rights to move and reside find *specific expression* in provisions guaranteeing the freedom to provide services.

be extrapolated from the Treaty text; some provisions are explicitly and therefore formally 'inferior,'[50] others are treated more informally as 'secondary.'[51]

In addition to these 'techniques,' a common feature in constitutional theory relates to the 'legal effects' of different legal norms in the context of their interactions.[52] A basic elaboration of 'legal effects' suffices for present purposes. On the one hand, there may be possible 'hard' effects, in which case priority is afforded to one norm, such that it is possible to determine the outcome of an interaction with another norm of a lower value in advance. The 'hierarchical' approach is traditionally associated with (but not necessarily limited to) the work of theorists such as Kelsen and Dworkin. Whilst Kelsen's work is often linked to ideas about a procedural 'hierarchy of norms' since it addresses the issue of norms 'derived' from another (higher) source,[53] Dworkin's ideas are more akin to a 'content-based' approach to the 'hierarchy of norms.' It is a common feature of the literature associated with Dworkin to focus on 'rights' and 'values' that are assumed to enjoy an elevated position in the 'hierarchy of norms' due to their inviolable quality.[54] This approach is substantive in nature and tends to work on certain assumptions as to the 'contents' which a particular author is inclined to think should be accorded priority in the context of interactions between different norms.

On the other hand, there may be 'softer' effects as regards the interactions between Union primary norms. In such circumstances different norms may not necessarily take an automatic precedence over another, but they may be able to exert conditioning effects on other norms. This may materialise through a process which is understood as 'balancing' different (but hierarchically equal) norms in concrete circumstances.[55] The 'balancing' approach stems most clearly from the work of Alexy.[56] For Alexy, all

[50] E.g. Article 106 TFEU can only be applied in conjunction with another, directly applicable Treaty provision, such as those concerning abuse of a dominant position. As confirmed in Case C-295/05 *Asemfo*, EU:C:2007:227, at para 40: 'It follows from the clear terms of Article 86(1) EC (now Article 106 TFEU) that it has no independent effect in the sense that it must be read in conjunction with the relevant rules of the Treaty.'

[51] For example, the derogations from the free movement provisions are formulated as counter-weights to other Treaty provisions, e.g. Article 45(3)/(4) and Article 36 TFEU. However, the Court has explained that the derogations are to be restrictively interpreted, whilst the rights contained in the Treaty are to acquire a broad interpretation: Case 7/68, *Commission v Italy*, EU:C:1968:51.

[52] E.g. Dworkin, 'Rights as Trumps' in Waldron, *Theories of Rights* (OUP, 1984), and the distinction between rules and principles in Dworkin, *Taking Rights Seriously* (Harvard University Press, 1997).

[53] Dworkin, 'Rights as Trumps' in Waldron, *Theories of Rights* (OUP, 1984)

[54] See, Dworkin, *Taking Rights Seriously* (Harvard University Press, 1997) and *The Philosophy of Law* (1977, OUP)

[55] This is the case in the Union context with clashes between fundamental rights, Case C-544/10, *Deutsches Weintor eG v Land Rheinland-Pfalz,* EU:C:2012:526; Case C-283/11, *Sky Österreich v Österreichischer Rundfunk,* EU:C:2013:28. See, also, for suggestions about how this could develop in the context of the Union internal market, de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9 ULR 169.

[56] Alexy, *A Theory of Constitutional Rights,* (2010, OUP).

legal norms are either rules or principles: principles are norms that require something be realized to the greatest extent possible in law and fact, rules are norms that occupy fixed points; they are always either fulfilled or not. Both rules and principles have only *prima facie* force, but, on this account, rules have greater weight due to, *inter alia*, being laid down by a legitimate authority.[57] Alexy's work connects the theory of principles and balancing, such that in the case of a collision of principles, a balancing strategy must be employed. In that sense, the framework employed in his work does not prescribe specific results, in the same way that substantive theories might; rather, it offers a structure within which an argument about the substance of constitutional rights can take place.

There are advantages and shortcomings to the use of both approaches. On the one hand, a 'hierarchical model' may be favoured since it is possible to predict the outcome of interactions. Moreover, a balancing exercise provides courts with a considerable amount of discretion to reach an outcome in specific cases: this inevitably castes courts into a more legislative style of deliberation and decision-making than would the jurisdiction of absolute rights.[58] In addition to the theoretical problems with a process of 'balancing' – not least in terms of the possible power this process affords to judicial authorities – 'equal legal status does not signal an obvious way forward when values collide.'[59] On the other hand, a balancing process has its own advantages since it is not realistic to recognise 'absolute' rules and principles, without allowing any possibility for them to be qualified by the application of other norms that are situated at the same hierarchical level.

2.1.2) The interactions between the sources of Union primary law: methodological approach

These *external* techniques and theories have an exploratory value in that they help to inform the discussions in this thesis and elucidate certain patterns that are evident in the Union's approach. But the thesis does not use any specific theoretical benchmark which prescribes certain results and/or reasoning frameworks as the foundation of the inquiry. Rather, the analysis is informed by the practice within the Union which helps

[57] For Alexy, constitutional rights are hybrids - both rules and principles.
[58] Stone Sweet, *The Judicial Construction of Europe* (OUP, 2004)
[59] See, Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (OUP, 2013), pg.47.

us to gather a more natural idea of how the relations between the primary sources of Union law are understood, and whether any particular techniques and/or theories are evident in the judicial practice. The focus of the thesis is to identify the judicial approach when it comes to dealing with the interactions between the Union's primary law materials in different contexts. The thesis will also identify any indications from the Union's political actors as to how they view the relations between the primary sources of Union law, including the Member States and the Union's political institutions. It may well be the case that the models employed by the Court (and also the views of the Union's political actors) range from a 'hierarchical' approach in which certain norms are straightforwardly accorded priority by reference to consistent factors such as the 'fundamental' nature of the norm. Or there may be evidence of a 'balancing' approach whereby the Union's primary norms are afforded equal consideration in the case law and in the formulation of Union law and policy.

While the thesis relies heavily on the findings of the Court, it is also useful to consider certain indications from the Union's political actors about how they view the relations between the primary sources of Union law. It is interesting, for example, that the discussions on the Convention on the Future of Europe included the development of a clearer conception of a 'hierarchy' within Union primary law.[60] One of the suggestions consisted of introducing a formal hierarchy between the TEU and the TFEU. The idea was that the TEU was to comprise of the Union's core constitutional text. The TFEU would then be construed subject to the TEU. The suggestion was to split up the Treaties into a 'fundamental' and a 'less fundamental' part, and to combine this distinction with a differentiation in the Treaty *amendment procedure*: the fundamental provisions in the TEU would continue to be revised according to the procedure of Article 48 EU, whereas the more technical provisions in the TFEU would be amendable according to a more flexible procedure.[61] Whilst this idea was ultimately abandoned by the Convention,[62] and the Treaties enjoy the 'same legal value,' this idea has spilled over (albeit implicitly) into the current Treaties. Indeed, the simplified

[60] See de Witte, 'Treaty revision procedures After Lisbon.' In Biondi, Eeckhout, Ripley, *EU Law After Lisbon* (OUP, 2012).
[61] See, Von Weizsäcker, Dehaene and Simon, *The Institutional Implications of Enlargement* (18 October 1999) 12–13 (http://europa.eu.int/igc2000/repoct99_en.pdf).
[62] Treaty revision was not a priority of the Convention on the Future of Europe. The subject was not entrusted to any of the working groups, and the Praesidium waited until a late stage before making concrete proposals. The first proposal, submitted on 2 April 2003, repeated the existing treaty amendment procedure of Article 48 TEU. Members of the Convention made many proposals to change that first text. In a first stage, they encouraged the Praesidium to include the Convention method as a normal feature of future treaty revisions, preceding the formal IGC; in a second stage, they tried to convince the Praesidium of the need for more flexible procedures to amend specific parts of the Treaty.

revision procedures under Article 48(6) and (7) TEU may only be used to make changes to the TFEU. The fact that the simplified procedures are not available for changes to the TEU may suggest there is a subtle hierarchy between the contents of the Treaties. After all, the nature of the simplified procedures is to reduce the difficulties of agreeing to, and ensuring the ratification of, amendments introduced under the ordinary revision procedure pursuant to Article 48 TEU.

The legal basis disputes also tell us something about the relationship between the Union's primary norms from the perspective of the Union's political actors. These offer some ideas about how the Union legislature conceives of a possible 'content-based' hierarchy within Union primary law. In such disputes we see the Union's institutions arguing amongst themselves about the implicit hierarchies between provisions, and we can identify particular understandings about where the Union's objectives and competences fit in within the broader scheme of Union law. Of course, such disputes are not wholly accurate as a gauge of the Union institution's conception of the Union hierarchy; there are clearly other, more instrumental, reasons why institutions favour different legal bases, not least because certain legal bases are more advantageous (in a procedural sense) to some institutions.[63] It is still however quite revealing as to the importance the Union's actors ascribe to certain provisions in Union primary law. For example, there are a range of cases on the importance of the internal market legal bases, over and above those on say environmental protection.[64] In *Framework Directive on Waste*, the Commission challenged the adoption of a Directive under now Article 192(1) TFEU, the environmental legal base, arguing that it should have been based on Article 114 TFEU as regards the internal market.[65] For the Court, in the application of the 'predominant aim' test to decide the correct legal basis of the Directive, the central tenets of the Directive were those of environmental management, and not of securing the internal market objectives of the free movement of waste.

With these types of disputes the Court is capable of setting out, and analysing, the views of the Union's political institutions. It is important to note that it remains unclear

[63] Cullen and Charlsworth, 'Diplomacy by other means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States' (1999) 36 CMLRev 1243.
[64] Before the Three Pillar structure was abolished, questions arose about whether the Court was creating a hierarchy of policy competences available to the Union's institutions, favouring the internal market over social policy legal bases. See, e.g., Case C-300/89, *Commission v Council (Titanium Dioxide,)* EU:C:1991:244.
[65] Case C-155/91, *Commission v Council*, EU:C:1993:939.

whether the choice of the actors is based on the contents of the legal basis (in that a particular objective is prioritised by those actors) or whether the choice is largely a matter of power struggles between the Union's political institutions. Moreover, it is not clear whether there is a hierarchy of legal bases at all, or whether within a *particular* legal instrument there is a hierarchy over its substantive contents. Despite this ambiguity, there are instances which do not reach the Court, but where choices between different objectives and norms enshrined in Union primary law will necessarily have to be made by the political actors of the Union. Thus, the Commission's preparatory documentation for legislation is revealing in this sense. For example, the Commission has used it to explain that there is a 'formal equality' amongst the principles set out under Title II of the TFEU.[66] The documentation of the other Union institutions released during the legislative process is also interesting for present purposes, particularly in relation to the relative value placed on the Union's different mainstreaming provisions.[67]

On the whole, the interjections by the Union's political actors tend to be quite sporadic and limited to certain types of issues, such as legal basis disputes. So whilst any evidence of their intentions about the hierarchy and how they understand certain interactions between norms will prove useful to the thesis, they cannot provide the sole (or indeed a reliable) benchmark through which to conduct the broader inquiries. As a result the analysis for the most part is informed by the proactive or reactive practice of the Court in the context of Union primary law. Indeed, chapters one and two largely concern the proactive role of the Court in addressing (and perhaps even creating) 'hierarchy of norms' issues, whilst chapters three and four focus on how the Court *reacts* to actions taken by the Union's political actors. The thesis therefore touches upon important constitutional questions about whether it is a feasible to expect a clear 'hierarchy of norms' within the Union legal order, and if so, whether the Court has assumed responsibility for concretising this idea in practice.

[66] See, the Communication from the Commission to the Council and the European Parliament of 29 June 2017 on a European One Health Action Plan against Antimicrobial Resistance (AMR) (COM(2017) 339 final), (p.3) the 'One Health' approach 'is a term used to describe a principle which recognises that human and animal health are interconnected, that diseases are transmitted from humans to animals and vice versa and must therefore be tackled in both.'

[67] E.g., the mainstreaming duty under Article 9 TFEU regarding public health has been used to justify action for the Tobacco Products Directive reform: Proposal for a Directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products, COM(2012) 788 final.

2.2) What are constitutional implications of how the Union's primary norms are arranged?

The purpose of this thesis is not confined to an exposition of the status of the various sources of Union primary law in the 'hierarchy of norms:' the findings may also be connected to other more general debates in EU constitutional law. Thus, the second question which informs the discussions in each of the substantive chapters aims to identify the implications of the constitutional practice of the Union. It assesses *who* is responsible (and thus *where* the locus of authority lies) for dealing with the tensions between the Union's primary sources. The nature of the relations between the Union's primary sources tells us interesting things about the balance of powers within the Union, both on the vertical and the horizontal level.

On the horizontal level, the resolution of certain issues through the prism of primary law by the Court may perhaps reduce the space for concrete policy choices enshrined in Union legislation. For example, if the Court fleshes out the Treaty provisions (in a substantive sense) through the process of interpretation then it may be difficult for such choices – which fall to be recognised as Union primary law – to be altered through the political process by the Union's political institutions. One of the main questions in the thesis is whether the Union's political institutions are solely responsible for the operationalization of primary law, or whether, and to what extent, the Court has (or ought to have) a role in the process.

On the vertical level, when the subject of a particular interaction concerns two principles, rules or objectives that are protected as Union primary law, the Court may be inclined to conduct a centralised assessment of their relationship. Such an assessment may work to the detriment of, and encroach upon, the Member States' discretion, be that in the context of the enforcement or the amendment of Union primary law.

Taken together, both the vertical and horizontal relations touch upon the extent to which the Court retains control over issues that are framed as a set of interactions between the sources of Union primary law. Indeed, a recurring theme of the thesis is whether, and how, the political balance of powers envisaged by the Treaty for the operationalisation, enforcement and amendment of Union primary law is respected by the Court in practice. The Court is competent to interpret Union primary law and to

assess the constitutionality of Union secondary law with Union primary law: thus it is in a position to define and elaborate upon the content and scope of Union primary norms in significant ways.[68] It is open to question how far such authority (legitimately) extends.

In addition, the relationship between the sources of Union primary law may affect the nature of the Union's constitutional framework in very different ways. Indeed, the issues explored in the thesis may serve to reinforce the view that the Union has a strongly developed 'legal' dimension of the constitution, but at the same time the 'political' dimension of the constitution is either barely existent or at least under-developed.[69] This idea ties in with a broader debate in constitutional scholarship which explores legal and political 'models' of constitutionalism. The distinction between these models rests on the emphasis accorded to law and politics - and the roles of legal and political institutions - in holding the exercise of political power to account. As such, the distinction between 'legal constitutionalism' and 'political constitutionalism' maps onto the distinction between 'legal constitutions' and 'political constitutions':

"A political constitution is one in which those who exercise political power are held to constitutional account through political means, and through political institutions... A legal constitution, on the other hand, is one which imagines that the principal means, and the principal institution, through which the government is held to account is the law and the court-room."[70]

To some, at least, it is clear that the EU possesses a legal rather than a political constitution, since the Court is afforded a judicial review power to annul legislative interventions with reference to primary law and interprets such legislative interventions creatively.[71] The result is that it falls to the Court to determine the extent to which the Union's political actors are able to play their part in the elaboration of Union law. This thesis reveals that this understanding is particularly marked when it comes to the relationship between Union primary legal sources.

[68] E.g. Article 19 TEU, and Article 263 TFEU.
[69] See Gee and Webber, 'What is a political constitution?' (2010) 30 OJLS 273. See, also, Syrpis, 'The Relationship between Primary and Secondary law in the EU' (2015) 52 CMLRev 461.
[70] Tomkins, *Public Law* (OUP 2003), pgs.18-19.
[71] Wilkinson, 'Political Constitutionalism and the European Union' (2013) 76 MLR 191

The thesis also implicates questions about the locus of ultimate constitutional authority within the Union as regards the development of Union primary law. Indeed, this inquiry may shed light on debates about the genuine nature of the Union legal order, as either an autonomous (and perhaps) constitutional entity which may limit the actions of political actors,[72] or as a compact between States under international law under which the Member States are the 'masters of the Treaties' and are not greatly limited in the exercise of their amendment powers.[73]

It is therefore clear that the issues explored in the thesis serve to reveal important patterns, and raise certain questions, about the Union legal order more broadly.

3) Findings of the thesis: main themes

There are three (inter-related) themes that this thesis aims to shed light upon. The first is about the idea of a 'hierarchy of norms' within Union primary law. The second is about the nature and scope of Union primary law, its historical constitutional development, and the implications of its expansion for the balance of powers within the Union. The final theme is the (expansive and decisive) role of the Court in the management of the interactions between the sources of Union primary law. Although this final theme draws heavily upon, and is supplemented by, many of the ideas highlighted by the first two themes, it deserves its own discussion in view of the important constitutional consequences of the role of the Court.

3.1) 'Hierarchy of norms:' is there a hierarchy within Union primary law?

The key theme of this thesis is the notion of 'hierarchies' between norms with a place in the Union's primary law. The notion of 'hierarchies' is important in the sense that the presence or indeed the absence of hierarchical orderings amongst the Union's primary legal sources may reveal important things about the balance of powers within the Union. The thesis demonstrates that there is no clear 'hierarchy of norms' within

[72] Constitutions are generally able to set limits to amendment, be it implicit or explicit. See, Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP, 2017). For references to the EU as a 'constitution' see Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited,' (1999) 36 CMLRev 703 and Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (2009) 15 Columbia Journal of Law 703

[73] In international law, it is possible to amend Treaties in any way that is deemed desirable by the contracting parties: even beyond the procedural restraints designed to condition how the Treaties are amended. The Vienna Convention on the Law of the Treaties provides that State parties to any international agreement may at any time amend or revoke a Treaty, whether formally or not, in principle by unanimity; Articles 39, 54, 57. Moreover, even when an international treaty lays down provisions establishing a specific procedure for its amendment, contracting parties may, by common accord, disregard such provisions. For references to the international law view of EU law see Hartley, *The Foundations of EU Law* (OUP, 2014) and Schilling, 'The autonomy of the Community Legal Order' (1996) 37 Harvard International Law Journal 389.

Union primary law at present, and there are no real 'meta-norms' or principles that serve to guide the interactions between the Union's primary law sources. The question that arises as a result is whether this is potentially problematic or whether the absence of a 'hierarchy' is part of how the Union system works.

It is useful to consider the reasons why a 'hierarchy' may be a desirable constitutional feature. A 'hierarchy of norms' imbues a degree of clarity, structure and thus predictability in constitutional frameworks.[74] This was the underpinning rationale for the (failed) plans to separate the TEU and the TFEU during the Convention on the Future of Europe discussed above. Moreover, from the debates in German and UK constitutional law the creation of a 'hierarchy of norms' also reflects an urge to protect certain 'constitutional' norms from being easily amended.[75] The problems arise however when a 'hierarchy of norms' emerges as a case-law construction, rather than as a written construct under the control of political actors.[76] Amongst other things, such an approach undermines the purported rationale for a 'hierarchy of norms' in the first instance: clarity, structure and predictability. The thesis argues that even if a 'hierarchy of norms' *per se* is not necessarily desirable, the fact that the flexibility of the primary law framework may be exploited by – or perhaps even exacerbated by - different constitutional actors to formulate their own idea of the relationships between different norms and of a 'hierarchy of norms' poses particular problems for the Union legal order.

3.2) The expanding nature and scope of Union primary law

The second main theme that runs throughout the thesis is that the issues framing the discussion in each of the chapters arise due to the proliferation of what constitutes Union primary law. Indeed, the historical development of Union primary law has led to a situation where there is much more space for *substantive* interactions between ever more diverse values, objectives, principles and sometimes even policy choices enshrined in primary law.[77] Since so many sources of Union law are recognised as

[74] See, Shelton, 'Normative Hierarchy in International Law' (2006) 10 The American Journal of International Law 291.
[75] See, *HS2 Action Alliance Ltd v Secretary of State for Transport* [2014] UKSC 3 and Elliot, 'Constitutional legislation, European Union Law and the nature of the United Kingdom's contemporary constitution' (2014) 10 EUConst 379. See the rationale in post-war Germany for the introduction of immutable principles, see Brecht, *Federalism and Regionalism in Germany – The Division of Prussia* (OUP, 1945), 138
[76] See, in the UK context, Gordon, *Parliamentary Sovereignty in the UK Constitution* (Oxford, 2015)
[77] The problem of conflict is accentuated with the 'fragmentation of international law.' International law has expanded into new subject areas leading to tensions between substantive norms or procedures. See, Meron, 'On a Hierarchy of International Human Rights' (1986) 80 American Journal of International Law 1.

holding primary legal authority, there are inevitable difficulties with identifying the correct relations between them. The fact that this occurs at the level of primary law is problematic, given that it is the 'higher level' of Union law (and perhaps also its constitutional law.)[78] The important point is that this expansion seems to have occurred without any broader consideration of how to establish a working hierarchy between the different sources of Union primary law.

Union primary law has continued to expand as the Union has evolved to include not only the Treaties, and now the Charter, as written primary law created by the Member States, but also the foundational principles of the Union and the general principles of Union law created by the Court. The relationship between these unwritten and written sources is especially important for questions about the location of constitutional authority within the Union. Each of the chapters seeks to demonstrate that the judicial interpretation of Union primary law acquires the status of 'higher' primary law (perhaps equal to – or in some contexts situated at a higher level – than the written Treaty materials.) Any 'hierarchy of Union primary norms' seems to be populated by and centred on the judicial interpretation of Union primary law. Indeed, norms which the Court retains its definitional monopoly over seem to be elevated to a higher position in the Union framework. This is even the case in contexts where the Court recognises the existence of competences which are primarily, if not exclusively, reserved to other political actors at the Union level or at the domestic level. On the whole, the Court has space within the malleable primary law framework to reach different results about which provisions are prioritised within a given context. This has very real implications for the questions explored in the thesis: in elevating judicial interpretations or elaborations of Union law to the place of primary law (but not of a second-order nature) both the nature and extent of the Union's political institutions', and even the Member States', competences are conditioned by the Court's interpretations.

This seems to be a product of both the constitutionalisation of the Union legal order, and the idea that the Union framework, and Union primary law, is now – at least to a certain extent - 'over-constitutionalised.'[79] These developments have been engineered

[78] See, for references to 'constitutional law' von Bogdandy & Bast (eds), *Principles of European Constitutional Law* (Hart, 2009).
[79] Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21 ELJ 460

by the Court, alongside certain actions of the Member States: such as the expansion of the Treaty text so as to include more 'constitutional' values in Article 2 TEU, and the introduction of the Charter of Fundamental Rights. Thus the current Union primary law framework does not merely set out a broad framework for political decision-making; it contains substantive objectives and values. Taken together with the Court's authority to interpret the sources of Union primary law (albeit an authority which is generously construed by the Court), this ultimately enables substantive policy choices to be clothed by the Court as Union primary law.[80] This has profound implications for questions about the allocation of powers within the Union, and between the Union and the Member States.

While this is not a unique problem to the Union, the specificity of the Union's transnational legal framework serves to accentuate these problems.[81] On the one hand, it is necessary for the Treaties exhaustively to prescribe the powers of EU, its objectives and details of the relevant policy areas. After all, under Article 5 TFEU the Union acts on principle of conferral and cannot exercise powers not attributed to it. On the other hand, the framework now extends beyond the text of the Treaty, to include unwritten principles of law and the directly effective provisions invested with a life of their own through the Court's definitional monopoly.[82] The distinction between 'core' constitutional provisions – i.e. the founding values of the constitution - and norms that would usually be understood as 'ordinary' law – i.e. political decisions and policy choices - is thus blurred in the Union context.[83] As this thesis reveals, this is particularly problematic, and a growing problem, due to the broad category of norms classified as Union primary law.

3.3) The role of the Court in the Union primary law framework

[80] For the Court's expansive approach to interpretation, see Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart, 2013)

[81] See, generally, the problems with judicial interpretation of the demands of the constitution which are common to many domestic legal systems. Tushnet, 'Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory' (1980) 89 Yale Law Journal and Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346.

[82] This very idea is based on contested assumptions about the Court's power. See, generally, Horsley, *The Court of Justice of the European Union as an Institutional Actor* (CUP, 2018).

[83] In constitutional frameworks law can be divided into two parts: constitutional law regulates rule-making, and legitimises and limits political power. Ordinary law is created to give effect to the constitutional framework. Thus, the constitutionalisation of concepts, ideas and principles - that may be categorised as ordinary law or political decisions under most constitutional systems - may have a cementing effect in the framework more broadly. See Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21 ELJ 460

As has already been mentioned this third theme is strongly inter-linked with the previous two themes of the thesis, but it deserves its own discussion due to the important constitutional consequences it entails. There are three main layers to this analysis.

The first concerns the formative case law of the Court, and particularly the 'constitutionalisation' of the Union legal order.[84] It is through the introduction of foundational concepts including direct effect and the principle of primacy that the Court has carved out a policy-making platform with the authority of Union primary law. This has (and has had) considerable implications for the horizontal and vertical distribution of powers across the Union and its Member States.[85]

Indeed, the three key issues explored by the thesis are to some extent attributable to the judicial development of Union law. The main pattern from the issues explored in the thesis is that Court-made (or judicially interpreted and shaped) primary law governs and frames the rest of Union primary law in practice. The result is that the (changing) judicial interpretation of Union primary law now sits, for the most part, at the apex of the Union's 'hierarchy of primary norms.' This is the case even despite the fact that the contents of Union primary law as developed by the Court are fairly substantive in nature. The elaboration of certain principles of Union primary law may make sense in specific contexts, but create problems when they are situated within the contemporary Union legal order. It is thus possible that the Court is the *cause* of 'hierarchy of norms' problems within the Union legal order. This raises questions about the appropriate place of judicially-developed concepts and understandings in the European system. It is this contentious issue that the thesis seeks to examine. One of the central questions is whether a more mature approach is required on the part of the Union – and particularly the Court - to work out the appropriate place of certain rules and principles in a more densely textured and diffuse legal environment. In particular, should the Court take responsibility for differentiating between sources of Union primary law more clearly, in terms of their status within the overall system: those genuinely constitutional norms; those which require further elaboration through

[84] See, generally, Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 AJUL 1, Mancini, 'The Making of a Constitution for Europe' (1989) 26 CML Rev 595 and Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403

[85] Micklitz and de Witte (Eds), *The European Court of Justice and the Autonomy of the Member States* (Insentia, 2012), Adams, de Waele, J. Meeusen and G. Straetmans (Eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart, 2013) and Dawson, de Witte and Muir (Eds.), *Judicial Activism at the European Court of Justice* (Elgar, 2013).

political means; and mere policy choices which ought to be able to adapt to changing circumstances?

The second layer considers the role of the Court vis-à-vis the Union's political actors. On the whole, the chapters reveal that the Court takes decisions about the arrangement of Union primary law, which at times is to the detriment of the competences and powers reserved to other constitutional actors under the Treaties. Rather than the Court's centrality vis-à-vis the Union's political actors arising as a by-product of the absence of a 'hierarchy of norms' and the expansion of the scope of Union primary law, the Court's role in expanding the contents of Union primary law has *directly increased* the possibility for tensions between the Union's primary law materials. This is not to say that the Court always enjoys a central role, as chapter three explores the active role of the Member States and the Union's political institutions in negotiating the relationship between Union primary norms. Thus, one of the central themes of the thesis is the question of *responsibility* for the 'hierarchy of norms' problems: after all, the Member States have the authority to draft the Treaty and to structure it effectively.

Finally, it is important to emphasise why the central role of the Court is problematic. Cutting across all of the issues explored in the thesis is the idea that how the Court views the 'hierarchy' and the scope of Union primary law is usually considered to be the 'right' answer to issues about the relationship between Union primary norms. This is problematic for two reasons. First, the Court encroaches upon areas entrusted to the Union's political actors and the Member States under the Treaties when it comes to addressing the tensions between the sources of Union primary law.[86] Second, this raises obvious questions about whether the Court ought to enjoy such a role as a matter of principle: why is the Court (if it is) the institution that determines how Union primary norms relate to one another? Is it a common feature of constitutional frameworks for judicial organs to make such determinations, given the silence of the written arrangements and the silence of the constitutional legislator? And where does the Court (and indeed other courts) derive its authority? These are familiar questions about the democratic credentials of courts generally.[87] Thus, the thesis does not offer any new critiques of the Court; it rather reinforces existing concerns and situates them in the context of a line of inquiry about the Union's 'hierarchy of norms.'

[86] See, similarly, Horsley, cited supra n. 82.
[87] See, Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346

4) An overview of the main chapters

The thesis is composed of four substantive chapters which each focus on a particular interaction between the sources of Union primary law *in three different contexts*. The thesis is not intended to challenge the existing literature on the 'hierarchy of norms' within Union law: rather, it is designed to reframe the current debates in the literature to focus on the broader relationship(s) between the sources of Union primary law. In this way, the first chapter of the thesis aims to tackle one of the most obvious sets of circumstances within which the issue of a 'hierarchy' has been discussed within Union law; the relationship between Union primary and Union secondary law in the internal market.[88] This first chapter sets out to 'reframe' the nature of the debate as a matter of the relationship between the sources of Union primary law, which the following three chapters aim to expand upon in less-explored areas of Union law. Whilst chapter one naturally focuses on the horizontal relationship between the Union's political institutions and the Court, chapters two, three and four take the debate to the vertical plane, and aim to capture how the issues as regards a 'hierarchy' within Union primary law are accentuated in these contexts.

Chapter one focuses on the *operationalization* of EU primary law by the Union's political institutions, and by the Court. It looks to the relationship between the direct obligations under Union primary law, such as the free movement provisions, and the regulatory competence provisions available to achieve Treaty objectives which are laid down in the Treaty. The main issue is to identify which of these provisions, if any, takes priority when it comes to concretising the Union's objectives in practice. The traditional approach in the literature is to conceive of this issue as a simple hierarchy between primary and secondary law. This however implicitly assumes the answer to a prior question: that the relation between directly effective provisions and regulatory competences, both as sources of Union primary law, is hierarchical in nature with the priority falling to the directly effective provisions. The chapter therefore considers the relationship between the Union's competences and directly effective obligations in more detail: should (if they indeed are) the directly effective obligations automatically be assumed to enjoy a higher place within the Union's 'hierarchy of norms?'

[88] See Syrpis, 'The Relationship between Primary and Secondary law in the EU' (2015) 52 CMLRev 461; Davies, 'Legislative Control of the European Court of Justice' (2014) 51 CMLRev 1579.

Chapter two captures matters relating to the *enforcement* of EU primary law by the Member States. The chapter explores the interactions between the Unions' foundational principles – specifically primacy and direct effect - and the general principles of Union law. It assesses whether the foundational principles are viewed as 'unconditional' in the Union's 'hierarchy of norms' or whether the Court allows for certain qualifications to their full effects in order to safeguard counter-veiling values which the Union purports to protect, such as legal certainty. The interactions (and possible tensions) between the foundational obligations and legal certainty occur in an area of national regulatory autonomy whereby Member States enjoy the discretion to set their own rules as regards the procedures through which Union law can be enforced.[89] In this context the Court must determine how the principles associated with the enforcement of Union law, and the national courts' obligations to enforce Union law, can be reconciled with the general principles of Union law, including the principle of legal certainty.

Chapters three and four concern matters relating to the *formulation and amendment* of primary law by the Member States. These chapters are more speculative in nature, and to a certain extent represent a culmination of the issues explored in the first two chapters. The central question is whether the ultimate implication of the existence of a 'hierarchy of norms' within Union primary law is that certain sources of Union primary law cannot be amended by the Member States at all, due to their 'higher,' 'inviolable' status. This naturally raises questions about the location of ultimate constitutional authority for the formulation of Union primary law. More specifically, chapter four addresses the phenomenon of 'supra-constitutional' values as constraints on the powers of the primary law-making,[90] and attempts to situate this idea within the context of traditional views of the Member States as the 'masters of the Treaties.'[91] Both chapters examine the prevalence in practice and the theoretical and conceptual coherence of the very idea of limitations to amendment powers within the context of the EU legal order.

[89] See, the case law on *res judicata* Case C-505/14, *Klausner Holz Niedersachsen*, EU:C:2015:742 and Case C-69/14, *Târşia*, EU:C:2015:662. See also the case law on limitation periods, Case C-188/95, *Fantask*, EU:C:1997:580; Case C-640/13, *Commission v UK*, EU:C:2014:2457; and Case C-362/12, *Test Claimants in the Franked Investment Income Group Litigation*, EU:C:2013:834.
[90] See, Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP, 2017)
[91] The idea that the Member States are 'masters' is derived from the German Constitutional Court's judgments, in particular BVerfGE 89, 155; Brunner CMLR [1994] 57.

The overall purpose of the thesis is to explore these *three contexts* in greater detail, so as to identify how the relationships between the different sources of Union primary law are understood at the Union level. It is these three different contexts that when explored together inform the key lessons of the thesis: the absence of a clear 'hierarchy of norms' as an issue which is not necessarily intuitively problematic; combined with the increasing breadth and scope of Union primary law; which in turn contributes to (or is facilitated by) the centrality of judicial power within the Union's constitutional framework.

5) Conclusion

The issue of a 'hierarchy of norms' within Union primary law has not been explored directly or comprehensively in the literature. Nevertheless, the possible interactions between the sources of Union primary law have been noted by academics in a variety of different contexts. This thesis seeks to develop this line of inquiry so as to consider the interactions between Union primary norms from a broader constitutional perspective and thus intends to highlight the importance of the relationship between the primary sources of Union law in the contemporary EU legal order. It is through the adoption of an essentially pragmatic approach that this thesis seeks to portray how the relations between the primary law materials are understood, managed and structured within the Union. The central idea is to explore whether the primary law materials are of equal value both in principle in terms of their formal legal status, and in the constitutional practice of the Union.[92] In particular, the thesis asks whether there are 'meta-norms' or principles which function to guide the relationship between the Union's primary legal sources. This may offer the potential to shed light upon the established view that there are two principal levels to the Union legal order and its 'hierarchy of norms', comprising of primary law and secondary law.[93] Moreover, the thesis outlines the constitutional implications of this appraisal, in an attempt to capture the very real institutional and constitutional importance of the relationship between Union primary law. In so doing, it attempts to expose the problems that arise for the allocation of powers within and across the Union due to the 'hierarchy of norms' (or absence thereof) that may emerge in practice. The thesis is thus framed by two central

[92] Pierre-Marie Dupuy argues that in the context of international law and due to the sovereign equality of states there is no hierarchy in international law generally: 'international rules are equivalent, sources are equivalent, and procedures are equivalent, all deriving from the will of states.' See, Dupuy, *Droit International Public* (*Dalloz*, 1995), pgs.14-16.
[93] Lenearts, Van Nuffel, *Constitutional Law of the European Union* (Sweet and Maxwell, 2011)

questions: *how* do the Union's primary legal sources relate to each other, and *what* does this tell us about the Union's constitutional framework?

The thesis outlines three key findings that have broader relevance for the development of Union constitutional law. The first is the absence of a clear 'hierarchy of norms' within Union primary law. The reasons for this are numerable, but they are most clearly related both to the fact the Treaties do not set out the ordering between the written provisions in any comprehensive manner, and to the Court's (inconsistent) management and organization of the interactions between the sources. The second key finding relates to the expanding scope of Union primary law and how this has contributed to (or caused) the problems with the interactions between the Union's primary legal sources.

The final finding concerns the role of the Court in the Union's primary law framework in three ways: its formative role in 'constitutionalising' Union law; its role vis-à-vis the Union's political actors; and the normative basis of its authority in these contexts. By exploring the practice of the Union, the thesis reveals a common pattern in the expansion of judicial authority to define what Union primary law is, to determine what Union primary law entails, and to decide the result of the interactions between different sources of Union primary law. This is not necessarily unique to the Union context. Indeed, in certain domestic constitutional frameworks, there have been attempts to construct some form of hierarchy amongst the 'higher sources' of the constitution, outwith the formal prescriptions of the constitutional framework.[94] But with this has come increased flexibility for the Court to organise the higher sources of Union law in ways it sees fit. One obvious question here is whether the situation could be approached in a different way, and particularly one which is less dependent on the role of the Court. Indeed, as regards the first finding, it could be that in the absence of a written hierarchical ordering the Court has merely made sense of the existing framework. But this thesis reveals that in the present environment the Court arrogates for itself too much power at the expense of other of the Union's constitutional actors

[94] Consider the UK constitutional context: although there is no formal, written constitution, the Court has expressed sentiments about the possibility of recognising certain statutes (UK primary legislation) as constitutional in nature. The implication is that 'constitutional' statutes are of a higher value than 'ordinary' statutes, such that they cannot be altered or abrogated (at least without express words to that effect.) See, *(HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, and for commentary, Elliot "Constitutional legislation, European Union Law and the nature of the United Kingdom's contemporary constitution" (2014) 10 European Constitutional Law Review 379.

who are supposed to enjoy a central role under the Treaty framework. The aim of chapter one, two, three and four is to explore these issues in more detail.

Chapter one: the relations between the primary sources of Union law in the context of the operationalisation of Union law

The main theme of this chapter is the operationalisation of the primary law of the Union. In particular, the chapter considers the interactions between two sources of Union primary law: the sources which are capable of producing direct effect and the provisions on regulatory competences allocated under the Treaty to the Union's political institutions. This is distinct from the usual approach in the literature to discussing the outputs of the regulatory competences - i.e. secondary legislation - rather than focusing on their primary legal value.[1]

The chapter explores two different configurations where these sources interact. The first concerns the relationship between the obligations found in the text of the Treaty – such as the free movement provisions – and the competence provisions. The second concerns the relationship between unwritten direct obligations – such as the general principle of equal treatment – and the competence provisions. These two sets of interactions may ultimately reveal something about the place and value of direct obligations in the Union's 'hierarchy of norms' in light of the regulatory competences allocated to the Union's political institutions. In this context, a broader institutional dynamic comes into play as regards the horizontal allocation of power between the Court and the Union's political institutions for operationalising Union law. In order to explore this dynamic, the chapter looks at: *how* the Court manages the interactions between these sources of Union primary law in practice; and, from a constitutional perspective, *what* effect its management has on the nature and scope of the Union political institutions' competences.

Both of these areas are characterised by considerable contestation. Discussions as to the excessive reach of Union law, and particularly the role of the Court in driving such developments, have led to both hypothetical and real 'rejections' of the Union-based understanding of certain entitlements. On the one hand, the domestic concerns with free movement from the Union often find their basis in the extension of the scope of entitlements of (largely non-economically active) Union citizens engineered by the

[1] Davies, 'Legislative Control of the European Court of Justice' (2014) 51 CMLRev 1579, and Syrpis, 'The Relationship between Primary and Secondary law in the EU' (2015) 52 CMLRev 461

Court.[2] On the other hand, the Court's development of the general principle of equal treatment, particularly with regards to age, has been received with some hostility at the domestic level in cases such as *Honeywell* and more recently in *AJOS*.[3] On the whole, these concerns tend to have a direct correlation with judicial, and not political, developments in the operationalisation or elaboration of Union law. The prevailing assumption is that the Court encroaches upon the Union political institution's competences in the Treaties when it is interpreting the directly effective free movement provisions by essentially making policy choices about the scope and trajectory of Union primary law.[4]

At present, the literature approaches the relevant 'hierarchy of norms' issue between these sources of Union primary law from a slightly different perspective to the one that this chapter employs.[5] In particular, the chapter is not directly concerned with the relationship between primary law and secondary law: the latter instinctively (and legitimately) presumed to enjoy a lower rank in the hierarchy, since secondary law is ultimately derived from primary law.[6] Rather, the chapter is concerned with the origins of secondary law – as expressions of Union primary law itself - which are grounded in an explicit competence base in the Treaty. The competence provisions *as sources of Union primary law* clearly attribute a role for making policy choices, and for informing the development of primary law, to the Union's political institutions. Indeed, it is clear from the Treaty framework that the Union's competence provisions are the principal, if not the only, tools in Union primary law for operationalising the Union's key objectives.[7] Thus, it is something of a paradox that, as the chapter reveals, the Union's political institutions' role to inform, and inevitably also to define, primary law as set out in the Treaty is, at times, reduced to a question of compliance with the primary law framework (and importantly a framework as it has been interpreted by the Court.) The framing question of this chapter therefore presents a way to think about these important questions as a hierarchy *within* Union primary law. This resituates the discussions at the level of constitutional law, and speaks directly to the balance of

[2] See, Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 CMLRev 1245 and Newdick, 'Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity' (2006) 43 CMLRev 1645
[3] See, Bundesverfassungsgericht [BVerfG], July 6, 2010, Case No. 2 BvR 2661/06, and also Case no. 15/2014 *Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A.*
[4] See, Dougan, cited supra n.36 of the introductory chapter, where the relevant literature is considered in detail.
[5] See, in the context of the internal market, Davies and Syrpis, cited supra n.1.
[6] The Treaty has a catalogue of competence provisions for the Union's institutions to adopt legal acts in different subject areas. Moreover, under Article 263 TFEU the Court can assess the validity of secondary law as against Union primary norms.
[7] See also Horsley, *The Court of Justice of the European Union as an Institutional Actor* (CUP, 2018), particularly chapter 5.

power in the Union framework on a horizontal level between the Court and the Union's political institutions.

Against this background, the chapter reveals a level of incoherence on the part of the Court about *how* it approaches the management of the relationship between Union primary norms in relation to the operationalisation of Union law. There are no clear benchmarks, 'meta-norms' or principles in this context that help to guide the relations between the sources of Union primary law: the Treaty does not specify what the relationship between the Union's directly effective obligations and its competences is, and the institutional practice of the Union is confused. In practice, the Court has space to exploit the unclear relationship between the higher sources of Union primary law so as to identify for itself the 'appropriate' organisation of such norms depending on, and tailored to, a particular context: for example, to suggest that primary law is hierarchically superior to secondary law such that the exercise of competence must comply with Union obligations (as interpreted by the Court); or to explain that the Union's political institutions have a significant degree of discretion to shape and reshape the trajectory of Union primary law on the basis of their competences. This has a direct bearing on the allocation of responsibility within the Union, especially as to the scope of the Union political institutions' primary law competences for operationalising and elaborating upon the contents of Union primary law.

In terms of *what* these findings mean from a constitutional perspective, this chapter serves to reinforce the second key finding of the thesis that Union primary law has expanded significantly.[8] Indeed, it is not only basic structures and the institutional framework of the Union that find a place in primary law, but also key policy questions, trajectories, and sometimes policy choices. The responsibility for managing (and perhaps attempting to resolve) tensions between different objectives, values and norms is envisaged by the Treaty to fall under the control of, and belong to, the political realm. For instance, the Union's political institutions may adopt measures to tackle barriers to free movement under Article 114 TFEU, but they must also respect potentially counter-veiling social values that the Union aims to protect. Nevertheless, the chapter reinforces the third key finding of the thesis: the role of the Court as the

[8] See, generally, Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21 ELJ 460

central actor in the operationalisation of Union primary law. On a first level, the problems with the 'hierarchy of norms' in this context are a result of prior judicial choices about the Union legal order. In particular, the doctrine of direct effect acts as a primary law counter-part to the Union's regulatory competences and the policy-making envisaged thereunder. This has enabled the Court to (whether intentionally or not) arrogate to itself a substantial amount of power to interpret – and ultimately to entrench its interpretation of - the bare materials in the Treaty and also the general principles of Union law.[9] Thus, some of the most important constitutional questions have been, and continue to be, reduced to Treaty interpretation. This includes the scope of the fundamental freedoms and the scope of the principle of equal treatment.[10] On a second level, the Union's political actors are constrained in their ability to resolve salient political and social issues. Indeed, there seem to be very real constraints that operate on the actions of the Union's political institutions that derive from Union primary law, which are ultimately exploited by the Court in the exercise of its interpretive authority.[11] On a third (normative) level, the Court ultimately seems to act in a way which encroaches upon the powers of other constitutional actors at the Union level, as they are set out in the Treaties.

The structure of this chapter is as follows. Section 1 describes the various ways in which interactions between Union primary norms of this nature manifest themselves in the current framework. Section 2 sets out the possible perspectives, and the reasons underpinning such perspectives, that may be employed to describe the correct relationship between direct obligations and the competence provisions. Section 3 briefly outlines the benchmark the chapter employs to explore the relations between Union primary norms in this context. Sections 4 and 5 reflect upon *how* the Court has dealt with these interactions in practice, and *how* it has attempted to reconcile potentially competing conceptions of the correct role of the Court and the Union's political institutions in the operationalisation of Union law. It is unlikely that there will be any uniform scheme which explains what the 'correct' relationship between Union

[9] This is linked with the preliminary reference system and direct effect: the privatisation of policy-making, whereby individual litigants drives the development of Union law.
[10] Davies, 'The European Union legislature as an agent of the Court of Justice' (2016) 54 JCMS 846.
[11] The prevailing assumption in the literature is that the Court is too ready to frame policy judgments in terms of primary Treaty provisions and the general principles of Union law (both directly effective obligations) in a way which effectively reduces the capacity of the Union's political institutions to exercise their legislative functions to negotiate and adopt a different policy choice. See, Dougan, Dougan, 'The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens.' In Adams, de Waele, Meeusen, & Straetmans *(Eds.), Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing, 2013).

primary law is supposed to be, or even what it is understood to be, in this context. On the whole, the different perspectives appear more permeable, with potentially interesting underlying patterns exposed by the judicial approach(es). Section 6 explores *what* the consequences, from a constitutional perspective, of the approach(es) adopted in the Union framework to operationalising primary law are for the Union.

1) Interactions between the Union's primary norms

This section outlines how the sources of Union primary law of interest to this chapter come into contact with one another.

The chapter aims to capture the extent to which certain primary norms have influenced, and/or retain the possibility of influencing, the exercise and operation of other primary sources. There are two parts to the inquiry. The first concerns whether a Treaty obligation - the guarantee of free movement - should be understood as hierarchically superior to the regulatory competences which have been conferred on the political institutions under the Treaty. This gives rise to a significant potential for tension as regards the responsibility for the operationalisation of primary law as it is set out in the Treaty. The overarching issue here is whether the Court, in effect, treats directly effective obligations as superior to the regulatory competences within the Union's primary law framework.

Second, the Court has also recognised that the general principles of Union law are capable of producing direct effect within the national legal order.[12] As a result, the relationship between the general principles of Union law and regulatory competences set out in the Treaty is also of interest. Taking the area of equal treatment as an example, the chapter explores what impact the Treaty regulatory competences have on the development of the general principles of Union law.

1.1) The relations between the Court and the Union's political institutions

The inquiry in this chapter is characterised by a close interplay between the Court and the Union legislature as regards the scope of their primary legal authority (if any) to operationalise Union law. Thus, both sets of interactions tell us interesting things about the horizontal relationship between the Court and the Union's political institutions,

[12] See, e.g., Case C-144/04, *Mangold*, EU:C:2005:709.

including the location of responsibility for 'operationalising' provisions set out in the Treaty, and the nature of the Union's constitutional framework as a whole.

On the one hand, the Treaty framework outlines the objectives, values and principles of Union law in a general way and offers a catalogue of competence provisions for the Union's political institutions in order to concretise these objectives through the adoption of Union secondary law.[13] Therefore, under the Treaties the political institutions enjoy a broad degree of discretion for operationalising the Union's objectives and principles. At the same time, however, the Court enjoys the ultimate interpretive authority over Union law under the Treaty framework; Article 19 TEU. Thus, for the Court, EU legislative measures ought to comport with the Union's constitutional charter: 'a Union measure must be interpreted, as far as possible, in such a way as not to affect its validity and conformity *with primary law as a whole*.'[14] Moreover, in light of the Court's formative case law on the nature of Union law and its effects within the national legal system, many of the obligations contained in the Treaty - to secure free movement or to protect rights to equal treatment - are directly effective and capable of independent application. Even in an area where the Treaty confers regulatory competences, but where no legislation has been adopted, the absence of legislation may not always preclude Treaty obligations from producing direct effect within the national legal system.[15] In this way, the chapter reinforces the third key finding of the thesis about the centrality of the Court, particularly in view of its formative role in the 'constitutionalisation' of Union primary law.

More specifically, the chapter focuses on the Court's creation of a 'parallel' policy-making platform outside of the Treaties through the medium of direct effect. There are now two different avenues for policy-making under Union primary law: one from the Treaties allocated to the Union's political institutions, and one from the case law under the responsibility of the Court. Although the very framework created by the Court is contestable, this chapter focuses on the 'hierarchy of norms' problems that result from the tensions between directly effective provisions and competence provisions.

[13] See Weatherill, *The Internal Market as a Legal Concept* (2017, OUP) for more detail.
[14] E.g. Case C-149/10, *Zoi Chatzi*, EU:C:2010:534, at [43], and also Case C-403/99, *Italian Republic v Commission*, EU:C:2001:507
[15] E.g., Case 2/74, *Reyners v Belgian State*, EU:C:1974:68. Also as regards Article 21 TFEU, the Court recognised in Case C-413/99, *Baumbast*, EU:C:2002:493 that the provisions on citizenship are capable of producing directly effective rights independently of the adoption of legislative provisions.

1.2) Direct effect and its impact on the role of the Union's regulatory competences

It is important to consider the historical development of direct effect in the internal market and its implications for the trajectory of Union law and policy as a result.[16] Aside from the introduction of the doctrine of direct effect in itself, it is particularly interesting to understand how the Court positions the directly effective provisions against Union legislation (and thus as a prior consideration, to the provisions on regulatory competence.) The Court in *Salgoli* established that Article 34 TFEU - prohibiting quantitative restrictions on goods and MEQRs - was capable of producing direct effect, despite the fact that Article 36 enabled the Member States to derogate from that prohibition on certain specified grounds.[17] For the Court, the rule that the Member States ought to refrain from introducing barriers to movement was clear and precise and the application of any derogating grounds by Member States was amenable to judicial review before Union and national courts. More specifically, the obligations set out in Article 34 TFEU were not subject to any reservation, either as regards their execution or their effects, to the adoption of any positive measure of the Union's institutions. Article 36 TFEU was not considered to impose conditions on the main obligation to secure free movement in Article 34 TFEU; rather, the provision was understood to cover only 'exceptional cases' which are 'clearly defined.' This line of reasoning has been followed by the Court when conferring direct effect on the free movement of workers in *van Duyn*, the freedom of establishment in *Reyners* and the free movement of services in *Royer*.[18]

For instance, in *Reyners* the Court found that Article 49 TFEU on the freedom of establishment was capable of producing direct effect.[19] This was the case even though the original version of the text seemed to envisage that securing the freedom of establishment for the self-employed depended on the Union's political institutions adopting implementing legislation within a certain time period. Indeed, the intervening parties in the case argued that Article 49 was 'the expression of a simple principle, the implementation of which is necessarily subject to a set of complementary provisions

[16] de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in Craig and de Búrca (ed), *The Evolution of EU Law* (OUP, 2011).
[17] Case 13/68, *SpA Salgoil v Italian Ministry of Foreign Trade, Rome*, EU:C:1968:54.
[18] Case 48/75, *Royer*, EU:C:1976:57, Case 2/74, *Reyners*, EU:C:1974:68 and Case 41/74, *van Duyn*, EU:C:1974:133.
[19] Case 2/74, *Reyners*, EU:C:1974:68

both Community and national, provided for by Articles 54 and 57 EEC.'[20] The Court however stated that once the deadline for Union action had passed, the freedom of establishment was sufficiently clear and precise as to its result to have direct effect in its own right, even in the absence of implementing measures adopted by the Union's political institutions.[21] For present purposes, the Court's approach reveals that it is not only the reliance on derogations under the Treaties that falls under the definitional control of the Court.[22] It is also the directly effective rights derived from the Treaty text that the Court sees itself as competent to define. Therefore the bestowal of direct effect on these provisions serves to legitimise – at least for the Court – the definitional control it assumes over the Treaty objectives in the internal market. Indeed, in *Royer* the Court referred to secondary legislation as providing 'closer articulation' of the directly effective rights bestowed on individuals by the Treaty.[23] In this sense, the Court appears to be (implicitly) ruling on the 'hierarchy of norms' within Union primary law.

Perhaps the most significant point to take from this is that through the attribution of direct effect to the Treaty freedoms the Court has been able to transform what seemed to be objective principles in the Treaty into subjective rights of individuals who are then able to enforce them against their Member State in domestic courts.[24] The consequence is that the operationalisation of the freedoms and the internal market more generally can be, in certain circumstances, understood as a matter of jurisdiction, rather than a process entrusted to the Union's political institutions. This ultimately renders the exercise of the Union political institutions' *primary law* competences less significant as a means to inform the contents and scope of already 'sufficiently precise' Treaty-based rights. The Court's finding that the provisions of the Treaty are clear, precise and unconditional has the implication that the objectives are themselves 'complete,' obviating the need for legislation to work out the practical details of how to achieve the goal of free movement. This immediately reflects the paradoxical position of the regulatory competences in the Union primary law framework: although they may have been thought to provide the basis for defining what free movement

[20] At, para 5.
[21] Compare: Case C-378/97 *Wijsenbeek* EU:C:1999:439. The original version of now Article 26 TFEU provided that the Union institutions should adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992. The Court that the abolition of internal border checks was necessarily dependent upon adopting of legislation establishing a common policy on border controls at Member State's external frontiers.
[22] Craig, 'Once Upon a Time in the West: Direct effect and the Federalisation of EEC law' (1992) 12 OJLS 453.
[23] Case 48/75, *Royer*, EU:C:1976:57, at para 23.
[24] Grimm, cited supra n.8.

means in practice, and how it is to be achieved, for the Court competence provisions must now comply with, and facilitate, the broader primary law framework - developed on the basis of direct effect. It is arguable overall that the parallel system of policy-making available through the medium of direct effect makes it easier to present the interactions in this context as primary-secondary law interactions. Indeed, the present framework has developed to imply that secondary legislation ought to comply with the Court's interpretation of the directly effective provisions.

Given that the Union's political institutions, and to some extent the Court, therefore enjoy a (possible contested) role in operationalising Union law, it is crucial to explore in more detail *how* the relations between the direct obligations and the competences set out in primary law have been negotiated in practice. This is all the more important as while both provisions might relate to the achievement of the same objective of Union law, they signal alternative ways of securing that goal: through a political or judicial medium.[25]

This chapter focuses on the way in which the direct obligations (both written and unwritten) and competence provisions interact and *how* their relationship is understood through the constitutional practice of the Union. The Treaty is not explicit about the 'preferred' solution to resolving possible clashes in relation to the operationalisation of Union law, not least since it does not make reference to the role (or even existence of) directly effective provisions in the internal market. Thus, the manner in which Court has managed these interactions is useful as a reference point.[26] In the arrangement of the primary framework, the Court could be considered to have expressed that either the direct obligations or the competence provisions are of lesser importance, even if that is only through implicit statements. If such expressions of 'priority' are identified in the case law, then it is logical to explore how they are justified and whether they are supported by a cogent constitutional rationale. Thus, the findings about *how* the Union's primary legal sources relate to one another in this context help us to understand *what* constitutional implications are attendant to the judicial approach.

2) The parameters of the existing debate: two (opposing) perspectives

[25] This can be related to the 'institutional choice' theory. See, Komesar, *Imperfect Alternatives – Choosing Institutions in Law, Economics and Public Policy* (1994, University of Chicago Press)
[26] See, however, Horsley cited supra n.7 who argues the Treaty sends clear signals that these are political choices.

This section sets out the ways in which the relations between the Union's direct obligations and competences have been conceptualised in the literature as initial perspectives through which to assess the practice of the Union. As the Union's constitutional actors operate within a constitutional framework – the Treaties – there are two views of the respective roles of the Union's institutions in this regard. It is important to note at the outset that problems with the appropriate role of courts in any legal framework when it comes to substantive judicial review are commonplace, and impossible to resolve in any concrete way.[27]

2.1) The Union's political institutions' role in operationalising Union primary law

On the one hand, it is arguable that the conferral of regulatory competences to the political institutions by the Treaty authors could be taken as an indication of their role as the interpreters of the contents of the Treaty provisions.[28] This may be categorised as the 'bottom-up' perspective as regards the degree of discretion left to the Union's political institutions' for operationalising key concepts of primary law through the introduction of secondary legislation. After all, the Treaty framework does not seem to reduce the Union's political institutions' influence to an obligation to comply with the contents (however defined) of that text. Rather, it seems to afford them a role to inform the text of the Treaty, and thus to determine the detailed contents and the means through which to facilitate the Union's objectives. The logical outcome of this approach is that both the existence and exercise of regulatory competences laid down in the Treaty can (and ought to) condition the application and scope of the (bare) principles and obligations in the Treaty or the general principles of Union law.[29] For example, determining how to secure the goal of free movement involves policy choices which cannot be settled by the Treaty provisions themselves. This view implies that the power lies with the political institutions under the Treaty to make

[27] See, broadly, the phenomenon of 'judicial constitutionalism' i.e. Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 2000) and Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007, CUP).

[28] See, Craig, *EU Administrative Law* (OUP, 2006), pg.20: 'The fact that there is a close parallel between directly effective Treaty-based rights and legislative competences means that it is possible to understand legislation as an interpretation of the Treaty. The contributions to free movement, security, the environment and other policy fields contributes implicitly to understanding what these ideas in the Treaty context mean.'

[29] See, also, the traditional distinction in domestic constitutional frameworks between the rules for political decisions (in the constitutional text) and the political decisions themselves (left to secondary measures) discussed in the introductory chapter and particularly n.36.

provision for a policy problem on the basis of their interpretation, and essentially their definition, of the relevant Treaty objective.[30]

The general tenet of this first approach is that the Court ought to defer to the Union's political institutions' regulatory responsibility as established by the Treaty *as a source of Union primary law*. This view aligns with the (original) route to Union integration envisaged under the Treaty: integration was to originate from political action, as evidenced by the allocation of competence in the main areas of Union activity.[31] It would therefore seem that there is a prominent role for the Union's political institutions in defining the meaning of Union primary law.[32] Overall, this has implications for how the Court is able to exercise its review function and for its role (if any) in operationalising Union primary law.[33]

2.2) The Court's role in operationalising Union primary law

On the other hand, it could be argued that the direct obligations, as they have been interpreted by the Court, may set out the contents and scope of the relevant Treaty objective. Conceiving of the obligations contained in the Treaty as having a role to condition how and in what ways the Union legislature may exercise its Treaty-allocated competence is attributable to the Court's recognition that they are directly effective.[34] As a directly effective obligation has the status of Union primary law – according to the Court - it could therefore constrain or condition the ability of the Union political institutions to exercise their competences to introduce secondary law.[35] For instance, the institutions might have to ensure that the legislative scheme adheres to the envisaged scope of, and any limits to, Union primary law as they have been set out in the case law.[36] The logical result is that the specific interpretations of Union

[30] For example, Case C-120/78, *Rewe v Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon), EU:C:1979:42, the Court recognised that obstacles to free movement in the absence of Union legislation could be justified. Therefore, if the institutions were to deem that this would pose a problem for the functioning of the internal market they would have the power to adopt legislation to address the situation. See also Case C-356/89, *Newton*, EU:C:1991:265 where the Court provided a solution for the problem of SNCBs in the social security co-ordination system. However, in Case C-20/96, *Snares*, EU:C:1997:518 the Court accepted that the institutions had by way of amendment of the social security scheme adopted a different view.

[31] See, Horsley, cited supra n.7.

[32] See, Armstrong and Bulmer, *The Governance of the Single European Market* (Manchester University Press, 1998).

[33] E.g. it should generally be responsive to the passage of legislation, and it should only exercise its review powers when there is a 'manifest' or 'serious' breach of Union law due to the discretion afforded to the Union's political institutions. See, the Court's assessment of the proportionality of Union legislation: Case C-331/88, *ex parte Fedesa*, EU:C:1990:391.

[34] This position is contested given the nature of the judicial developments outside of the Treaties. See further, Horsley, cited supra n.7.

[35] The possible approaches over which to view this issue are set out in Dougan, 'Judicial activism or constitutional interaction? Policymaking by the ECJ in the field of Union citizenship' in Micklitz and De Witte (Eds.), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012)

[36] Edward, 'Editorial: Will there still be honey for tea?' (2006) 43 CMLRev 623.

obligations have been 'validated' and entrenched by the Court, so that divergent interpretations are not permissible.[37] This position may be classified as a 'top-down' perspective: a directly effective obligation operates to *condition* the reach and possible scope of the legislative competences. This view leans towards an understanding where the political institutions must concretise the parameters of primary law as set out in the case law.[38] As a result, the direct obligation is the naturally 'superior' norm, with the regulatory competences offering an avenue to place the entitlements recognised in the case law on a legislative footing.

It is important, however, to consider this perspective in more detail. The notion of the 'hierarchy of norms' in this context is often employed to emphasise the 'hierarchy' between primary law and secondary norms within the EU. Of particular significance in this regard is the rule that secondary legislation ought to be interpreted in light of the Treaties, and other Union primary law. The rationale which underpins this interpretive imperative is based on the desire to avoid any risk that an act or practice of the institutions could lead to a revision of the Treaties, outside of the specific procedures afforded for that purpose in the Treaty.[39] On this basis, it is arguable that the Treaty itself establishes an 'implicit hierarchy' between direct obligations and regulatory competences, given that if, for example, Union legislation creates obstacles to free movement then it can be challenged through the Court by virtue of Articles 263 and 267 TFEU.[40] Yet, this assumes an answer to a prior question about the relations between the sources of Union primary law.

The thesis argues that it is the Court's development of a 'parallel' policy-making platform through the doctrine of direct effect that has produced more problems for the 'hierarchy of norms' in this context. In particular, is it only the bare obligation in the Treaty – say to ensure that free movement is secured - which must be respected by the

[37] E.g., AG Mischo in Case C-49/98, *Finalarte*, EU:C:2000:395 explained that the restrictions of the assimilation of posted workers into the national labour regime as developed in case law should continue to apply even after Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, [1997] OJ L 18 came into force: secondary legislation would not be capable of authorising national authorities to engage in conduct that was prohibited under the primary Treaty rules.

[38] See, Syrpis, cited supra n. 1 who explains that the Court's task is to police the limits of what is 'constitutional' and to decide whether the legislature has infringed such limits, or in other words, to decide what the constitution/primary law allows.

[39] This issue is best illustrated in the citizenship case law. In Case C-202/13, *McCarthy II*, EU:C:2014:345 Advocate General Szpunar expressed scepticism about some judicial reasoning, 'the Court interpreted the Treaty in the light of secondary legislation, in particular Directive 2004/38. In that respect, let me at least express some doubt about such an interpretation, in the light of the principle of the hierarchy of primary law and secondary legislation. To my mind, it is secondary legislation that ought to be interpreted in the light of the Treaties, and not vice versa. Would there not otherwise be reason to fear that an act or a practice of the institutions or the Member State would lead to a revision of the Treaties outside the procedures prescribed for that purpose?' at para 82.

[40] Even if the standard of review appears quite different to the standard applied to national law, the theory is the same i.e. the implicit, yet quite clear, hierarchy between the free movement and competence provisions

legislature? Or is it also the Court's interpretation of the obligations (i.e. the attendant second-order rights and obligations)?[41] Whilst compliance with the bare Treaty obligation benefits from an explicit mandate from the authors of the Treaties, it is less clear whether the political institutions ought to follow the Court's understanding of what that obligation entails in terms of its detailed contents. After all, regulatory competences exist in these fields for the Union's political institutions to create a detailed framework of rules in different policy areas, which invariably involves the balancing of competing goals to decide how (and to what extent) to facilitate the objectives of the Union. It is therefore an open question whether the streams of 'second-order' principles recognised by the Court should be understood as hierarchically superior to the policy choices the Treaty envisages the Union's political actors may make.

With this in mind, given the main purpose of the thesis, the discussion would benefit from an appreciation of the relationship between the sources of Union primary law. The chapter contends that it is inappropriate (exclusively) to conceive of the relevant interactions in terms of the 'hierarchy of norms' between primary and secondary law. This is especially the case given that the sheer volume of primary law means that its 'higher' status should not be informed by the same reasons as in domestic constitutional systems which enshrine 'higher' organisational principles.[42] In this way, the presence of broad principles and objectives in Union primary law should not be understood as a licence for the Court to interpret their contents as it sees fit: such a path necessarily opens up a route to making subjective value choices. This is even more problematic if the Court's interpretation ultimately forecloses avenues for formulating an autonomous (and perhaps conflicting) political response due to its status at the Union's 'higher' law. As has been stated, the Court's actions in this regard would be directly contrary to the Treaty framework which leaves the role for policy-making to the Union's political actors.

2.3) A non-binary understanding

[41] Sørensen, 'Reconciling secondary legislation with Treaty rights of free movement' (2011) 36 EL Rev 339.
[42] E.g. the German constitution sets out basic structures and principles, but key policy questions are for the political actors to work out. See, for a full discussion, the German Constitutional Court in BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421). Para 257: 'The principle of the social state establishes a duty on the part of the state to ensure a just social order. The state must carry out this obligation on the basis of a broad discretion; For this reason, concrete constitutional obligations to act have only been derived from this principle in very few cases. The state must merely create the minimum conditions for its citizens to live in human dignity. The principle of the social state sets the state a task, but it does not say anything about the means with which the task is to be accomplished in individual cases.'

Whilst the preceding analysis offers quite a binary picture of the 'precedence' of one source of Union primary law over the other and therefore aligns with a 'hierarchical' method, another possible interpretation allows for a more nuanced characterisation of the relationship. For example, directly effective provisions and regulatory competences may adapt to the operability, and inform the development, of each other. This resonates with the idea explored in the literature that the operationalisation of Union law has taken place through, and has been shaped by, a gradual process of 'constitutional dialogue' between the Court and the Union's political institutions.[43] Thus, whilst the Court remains aware of the allocation of competence, the Union's political institutions also respect the judicial role of clarifying the parameters of the Treaty conception in the exercise of its interpretive authority. This dialogic appraisal offers a place for both the Court and the Union's political actors in operationalising primary law. For example, whilst the Court's decisions 'concretise' the framework of Union primary law – in contributing to a tighter framework affecting the legality of state and private conduct – legislative interventions also play a role in the concretisation process. This accords with the 'balancing' approach discussed in the introduction to this thesis.[44]

As a final observation, it cannot be assumed that the tensions inherent in analysing these relations are susceptible to rationalisation on the basis of a framework. In this sense, the approach employed in order to determine the appropriate relationship between direct obligations and competence provisions could be entirely context-dependent. In any case, the constitutional practice (whichever benchmark it does or does not adhere to) can tell us interesting things about the role of Union primary norms in the 'hierarchy' and the respective roles of constitutional actors within the Union.

3) The benchmark for exploring the relations between direct obligations and the competence provisions

There are two sets of circumstances where the position of the regulatory competences in the Treaty may affect the role of the direct obligations. The first concerns the free movement obligations and the competence provisions related to the internal market in

[43] Dawson, 'Constitutional dialogue between courts and legislatures in the European Union: Prospects and limits' (2013) 19 EPL 2
[44] See pg.13-15 of this thesis.

the Treaty. The second concerns the general principles of Union law and the competence provisions in the Treaty in the area of equal treatment. For both inquiries, this piece draws upon the Court's statements in the *Cassis de Dijon* judgment as a frame of reference to explore the constitutional practice of the Union. In *Cassis*, the Court promulgated the phrase 'in the absence of common [Community] rules' to discuss when it would be necessary and appropriate to provide a judicial solution to a policy problem, and to outline the appropriate extent of the proposed judicial solution. In the case, the problem concerned barriers to the free movement of goods within the Member States which remained due to the absence of the envisaged Union harmonising rules under the Treaty framework. In response, the Court established the principle of mutual recognition which effectively requires national legal orders to respect the regulatory standards of other Member States (if necessary by disapplying their own standards.) The phrase 'in absence of' is important as it suggests awareness on the part of the Court of the institutional balance of competences under Union law.[45] Moreover, it offers two different lines of inquiry which can be used to assess the relationship between directly effective provisions and regulatory competences.

First, the statement allows us to consider the 'absence' of legislation or a common Union 'system.' This refers to the circumstances where the Union's political institutions have yet to exercise their Treaty-allocated competences. In this sense, the chapter explores whether, in applying and interpreting directly effective obligations in primary law, the Court remains aware of the prospective exercise of competence and the role allocated to the political institutions under the Treaty. Might the political institutions *alone* be responsible for the provision of a 'solution' to a policy problem?[46] Or does the fact that the obligations are capable of producing direct effect provide the Court with the authority to develop its own regime? On the basis of the statement of the Court in *Cassis*, it seems to be the case that any judicial solution is merely of a

[45] The Court does not always reach the same conclusion, however: Compare e.g. Case 71/76, *Thieffry*, EU:C:1977:65, in which the Court held at para 17 that 'a person subject to [Union] law cannot be denied the practical benefit of that freedom solely by virtue of the fact that, for a particular profession, the Directives provided for by [Art. 53 TFEU] have not yet been adopted;' with Case C-210/06, *Cartesio*, EU:C:2008:723, in which the Court states at para 109 'in the absence of a uniform Community law definition of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, the question whether [Art. 49 TFEU] applies to a company which seeks to rely on the fundamental freedom enshrined in that article – like the question whether a natural person is a national of a Member State, hence entitled to enjoy that freedom – is a preliminary matter which, as Community law now stands, can only be resolved by the applicable national law.'

[46] To some, the inclusion of competence provisions in the Treaty could be taken as an indication that the political institutions should assume such authority. See Davies, 'Legislative Control of the European Court of Justice' (2014) 51 CMLRev 1579

temporary nature and is only relevant in default of a political solution expressed in Union legislation.[47]

Second, the statement allows us to consider the 'presence' of Union legislation. From this, we can ascertain how far the Court respects the exercise of competence by the Union's political actors in practice. The main question is how, if at all, does the attitude of the Court to the application of direct obligations evolve and perhaps change as legislation is adopted? Does the use of discretion conferred by the Treaty to the political actors mean that, in principle, the institutions have fulfilled the task entrusted to them of facilitating and defining the relevant policy framework?[48]

The structure of the following two sections is designed to consider how the Court views its role in the operationalisation of directly effective obligations, both in the absence and presence of Union legislative intervention. The space for the legislature to assert its own view over a certain policy matter may be reduced under either of the two circumstances, contrary to the Treaty regime of competence.

4) <u>How are the tensions between the free movement obligations and competence provisions dealt with at the Union level?</u>

4.1) 'In the absence of Union legislation:' does the Court offer respect for the Treaty framework of competence and, if so, how?

This section explores the Treaty freedoms and their relation to the regulatory competences for the development of the internal market set out in the Treaty. The focus of the inquiry relates to whether, and when, the Court may be minded to expose and develop new (essentially second-order) principles of Union law on the basis of directly effective obligations contained in the Treaties. It discusses the control the Court enjoys over defining the scope of Treaty-based rights and obligations in the absence of legislative intervention.

4.1.1) The role of directly effective provisions 'in the absence of Union legislation'

[47] At this stage, such a role for the Court is taken at face value, although the problems with its role have been discussed previously.
[48] In rare cases, the Court may find legislation (and the exercise of regulatory competence) to be incompatible with the Treaties i.e. *Joined* Cases C-293/12 and C-594/12, *Digital Rights Ireland*, EU:C:2014:238. The legislature is able to respond to this 'direct' clash between the parameters of primary law and the contents of secondary law, but must its actions so as to fit with the interpretation of the dictates of the Treaty.

This section explores the explanatory value of the Court's statements in *Cassis* to consider how it approaches the operationalisation of Union law 'in the absence' of Union legislation. Although the benchmark used for this analysis comes from *Cassis,* it also evident in the Court's previous case law on free movement. For instance, the Court in *Dassonville* did not only provide a definition of measures having equivalent effect to quantitative restrictions under Article 34 TFEU, it also explained that:

"in the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member State takes measures to prevent unfair practices in this connexion, it is subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals."

The phrase 'in absence of a Community system' is crucial for present purposes. The Court recognised that case-law based justifications – including consumer protection - could be used to permit national measures deemed to hinder trade to remain in force, until the Union legislature takes steps to offer protection at the European level to replace the need and justification for national measures in the fields concerned.[49] The clear structural signal to the Union's political institutions was that legislation at the European level was necessary to deal with those instances where the Court finds that Member States may act in a way which creates a justified barrier to trade.[50] Thus, the Court shows some awareness of the need for, and place of, rule-making on the part of the Union's political actors, in view of their explicit Treaty-based competences.

Moreover, for the Court the establishment of the principle of mutual recognition in *Cassis* was intended to form a default framework: as the Union's political institutions had not exercised their competences to address obstacles to free movement, the Court assumed their position in the meantime. The phrase 'in absence of common Community rules' ultimately suggests that the interpretation and operationalisation of

[49] Consumer protection was treated in a wholly ancillary fashion in the original EEC Treaty. Weatherill, *EU Consumer Law and Policy* (Edward Elgar, 2005)

[50] See, e.g., the case law on public order disturbances leading to barriers to the free movement of goods: Case C-265/95, *Commission v France*, EU:C:1997:595 concerned the lack of an effective response by the French authorities to disruption of imports through action by farmers which directly led to the adoption of notification and consultation obligations in Regulation (EC) No. 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Members States, OJ 1998 L337/8. E.g. also Case 302/86, *Commission v Denmark*, EU:C:1988:421 led to fears of market fragmentation if more Member States were to be able to justify divergent unilateral schemes for encouraging recycling of drinks containers; these fears undoubtedly contributed to the adoption of Directive 94/62 of the European Parliament and of the Council of 20 December 1994 on packaging and packaging waste, OJ 1994 L365/10.

the free movement of goods by the Court would have to adapt to the exercise of the competences laid down in the Treaty.

The framework of mutual recognition introduced in *Cassis* is fairly broad, such that every Member State must acknowledge the adequacy of other Member States' rules on product standards. As the Court did not assume the position of the legislature *in a positive sense* to set out common Union rules, the approach affords the Member States discretion to design their own rules in the absence of Union legislation.[51] This leaves open the possibility that obstacles to free movement remain in place, due to the availability of case-law based justifications for the Member States to derogate from the principle of mutual recognition. The Court acknowledged that the institutions could exercise their Treaty-allocated competences for the purposes of removing obstacles recognised in the case law in the interpretation of the Treaties.[52] This is true even though the need for harmonisation is significantly reduced by the principle of mutual recognition, as different national rules are able to co-exist across the Union, with legislation only being necessary to tackle obstacles to movement that the Member States are able to justify.[53] But, at least on one understanding - in relation to the free movement of goods - legislative intervention represents the ultimate and preferred solution to the problems posed by the remaining differences in national rules.[54]

Overall, both *Cassis* and *Dassonville* reflect a *balance of powers* approach which is informed by the existence of regulatory competences *as sources of primary law* for the Union's political institutions in the internal market. The Court, at least implicitly, is aware of the political responsibility conferred upon the Union's political actors, by recognising their powers of assessment and decision-making in certain areas of law:

[51] See, for the phenomenon of courts as positive legislators, Brewer-Carías, *Constitutional Courts as Positive Legislators* (Cambridge University Press, 2011.)

[52] In some cases, the Court has suggested that the institutions could use the primary legal bases to remove obstacles recognised by the Court in its interpretation of a direct obligation or in order to clarify the scope. This may be an indication that those competences would necessarily take 'priority' and therefore the exercise of which would be the preferred solution to the issues. In Case C-356/89, *Newton*, EU:C:1991:265 the Court provided a solution to gaps concerning certain entitlements relating to SNCBs in the social security co-ordination system. However, Case C-20/96, *Snares*, EU:C:1997:518, the Court accepted that the institutions had by way of amendment of the social security scheme adopted a different view, which was explicitly accepted by the Court.

[53] However, the consequences of mutual recognition may be that European legislation follows in order to promote transparency and uniformity. See, e.g., labelling requirements for alcoholic drinks, Regulation (EC) No. 110/2008 of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No. 1576/89, OJ 2008 L39/16 (which repealed and replaced earlier legislation).

[54] A similar approach is evident with the Court's development of the national procedural autonomy framework. In Case 33/76, *Rewe*, EU:C:1976:188 the Court seemed to envisage that the framework offered a default approach to Union control over systems of judicial protection, and it then made the suggestion that the Union's political institutions should use the available legal bases to remove distortions/obstacles attributable to differences in procedural rules. This formative case law suggests that whilst competences existed, the task for exercising them remained with the political institutions.

in the absence of common Union rules, competence remains with the Member States to deal with the matter, subject to the principle of mutual recognition.

This is not to discount the impact of the stance of the Court on the allocation of powers envisaged under the Treaty. The judicial development of the principle of mutual recognition in *Cassis* is constitutionally important for two reasons.[55] On a vertical level, it potentially overlooks the obstacles to mutual recognition within the Member States. Indeed, differences between national rules reflect domestic conceptions of constitutional principles and policy.[56] On a horizontal level, the Treaty recognises the importance of these national constitutional differences in the need for the harmonisation of standards by the agreement of the Union's political institutions in the exercise of their competences, for example pursuant to Article 114 TFEU. Legislative action was (and is) clearly envisaged to offer a means through which the Union's political actors can make policy choices and reconcile the various social and economic aims implicated in the creation of the internal market.[57] It is therefore arguable that the judicial development of mutual recognition is not consistent with the position of the Union's political institutions, in circumstances where they have not, cannot, or do not favour, harmonising national rules in a certain area. Thus, even though there is a judicial awareness of the competence framework, the Court has still been able to make substantial progress with the operationalisation of Union law despite the absence of legislation.[58] This is an immediate result of the Court's construction and use of direct effect as a vehicle for making policy choices – in Union primary law - about the trajectory of the internal market.

At this point, it is important to consider the possible factors that influence the Court when it comes to ascertaining the role and reach of directly effective provisions vis-à-vis the Union's regulatory competences in the absence of secondary legislation. Two factors in particular help to explain when and why the Court may intervene to deal with a policy problem on the basis of directly effective provisions, despite the absence

[55] See, Part I in Janssens, *The Principle of Mutual Recognition in EU law* (OUP, 2013)
[56] See, e.g. Case C-36/02, *Omega*, EU:C:2004:614 as regards the conception of human dignity.
[57] See, e.g. de Witte, 'A Competence to Protect: The Pursuit of Non-Market Aims through Internal Market Legislation' in Syrpis, *The Relationship between the Judiciary and the Legislature in the Internal Market* (Cambridge University Press, 2012), who argues that in the EU's constitutional framework, 'the appropriate mix of market-making and market-correction is for the legislator to decide.' By contrast, 'the role of the Court is to set a broad framework within which competence must be exercised without constraining substantially the space for deliberation.'
[58] This may suggest some form of 'constitutional dialogue' is evident in the Union context, in the sense that both the Court and the Union's political actors play a role in elaborating upon the workings of the common market and giving effect to the free movement provisions. See, Dawson, cited supra n.43.

of Union legislation. The first is the time factor of particular developments. Indeed, *Cassis* itself is well-known as a judicial response to a period characterised by legislative inertia in the development of the internal market.[59] This is true also of the Court's decision to find the free movement provisions on services and establishment directly effective in cases like *Reyners* and *Royer*, despite the programmatic nature of those provisions and the fact that the Treaty anticipated that legislation was necessary to give substance to those freedoms. It is broadly true that the Court has assumed an assertive role in policy-making in a period characterised by legislative inertia, but has been less active where the Union's political institutions assume greater responsibility to address the relevant policy problem.[60]

This time factor nevertheless gives rise to the question of whether - beyond the possibly accepted periods of legislative inertia which account for the historical development of the direct effect of free movement provisions - the direct effect of such provisions itself has reduced the role of the Union legislature both in informing and in defining the contents of the free movement obligations. Indeed, if the free movement provisions are capable of independent application, the Court has a tool to reduce the need for the involvement of the Union's political institutions in their development: a role which may perhaps be filled by the Court as a 'surrogate' or a 'substitute' for the legislative process.[61] Consider, for example, the extensive entitlements for workseekers that the Court developed on the basis of the directly effective nature of Article 45 TFEU: to enter and reside a Member State of which they are not a national (*Royer, Antonissen*)[62] and to access equal treatment rights therein (*Lebon, Collins.*)[63] Even though such entitlements have been accepted, consolidated and codified in the Citizens' Rights Directive by the Union's political institutions, the Court certainly reduced to need for, and possible scope of, intervention.[64] Indeed, it is an open

[59] Weiler, 'The Community System: the Dual Character of Supranationalism' (1981) 1 Yearbook of European Law 267.
[60] See, Lenearts, 'Some Thoughts About the Interaction Between Judges and Politicians in the European Community' (1992) 12 Yearbook of European Law 1. To a certain extent this is true within the context of Union citizenship. Before the introduction of the Citizens' Rights Directive, the Court assumed a proactive role in the development Treaty-based rights for economically inactive citizens. But, although there are exceptions, it is fair to say that after the intervention of the Union legislature the Court has taken a step back from continuing to develop its own understanding of the scope and contents of Union citizenship. Consider Case C-333/13, *Dano*, EU:C:2014:2358. But, also, consider the cases where the Court has not been minded to divert from its original course of action pre-CRD: Case 22/08, *Vatsouras*, EU:C:2009:344 and Case C-127/08, *Metock*, EU:C:2008:449.
[61] Craig, cited supra n.28.
[62] Case 48/75, *Royer*, EU:C:1976:57; Case C-292/89, *Antonissen*, ECLI:EU:C:1991:80.
[63] Case 316/85, *Lebon*, EU:C:1987:302 and Case C-138/02, *Collins*, EU:C:2004:172.
[64] Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. 2004, L 158/77.

question whether the Union's political actors have to follow the Court and thus not alter what Article 45 TFEU as a directly effective provision entails.[65]

A second explanatory factor is the subject-matter and field of intervention. Indeed, there are certain areas where the Court has been reluctant to develop second-order rights - or any legal regime at all - without prior legislative intervention as envisaged by the Treaty.[66] An interesting example here is the free movement of capital, an area within which liberalisation of the market was to be achieved solely through legislative intervention.[67] The Court played a limited role in the development of capital principles, and deferred to the competences of the legislature allocated to it under the Treaty. There are broadly two reasons for this. The first is that the Treaty provisions where, at least initially, drafted in such a way as to assign responsibility for the development of the field to the Union's political actors. Indeed, despite the fact that capital was placed – at least formally - on an equal footing with the other Treaty freedoms within the internal market, the detail of the capital rules differed from the other freedoms. In particular, Article 67(1) EEC did not provide a mandate for the 'full' liberalisation of the capital markets: liberalisation was required to the extent that it would be 'necessary' for the proper functioning of the common market. Moreover, the legal basis for developments in this area was Article 69(1) EC, which required unanimity in the first two stages of the transitional period and QMV thereafter. Taken together, these primary law provisions demonstrate that capital liberalisation was to occur in a staged manner, with the rate of liberalisation a question of the Council agreeing to introduce legislation. For this reason, prior to Maastricht, the free movement of capital provisions were not found by the Court in *Casati* to be capable of producing direct effect within the Member States.[68] The second reason for the limited role assumed by the Court in this context relates to the substantive policy area, and the economic and political sensitivity of capital movements.[69] In terms of context,

[65] See, the discussion of *Vatsouras* on pg.54 of this thesis.
[66] For instance, gambling is an area which the Court has identified as falling within the scope of Union law and which presents problems for the development of the internal market, but it has adopted a hands-off approach to justifications. It is possible that this then provokes consideration of a political agreement to determine the legal status of gambling, and to develop technical regulatory rules. See, van den Bogaert and Cuyvers, 'Money for Nothing: the case law of the ECJ on the Regulation of Gambling' (2011) 48 CMLRev 1175
[67] See, Murphy, 'Changing treaty and changing economic context: the dynamic relationship of the legislature and the judiciary in the pursuit of capital liberalisation' in Syrpis, *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press, 2012). See also Horsley, 'Death, Taxes and (Targeted) Judicial Dynamism: The Free Movement of Capital in EU Law' in Arnull, Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP, 2015)
[68] Case 203/80, *Casati,* EU:C:1981:261.
[69] See, Murphy, cited supra n.67.

the Court tempered its approach to developing directly effective provisions owing to the ramifications of intervening in such a sensitive area.

A final issue deserves discussion at this point. So far the analysis has centred on situations where the Union's political institutions have yet to exercise their competence, but where that competence does exist. Thus, the 'temporary' nature of the intervention of the Court on the basis of the direct effect of the Treaty provisions may be more easily accepted. In many circumstances, however, the bestowal of direct effect on the free movement provisions in the Treaty has led to a disjuncture between jurisdiction - through the Court's reliance on primary law to interfere with domestic policy choices in the absence of legislation - and competence - in the inability (both practically and sometimes legally) of the institutions to exercise any legally binding influence over the same issues.[70] This constitutional asymmetry means that the Union's political institutions are often unable to substitute a different assessment of how to balance certain goals for that of the Court.[71] This process of what essentially may become 'entrenched' policy-making through (and as part of) primary law on the initiative of the Court stands at odds with the system of competences under the Treaty. The ability of the Union's political institutions to (re)assume their role to deal with outstanding policy issues through the exercise of their competences - which provides the rationale for cases like *Cassis* - is significantly undermined.

This section on the 'absence' of Union legislation has some important implications for our understanding of the relationship between directly effective provisions under Union law and the competence provisions as sources of Union primary law. It thus directly feeds into questions about the horizontal allocation of powers between the Court and the Union's political institutions. In formal terms, it is fair to say that the framework on free movement comprises of the bare principles in the Treaties and the specific rules which have been (or should be) adopted by the Union's political institutions to operationalise those necessarily vague principles and to make the necessary value choices involved in constructing an internal market. But, in situations where the Union's political institutions have yet to exercise their competences, or

[70] See, further, Dawson, Muir, de Witte 'The European Court as a Political Actor' in Dawson, Muir and de Witte (eds.), *Judicial Activism at the European Court of Justice* (Edward Elgar, 2013).

[71] If they are able to intervene, the nature of the legislature's intervention may be coloured by the Court's framing of a particular issue. This is particularly true of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ L 88, 4.4.2011, p. 45–65. Its aim is clarifying the system of the free movement of patients, which was created primarily on the basis of internal market law, through the free provision of services, not on that of EU competence in public health.

where such competence does not exist, the bestowal of direct effect on the Treaty principles means that the Court can provide an answer to policy issues as and when they arise, and thus formulate solutions which may be understood by the Court as 'constitutionally-mandated.'[72] This allows the Court to assume a role which the Treaty affords to the political actors, and in so doing overlooks the nature of the regulatory competence provisions as sources of Union primary law.[73]

4.2) The 'presence' of Union legislation: does the Court show respect for legislative authority in the operationalisation of Union primary law?

This section looks into the nature of the Court's intervention on the basis of the directly effective obligations, and explores whether its interventions assume a binding or a temporary character within the legal framework.[74] The main question is whether, and to what extent, the legislature has the legal capacity (and practical capability) to alter decisions of the Court through the exercise of its regulatory competences.[75] It does so by using examples of situations where legislation embodies the views of the political actors about the scope of Treaty-based rights and perhaps introduces (in their view) permissible restrictions to free movement. It also considers how the Court reconciles its previous jurisprudence with the positive intervention of the legislature in the field. Although looking to secondary legislation could be understood as following the path set in the literature thus far on the relationship between Union primary and Union secondary law, this section focuses on how the role of the Union's competence *as sources of Union primary law* affects how the Union's political institutions introduce legislation.

On the one hand, the Court may aim to impose its own understanding of the interpretation of the obligations under primary law, even despite the presence of Union

[72] See, the role of the Court in relation to Member State restrictions to free movement in the area of gambling. Although the Court has employed a fairly deferential role in this area, when a Member State decides to grant exclusive rights to an entity which is not under the direct control of the State it must respect the principle of transparency. For the Court, in Case C-203/08, *Sporting Exchange (Betfair)*, EU:C:2010:307 at [41] 'without necessarily implying an obligation to launch an invitation to tender, [the] obligation of transparency requires the concession-granting authority to ensure, for the benefit of any potential concessionaire, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of the procurement procedures to be reviewed'.

[73] Craig, cited supra n.28.

[74] See the difference between AG Mischo in *Finalarte* cited supra n.37. - secondary legislation cannot authorise national authorities to engage in conduct that is prohibited under the Treaty rules, as interpreted by the Court – and the Court in Case C-154/05, *Kersbergen-Lap*, EU:C:2006:449 which held that as regards special non-contributory benefits that the principle of the exportability of social security benefits would apply so long as derogating provisions have not been adopted by the Community legislature.

[75] The distinction between 'capacity' (the legal scope of law-making authority) and 'capability' (the extent to which the actors are readily able to exercise their powers in practice) is taken from Gordon, *Parliamentary Sovereignty in the UK Constitution* (Oxford, 2015.)

legislation. This may mean that through direct effect the case law can function as a medium for developing a definitional framework of the free movement provisions: legislation is not viewed as completing and facilitating the Treaty principles, but to be interpreted in light of, and to comply with, the principles enunciated by the Court. On this basis, the Court would be effectively 'adding' to the limits to the exercise of competences that are already contained in the Treaty.[76] This view either overlooks the nature of the regulatory competences as *primary law* or at least relegates these provisions to a lower position in the hierarchy than the free movement provisions, as they are interpreted by the Court. On the other hand, the Court may be inclined to provide a temporary solution which operates in default to one eventually formulated by the political institutions in the exercise of their Treaty-allocated competence. This latter view is the one that most closely conforms to the Court's sentiments in *Cassis,* in the sense that it is open to the Union's political institutions to adopt a different solution to the one that prevails in the case law in the 'absence' of Union legislation. Such a view recognises the nature of the Union's political institutions' competences as Union primary law.

It is fair to say that the Court has, at times, been deferential to the policy choices of the Union's political institutions in the exercise of their competences.[77] This is the situation as regards social security coordination within the EU. For the Court, the relevant conflict rules in Regulation 1408/71 are neutral in terms of social security entitlements: they distribute social security responsibilities and entitlements *without* regard to their substance.[78] Although free movement may affect a migrant's social security position through a change in the applicable national legislation, many negative consequences are capable of being averted through the provisions of the coordinating regulations. Nevertheless, any adverse effects which flow from disparities between social security schemes are to be accepted as inherent in a system of mere coordination adopted by the Union's political institutions. The Court has explained that the legal basis employed to adopt the Regulation (Article 48 TFEU)

[76] See Article 5 TEU on conferral, subsidiarity and proportionality.
[77] See, also, the recent citizenship case law including Case C-333/13, *Dano,* EU:C:2014:2358, Case C-299/14, *Garcia Nieto,* EU:C:2016:114 and Case C-308/14, *Commission v UK,* EU:C:2016:436. Rosas, 'Foreword' in Koutrakos, Nic Shuibhne and Syrpis, *Exceptions from EU Free Movement Law* (2016, Hart) explains 'we may deplore the requirement to have sufficient resources as a condition of residence established in the Directive, but the Court is not empowered to remove it, unless it was held that it is in violation of Article 21 TFEU.'
[78] E.g. Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

tolerates the political actors' choice to maintain disparities between domestic social security systems.[79] Most importantly, this is still the case even if the obstacles to free movement are caused by shift of competence to a Member State with less favourable social security legislation.[80] In principle, such a shift may be compatible with the Treaty provisions on free movement: primary law offers no guarantee to citizens taking up residence and employment in another Member State that it will be neutral in terms of social security. This approach – whereby the Court explicitly refers to the legal basis and accepts the choices of the Union's political institutions made thereunder – suggests a respect for the Union's *primary legal competences* as the governing norm for operationalising Union internal market law.

But, despite these instances where the Court explicitly defers to the Union legislatures' choices, three common judicial techniques have been identified in the literature which suggest that the Court (at least implicitly) takes a narrower view of the role and scope of the legislative competences in view of the reach of directly effective obligations. The three techniques are annulment, 'emasculatory' interpretation, and the development of a scheme of parallel rights and entitlements on the basis of the Treaty.[81] They are helpful for exploring how the Court responds to the introduction of secondary legislation which perhaps differs from its own understanding of the scope and contents of Treaty-based rights.[82] This can (indirectly) inform the discussion of the perceived nature and scope of the Union political institutions' competences. Indeed, all techniques rest on the *same* judicial view of the 'hierarchy of norms' and the precedence of directly effective obligations: it is just the Court choosing to exercise its power differently across different contexts.

4.2.1) Annulment of Union legislation

The first 'technique' employed by the Court is annulment of secondary legislation which is deemed incompatible with Union primary law. Although this technique is seldom-used, it is nevertheless a powerful judicial tool to prevent the Union's political

[79] See, Case C-208/07, *von Chamier-Glisczinski*, EU:C:2009:455.
[80] See e.g. Joined Cases C-393/99 and C394/99, *Hervein II* EU:C:2002:182, at para 51 and Case C-388/09, *da Silva Martins*, EU:C:2011:439 at para 72.
[81] Davies, 'Legislative Control of the European Court of Justice' (2014) 51 CMLRev 1579
[82] A question arises here about what factors influence the Court: could it be the degree of harmonisation, i.e. total or minimum?

institutions from using their competences to introduce standards which differ fundamentally from the directly effective Union primary law obligations.[83]

On the one hand, a hierarchy between primary and secondary law is entirely logical: secondary law must comply with higher-ranking Union primary law. The Treaty affords the Union's political institutions the competence to introduce legislation in certain policy areas, but the text also prescribes that they must conform to the requirements of the Treaty when so doing. For example Article 263 TFEU sets out the grounds for annulment of Union legislation, which includes key constitutional principles and infringement of the Treaties or of any rule of law relating to their application. Nevertheless, in this context, the very concept of annulment is controversial. In particular, it is not clear how far the obligation of the Union's political institutions to comply with primary law extends in the exercise of their Treaty-assigned regulatory competences. For the Court, on the basis of its role in the interpretation of primary law, it seems that the obligation to conform also includes the stream of second-order principles that have been ascertained in the case law as 'inherent' to the obligations and principles contained in the Treaty. In other words, according to the Court its prescriptions are presented as 'constitutionally-mandated' and thus to be followed in the development of Union law. Again, the use of the medium of direct effect for making substantive policy choices gives rise to a troubling situation where the Union's political institutions' competence *to inform* the development of the text of the Treaty is transformed into an obligation *to comply* with the Court's understanding of how to develop the relevant obligations. As a result, the 'hierarchy of norms' perspective of the relationship between primary law and secondary law seems immediately less compelling.

So although it is common for the literature to take the view that annulment is favourable solution – since it hands the matter back to the Union's political actors – it is still not entirely satisfactory, since the incompatibility is usually judged against the Court's conception of the free movement provisions.[84] This, as a result, confers a substantial amount of power on the Court in the operationalisation of Union law which

[83] See, Case C-363/93 *Lancry*, EU:C:1994:315, as regards the validity of Decision 89/688 which allowed dock dues to be levied in French overseas departments until 1992. The question was whether this was a customs duty, even though it was also imposed on goods from France. The Court stated that according to previous case law article 30 also prohibits charges levied when goods enter Member State region and therefore charges collected contrary to article 30 TFEU.
[84] See, generally, de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart, 2014): 'a finding of invalidity, and that the legislation is to be annulled directly, puts the matter back in the hands of the legislature.

appears contrary to the Treaty framework of competences. After all, whilst the matter may be handed back to the Union's political institutions, their discretion under the Treaty competences is tightly curtailed by the Court.[85] One clear reason for this is the categorisation of the issue as an interaction between Union primary law and Union secondary law, the latter which must comply with the former from which it derives its authority. Yet the Court understands compliance with Union primary law to include its interpretation of directly effective provisions, which elides any full consideration of the primary legal basis of Union competence.

4.2.2) Emasculatory interpretation of Union legislation

The second technique has been termed 'emasculation' of Union legislation through judicial interpretation. In these circumstances, the Court sees itself as able to interpret secondary legislation so as to ensure it accords with its understanding of the broader principle of Union primary law - the directly effective obligation - in order to avoid a finding of incompatibility. The Court therefore appears unwilling to defer to the legislatures' view of a particular situation: it finds ways of enabling primary law to take priority over secondary law (and more generally above the legislature's primary law competence) by effectively 'rewriting' legislative stipulations.

A good example of this arises from the Citizens' Rights Directive and the apparent friction between the parameters of Union citizenship determined by the Court in the case law and that trajectory as it has been understood by the legislature in the CRD.[86] In *Vatsouras,* the Court did not find Article 24(2) of the Citizens Rights Directive to be invalid, although it appeared contrary to the Court's interpretation of Article 45 TFEU in conjunction with Article 21 TFEU since it precluded work-seekers from accessing social assistance benefits.[87] For the Court, Article 24(2) only excluded work-seekers from a certain category of 'social assistance' benefits: 'job-seekers allowance' or more accurately 'benefits of a financial nature intended to facilitate access to the labour market' would not qualify as 'social assistance.' This clearly alters

[85] See, in a slightly different context, cases like Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*, EU:C:2014:238 and Case C-362/14, *Schrems* EU:C:2015:650.

[86] Directive 2014/54 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers [2014] OJ L28/8

[87] In Case C-138/02, *Collins,* EU:C:2004:172 the Court departed from its pre-citizenship case law and held that 'in view of the establishment of citizenship of the Union, [it is] no longer possible to exclude from the scope of [Article 45(2) TFEU], concerning the equal treatment of workers, a financial benefit intended to facilitate access to employment…for work-seekers' at para 63.

the legislative regime set in place for work-seekers in the CRD. Indeed, Article 21 TFEU is explicit in subjecting the attainment of the goal of the free movement of citizens to the 'limitations and conditions' that may be set out in Union secondary legislation, and thus recognises the primary legal nature of the Union's political institutions' competences. But the Court's response to political attempts to limit (and to more closely define) Union citizens' entitlements has the effect of elevating its own interpretive competence to a situation of priority over the Union's political competences. The case also demonstrates the continued authority that the Court apparently enjoys to extend its view of the scope of Treaty-based principles, even despite the presence of legislation and clear choices made in the exercise of the Union's primary legal competence.

A second example of 'emasculation' concerns the relationship between the Posted Workers Directive and the Treaty.[88] This illustrates how the Union's regulatory competences are not treated by the Court as a means through which the political actors are able to make choices about how to secure the free movement of services in the context of the cross-border posting of workers. It is well-known that the Court imbued the PWD with a presumption of regime portability stemming directly from Articles 49 and 56 TFEU.[89] Indeed, in *Laval*, the Court determined the scope of the PWD by reference to the obligation to abolish restrictions to the free movement of services: it was deemed to be a concrete expression of the goals of Article 56 TFEU. It is made clear in Recital 17 and Article 3(7) of the PWD that the Directive's terms and conditions should not prevent the application of more favourable measures to workers. On a literal reading of these provisions, the host State may apply higher standards to posted workers. But the Court in *Rüffert* found that the Member States are not able to 'make provision of services in their territory conditional upon the observance of terms and conditions which go beyond mandatory rules for minimum protection.'[90] The Court thus reinterpreted Article 3(7) to preclude the host Member State from applying higher standards. The legislature's clear choices in the field of social policy – not to prescribe uniform requirements, but to establish a floor of rights – are apparently bypassed as a result of the Court's interpretation of the Directive in light of Article 56

[88] Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, [1997] OJ L 18
[89] Barnard, 'Fifty Years of Avoiding Social Dumping? The EU's Economic and Not So Economic Constitution', in Currie, Dougan (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart, 2009), ch.13 .
[90] Case C-346/06, *Rüffert*, EU:C:2008:189.

TFEU. It is again important to reiterate that the limits of national autonomy are thus set by Court's interpretation of the Directive read in light of the Treaties, rather than by the Treaties themselves.[91] As a result, in these circumstances the final say on the operationalisation of Union law falls to the Court: the political actors' definitional authority recognised in the Treaty to operationalise Union primary law is greatly reduced.

This example is particularly interesting since it illustrates how legislation (the PWD) - which is envisaged to facilitate the free movement of services - is understood by the Court as a possible derogation from the overarching goal of free movement. This is important as while the PWD includes a clear reference to its legal basis in Article 56 TFEU, the legislation also incorporates social protection objectives through the construction of 'hard core rights.'[92] The fact that the Court does not consider this package to be part of the social and political choices involved in the attainment of a functioning internal market seems to stem from the *directly effective nature* of Article 56 TFEU as a provision which simply mandates the abolition of obstacles to free movement. And since that provision is clear, precise and unconditional and capable of independent application, any limitations are naturally viewed – by the Court - as potential 'derogations.'[93] Again, this overlooks the nature of the interactions between the Union's legal sources: this situation does not solely concern the interactions between the Union's primary law on free movement and secondary legislation – there is a prior consideration about the relationship between the Treaty obligations on free movement and the Union's political institutions regulatory competences, which were the basis of the PWD.

As a further point, the proposed (and ultimately abandoned) Monti II Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services can be seen as the Union legislature's attempt to respond to the Court's case law on the terms and conditions of employment as regards the cross-border posting of workers.[94] The proposed

[91] See Barnard, 'More posting,' (2014) 43 Industrial Law Journal 194 and Davies cited supra n.81.

[92] Voss, Faioli, Lhernould, Iudicone, 'Posting of Workers Directive – current situation and challenges' (2016) Study for the European Parliament EMPL Committee

[93] See, further, Reynolds, *Tipping the scales: exploring structural imbalance in the adjudication of interactions between free movement and fundamental rights,* (University of Liverpool, PhD thesis, 2015).

[94] Proposal for a Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final. See, also, more recently, Recital 11a of the proposed amendment of the Posted Workers Directive, as a direct reaction to the case law: 'This Directive should not affect in any way the exercise of fundamental rights as recognised in Member States and at Union level, including the right or freedom to strike

Regulation affirmed that there was no priority of the freedom to provide services or of establishment over the right to strike, while recognising that situations may arise where these freedoms and rights may have to be reconciled. The failed attempts to adopt the Regulation illustrate the difficulties of achieving a broad enough political consensus to temper or to correct contentious judicial decisions on the basis of its regulatory competences.[95] Indeed, although one might expect the Union's political institutions to retain the *legal capacity* to respond through the adoption of secondary legislation, their practical *capability* may be limited by non-legal factors – in this context for formulating a response with broader enough political consensus across the Union.

A third example of 'emasculation' concerns what has been referred to as 'indirect judicial review' of Union legislation through the Court's assessment of national (implementing) rules for their compliance with the principle of proportionality.[96] Proportionality has been used to impose conditions on how legislative requirements are enforced in practice, which may give rise to a judicial appraisal which overlaps with or replaces the appraisal envisaged by the legislature.[97] This therefore presents a challenge to the balance of competences enunciated in the Treaty, as it significantly reduces the legislature's Treaty-allocated oversight to inform and develop a response to specific policy issues.[98]

A good example of this comes from the field of social security. Regulation 1408/71 is supposed to provide a uniform set of conflict rules which prevents the simultaneous application of Member States' social security regimes and aims to avoid a situation where no regime applies at all.[99] A Member State lacking competence under the Regulation is not allowed to apply their social security legislation, either to levy

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or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor should this Directive affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and /or practice.' Available at: http://data.consilium.europa.eu/doc/document/ST-13612-2017-INIT/en/pdf (last accessed 21st February 2018.)

[95] National parliaments issued a 'yellow card' which required the Commission to reconsider the proposal (which it eventually dropped on the basis that it did not believe it would receive the necessary political support in the European Parliament and the Council.) The main reason behind the objections of the national parliaments was that the EU was not competent to deal with the right to strike. See Jančić, 'The Game of Cards: National Parliaments in the EU and the Future of the Early Warning Mechanism and the Political Dialogue' (2015) 52 CMLRev 939.

[96] The first reference to this technique was in relation to the Court's judgment in Case C-413/99, *Baumbast*, EU:C:2002:493. See, further Dougan and Spaventa, 'Educating Rudy and the (non-)English Patient: A Double Bill on Residency Rights Under Article 18 EC' (2003) 28 ELRev 699.

[97] This creates further confusion for the understanding of the legal regime applicable in a given area, see 'Editorial comments: The free movement of persons in the European Union: Salvaging the dream while explaining the nightmare' (2014) 51 CML Rev 729.

[98] See also the principle of effectiveness which has been used to justify the exercise of judicial power in e.g., Case 6/90, *Francovich*, EU:C:1991:428 and the Member State's arguments in Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur SA*, EU:C:1996:79, to the effect that the right to reparation was legislation without a legislature.

[99] Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ 1971 L 149

contributions or to award benefits. As the Regulation now explicitly enshrines this 'principle of exclusivity', the Court has generally ruled out the existence of a Member State competence which is not based on the legislation.[100] But over time, the Court has narrowed the reach of the 'principle of exclusivity,' and allowed for the creation of an additional layer of rights under domestic legislation where a Member State lacks competence under the Regulation.[101] The rationale for such a development is that Article 48 TFEU - the legal basis for the coordination of social security - entails that migrant workers must not lose their right to social security benefits or have the amount reduced upon the exercise of their free movement rights. As a result, the coordination regulation is interpreted in light of the objective of Article 48 TFEU which, for the Court, is to contribute to the 'establishment of as complete a free movement of workers as possible.'[102] Therefore, in certain circumstances, the objective of Article 48 is often served by the exclusivity of applicable legislation.[103] In its case law, the Court has sought to balance 'exclusivity' with the establishment of free movement for migrant citizens.[104] The result is a regime which creates a complementary source of entitlements through both the Regulation and the Treaties. In effect, it thus elides the political choices made by the Union's institutions in the exercise of their Treaty-allocated competences.

In *Hudzinski and Wawrzyniak*, the Court employed proportionality as a means to open up a possible exportation of social security benefits, despite the conditions enshrined in the legislation.[105] The question in the case was whether a Member State (which was not competent under the Regulation's conditions) may be free to refuse benefits to persons insured in another Member State under less favourable rules.[106] As has been discussed, the social security legislation designates only one Member State as

[100] Exclusivity principles laid down in Article 13(1) Regulation 1408 and Article 11(1). Case 102/76, *Perenboom*, EU:C:1977:71. See, Case 302/84, *Ten Holder*, EU:C:1986:242 where the Court was strict in its application of the exclusivity principle. Thus, legal certainty, the interests of employers (in the freedom to provide services), and the legislature's prerogatives could have been said to be prioritised over general free movement objective.

[101] If Union legislation was to pre-empt conflicting but more favourable national legislation, the overall purpose of the legislation would be frustrated. In Case 100/63, *Van der Veen*, EU:C:1964:65 the Court ruled that in such circumstances national law should prevail over the Regulations. The reduction of purely national rights by Regulations would run counter to aim of Articles 45-48 TFEU

[102] Case 75/63, *Hoekstra*, EU:C:1964:19. See e.g. Case 92/63, *Nonnenmacher*, EU:C:1964:40; Case C-215/99, *Jauch*, EU:C:2001:139, para 20; Case C-287/05, *Hendrix*, EU:C:2007:494, para 52; Case C-619/11 *Dumont de Chassart*, EU:C:2013:92 para 53.

[103] Case 92/63, *Nonnenmacher*, EU:C:1964:40.

[104] E.g. in Joined Cases C-611 & 612/10, *Hudzinski and Wawrzyniak*, EU:C:2012:339 the Court alluded throughout its judgment to the lawfulness of exclusivity principle, even when the applicable legislation provides inferior benefits to those of the same kind of another Member State.

[105] Joined Cases C-611 & 612/10, *Hudzinski and Wawrzyniak*.

[106] AG Mázak also discussed the vertical implications at para 85: 'the powers of non-competent States in social security matters are curtailed by judge-made obligations imposed of them.' Joined Cases C-611 & 612/10, *Hudzinski and Wawrzyniak*, EU:C:2012:93.

competent, such that other Member States are free of social security obligations and responsibilities in relation to such individuals.[107] The posting rules entitle workers temporarily to work in another Member State while remaining exclusively subject to the social security legislation of the home Member State. Despite this, the Court found that under certain circumstances posted workers can also claim benefits from the host Member State.[108] Therefore, it is possible that additional responsibilities may now be imposed upon Member States other than those already contained in the legislation. For the Court, a Member State is able to exclude persons from the benefit of their social security system only if, in doing so, they comply with the principle of proportionality.

In terms of the implications of this decision for the horizontal balance of responsibility within the Union, it seems as though the Union legislature's primary law powers to adopt a *complete scheme* for organising social security systems are undermined. Indeed, the judicial understanding of the system of social security protection *reshapes* the relationship between the free movement provisions in the Treaty, the regulatory competences and secondary legislation.[109] For the Court, it is the responsibility of the Member States to determine whether or not to open up their social security systems to uninsured persons - whom they are not obliged to grant benefits to under the Regulation.[110] The Court therefore allows all Member States (whether they are competent or not under the terms of the Regulation) to take measures to protect individuals from the Regulation's shortcomings on a voluntary basis. The outstanding question is whether the directly effective Treaty provisions may *oblige* a non-competent Member State to participate in the new regime (rather than choose to participate) through the application of the proportionality principle.[111] Indeed, the presumption that the nature of regime is optional is capable of being rebutted on the basis of the proportionality of the Member States' refusal to grant certain benefits, particularly by reference to an individual's personal circumstances.[112]

[107] Article 13(1) Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ 1971 L 149. See also Case 276/81, *Kuijpers*, EU:C:1986:242, para 14

[108] Joined Cases C-611 & 612/10, *Hudzinski and Wawrzyniak*.

[109] The Regulation created a strong presumption in favour of upholding national territorial restrictions: see Joined Cases C-611 & 612/10 *Hudzinski and Wawrzyniak*, paras. 45, 48–51, 55–57, 62, 68 and 70. See also Case C-62/11, *Land Hessen v. Feyerbacher*, EU:C:2012:486 paras. 45–46.

[110] As AG Mázak explains every EU duty deprives principle of exclusivity as laid down in Article 13(1) and case law of part of its *effet utile*, at para 42. Joined Cases C-611 & 612/10, *Hudzinski and Wawrzyniak*, EU:C:2012:93.

[111] Rennuy, 'The Emergence of a Parallel System of Social security co-ordination' (2013) 50 CMLRev 1221

[112] This is similar to the proportionality assessment in some of the Court's citizenship case law, see Dougan and Spaventa, 'Educating Rudy and the (non-)English Patient: A Double Bill on Residency Rights Under Article 18 EC' (2003) 28 ELRev 699.

Overall, the pattern in the case law under the 'emasculation' category sees the Court engage in a process of ensuring (or at least trying to ensure) that legislation adheres to the demands of Union primary law.[113] Although it therefore avoids a direct confrontation between the Court and the Union's political institutions as may be the case with annulment, it is potentially more problematic.[114] After all, the examples discussed above do not seem to be instances of judicial deference to the actions of the political institutions in the exercise of their regulatory competence, but rather the Court assumes the role of a 'positive' legislature: it positively decides on the content of certain entitlements and obligations.[115] In many of the examples discussed above it is not at all clear that the Court is interpreting the text of the legislation, but at times could be accused of 'rewriting' the legislation, and introducing new – or even contradictory - entitlements. Indeed, in order for the Court to determine the validity or otherwise of Union secondary legislation, it must first define the scope of Union primary law. For the Court, primary law for the most part includes the free movement provisions – or more accurately its extensive interpretation of such provisions and its attendant rights and obligations through the medium of direct effect.

Again the clear problem is that the Court immediately assesses the relevant legal issues from the perspective of the relations between Union primary law and secondary law, and thus fails to engage with a prior issue about the relationship between the Union's primary legal sources: regulatory competences and free movement provisions. Its failure to address this relationship collapses the analysis into an appraisal of whether Union secondary legislation conforms to the Court's conception of the sources of Union primary law. Unless the legislature as a whole takes issue with any judicial modifications so far as that it would be willing to respond with new legislation, the judicial solution is likely to remain in place, and become the governing framework for the operationalisation of the free movement provisions.

4.2.3) A 'parallel' system of rights and entitlements

[113] See, similarly, Section 3 of the Human Rights Act 1998 and the obligation to interpret UK primary legislation in conformity with ECHR rights.
[114] It is assumed that judiciaries make use of 'constitution-conform' interpretation out of respect for the elected legislature whose policy choices they wish to uphold so far as possible. However, with decisions that do not annul the contested law but use corrective interpretation, judges are able to avoid an open confrontation with political actors. See, further, de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart, 2014).
[115] See for this phenomenon, Kelsen, 'La Garantie Juridictionnellede la Constitution' (1928) 44 Revue du Droit Public197.

The third technique refers to a situation where the Court develops a 'parallel' system of rights and entitlements on the basis of the Treaty, which operates alongside the system introduced by Union legislation. If successful, such an approach may essentially bypass the need for individuals to rely on legislation, which may be more restrictive, or avoid consideration of a particular issue entirely. In the literature, this is understood as judicial 'avoidance' of the conflict between the Treaty provisions and legislation.[116] For instance, where secondary legislation does exist, but does not grant the rights desired by the individual in a case, the implication of the technique is that individuals can ignore such restrictions and claim Treaty rights directly to achieve their desired goals. This ought to be distinguished from situations where the Court may 'fill gaps' in legislation, which is perhaps less contentious. A good example of this might be *Jessy St Prix.*[117] In this case, the Court found that the list of circumstances under Article 7(3) Directive 2004/38 specifying when individuals could retain their status as workers under Union law – and thus access the entitlements available to Union workers – was not exhaustive, so that the category of 'retained worker' could extend beyond the terms of the legislation to those taking a break from work due to pregnancy and child-birth. The question then becomes in circumstances where legislation is silent on how certain policy questions should be resolved, should the Court continue to draw from its own understanding of directly effective primary obligations and, if so, in what cases? There is clearly a fine line between 'gap-filling' and reaching decisions which contradict the Union's political institutions' political choices made in the exercise of their primary legal authority.

One of the best examples illustrating the Court's continued role in developing Treaty-based rights, even in the presence of legislation, comes from the field of cross-border healthcare.[118] In this context, the Court is not fulfilling a 'gap-filling' function as regards (arguably unintentional) omissions in Union legislation. Rather, it seems to see itself as enjoying a role to develop an entirely new system of entitlements, contrary to any limitations set out in the relevant legislation. So in cases like *Decker* and *Kohll* the Court essentially side-lined the role of the social security Regulation in the field of cross-border healthcare and created a parallel system of rights on the basis of the

[116] Davies, cited supra n. 1.
[117] Case C-507/12, *Jessy St Prix,* EU:C:2014:2007.
[118] Other examples include the principle enunciated in Case C-127/08, *Metock,* EU:C:2008:449 to the effect that Directive 2004/38 was intended to strengthen legal status of Union citizens and should not be interpreted so as to confer fewer rights than existed before its adoption. Consider, also, Case C-34/09, *Ruiz Zambrano,* EU:C:2011:124.

directly effective provisions on the free movement of services (Article 56 TFEU.)[119] Whilst the adoption of Regulation 1408/71 may have been understood as the ceiling for exportability, through the case law it has been supplemented by additional rights for patients stemming directly from Union primary law.[120] As Article 56 TFEU was deemed to apply to care covered by social security, national legislation that made the reimbursement of expenses incurred in the care-providing State dependent on obtaining prior authorization became subject to the judicial doctrines of the internal market. For the Court, prior authorization is a restriction on the free movement of the patient to obtain a service in a Member State, as it deters the patient from receiving treatment in a State other than his State of affiliation.[121] However, the Court did not provide an answer to the question of whether the system of prior authorisation in Regulation 1408/71 was unlawful.

In terms of the constitutional tensions generated by this approach, the judgment of the Union's political institutions on a complex policy issue - the allocation of resources for different healthcare systems – is rendered less important by the judgment of the Court. This is all the more troubling given the Union's political institutions' limited legislative competence in the field of healthcare as it is set out in the Treaty.[122] Not only does the limited competence provide the reason why there was (at the time of these cases) no Union-level legislative regime on cross-border healthcare to begin with, it also reveals that if the Union's political institutions wanted to respond, it would be difficult to do so in practice.[123] The Court, in failing to take into account the entirety of the Union's primary legal sources, - including the Union's regulatory competences (or absence thereof) in the field of social security and healthcare - incorrectly assumes

[119] Case C-120/95, *Decker*, EU:C:1998:167, Case C-158/96, *Kohll*, EU:C:1998:171.
[120] See, further, de la Rosa, 'The Directive on cross-border healthcare or the art of codifying complex case law' (2012) 49 CMLRev 34 who elaborates upon the different rationales underpinning the Treaty and legislative regimes. The Regulation is a uniform system of conflict rules; it seeks to mitigate the negative consequences that may result from the coexistence of national systems of social protection. By contrast, the system under the Treaty is based on a functional logic that involves eliminating all obstacles to intra-Community trade.
[121] Such reasoning reflects the Court's broad interpretation of the concept of restriction on the freedom to provide services. Since Case C-76/90, *Säger*, EU:C:1991:331 Art 56 TFEU requires the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, if it is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State where he lawfully provides similar services.
[122] In many areas of health and healthcare the EU plays a limited role, and only has a supporting competence. The EU is required in Article 168 TFEU to respect the responsibilities of each Member State to define their own health policy and to organise, deliver and manage health services; as well as to allocate resources to their health systems.
[123] The introduction of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ L 88, 4.4.2011, p. 45–65 came as a result of reliance on internal market competence (Article 114 TFEU.)

the role of the Union legislature under those provisions: it makes choices about the extent of free movement.

Overall, the Court's approach when dealing with Union secondary legislation generally confirms the priority of directly effective provisions over and above the provisions on regulatory competences. The same is true 'in the absence' of legislation, as explored in Section 4.1. In general, it is fair to say that when secondary law is present in the Union legal framework - as a vehicle through which to manage the various policy issues involved in facilitating free movement - the direct effective nature of the free movement provisions in the Treaty reduces the impact of such legislation. By contrast to the historical position of the competence provisions in the Treaty as a means through which the internal market could be 'completed,' and the definitional framework for achieving free movement in certain areas could be refined, the exercise of such competences is now to be interpreted in light of the (Court's understanding) of unconditional primary law obligations. Thus, secondary legislation is not viewed as part of the 'conditions' that help to outline how the free movement principles are to be achieved, but as derogations from the directly effective free movement obligation. It is not at all clear that the authors of the Treaties intended the allocation of competences to the Union's political institutions to have such a limited influence on the operationalisation of Union internal market law.

5) How are the tensions between the general principles of Union law and competence provisions dealt with at the Union level?

The second relationship between directly effective obligations and the Union's regulatory competences that this chapter explores focuses on the role of the general principles of Union law. Again, as a source of Union primary law, according to the Court the general principles may limit the discretion enjoyed by the EU legislature.[124] Therefore, when giving expression to a general principle, the EU legislature must respect the essential content of that general principle, otherwise the resulting legislation could be annulled by the Court.[125] This chapter aims to reframe this analysis so as to focus on the prior question about the relations between the Union's primary

[124] E.g. Case 29/69, *Stauder v City of Ulm,* EU:C:1969:57

[125] Lenaerts and Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 CMLRev 1629: Since general principles of EU law enjoy a 'constitutional status,' the principle of the hierarchy of norms mandates national courts to interpret both EU law and national law falling within the scope of application of EU law in accordance with general principles of EU law.

legal sources. The reason for this is to avoid the limited focus in the literature on how Union secondary legislation conforms to, or can be assessed against, the Union's primary legal obligations, particularly the general principles of Union law. To this effect, this section considers the extent of compliance with Union primary law that is expected of the Union's political institutions in the context of substantive judicial review. More accurately, this translates into a question of what is the 'contents' of hierarchically superior primary law that the Union's political institutions must comply with, and who holds the responsibility for defining its contents?

In a similar way to Section 4.1, the Court's approach to the general principles of Union law reveals further questions about the relations between directly effective provisions and competence provisions as sources of Union primary law. In this context, the relations between primary norms become triangulated as compared to the previous section: the Court is not dealing solely with the interactions between directly effective provisions and competence provisions, but it also has to manage the relations along with the general principles of Union law. Again, it is largely the vehicle of direct effect combined with unwritten norms (the general principles of Union law) that reduces the role and significance of the competence provisions as the envisaged *political means* through which to operationalise Union primary law.

5.1) 'In the absence of Union legislation:' does the Court respect the Treaty framework of competence and, if so, how?

In this section there are two particular inquiries: first, the recognition of the general principles of Union law; and second, the bestowal of direct effect on the general principles of Union law.

The first inquiry concerns the judicial approach to developing general principles of Union law. Its approach could be understood as demonstrating some form of restraint on the part of the Court, which seems to be informed by an awareness of the Union legislature's role and the consequences, at the constitutional level, for the distribution of powers across the Union of developing the unwritten general principles of Union law. The key issue in this context is the contents of the general principles of Union law. After all, the recognition of autonomous general principles of Union law could encroach upon the powers of legislature, by introducing rules that the political

institutions are competent to adopt.[126] Thus, depending on the level of specificity by which the general principles are formulated by the Court, they may produce effects which provide a positive obligation for the Member States.[127] Therefore in some circumstances, the Court has made it clear that it is not prepared to recognise general principles of Union law which require a degree of specificity, such that their formulation would require legislative choices. Two fairly recent decisions of the Court demonstrate that recognizing the principle of equality as a general principle of Union law could see the Court interfering with the prerogatives of the Union legislature.

First, in *Audiolux*, the Court explored whether there was a general principle of equal treatment of minority shareholders under Union law that could be inferred from the general principle of equality.[128] This principle would seek to protect minority shareholders by obliging the dominant shareholder - when exercising the control of or acquiring a company - to offer to buy their shares under the same conditions as those agreed when the acquisition or takeover of the company took place. For the Court, the principle of equality could not entail an obligation of the kind envisaged: not only would such a principle require weighing the interests of the dominant shareholder against those of minority shareholders, but it would also necessitate an evaluation of the legal consequences for corporate takeovers. Thus, the general principle of equality would not provide the right avenue for guaranteeing protection for minority shareholders. The Court also observed that, while the general principle of equality has a constitutional status, the alleged principle of equal treatment of minority shareholders would require such a degree of specificity that its formulation involves legislative choices.[129] The weighing of the interests and the fixing of detailed rules could neither be inferred from the general principle of equality, nor where they for the courts to determine since such an exercise would cross the line and require the making (or the replacement) of legislative choices. Rather than subsuming the legislature's

[126] Consider e.g., the recognition of the right to reparation across the Union. Its recognition may have been expected to require legislative intervention – along the lines of the formula 'in the absence of Community rules.' See, Case 6/90, *Francovich*, and Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur*.
[127] Case C-231/03, *Coname* EU:C:2005:487 concerned the reward of concession contracts, governed by the Treaty provisions on the free movement of services and establishment. The Court found that the equal treatment principle enshrined in the provisions *implies* an obligation of transparency and which ensured the creation of equality of opportunity to place all potential bidders on equal footing in formulating the terms of application for and participation in the tenders. Consequently, the absence of transparency would amount to indirect discrimination on the grounds of nationality prohibited by the Treaty.
[128] According to the plaintiff, from specific acts of EU law (such as the mandatory bid rule provided for by Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJ L 142/12, 2004) could be inferred the existence of a principle, according to which the person who purchases the control of a company should then offer to all other shareholders the same opportunity to sell their shares.
[129] Case C-101/08, *Audiolux*, EU:C:2009:626, paras 58-63.

authority into its own prescriptions, the Court therefore recognises the competence provisions as *the governing medium* for making concrete policy choices.

This allocation of power issue is central to the Opinion of Advocate General Trstenjak in *Audiolux*.[130] For the Advocate General, the recognition of a sector-specific and precise general principle of the nature proposed would risk the Court becoming embroiled in policy-making based on its own conception of redistributive justice. Such a specific legal consequence - a right to sell-out for minority shareholders - would be solely a matter for the legislature to decide. Moreover, the Advocate General recalled that the Court is an EU institution and forms part of the institutional balance. This means that, in its capacity as an EU judicial body, it respects the rule-making powers of the Council and of the Parliament. This necessarily presupposes that it leaves to the Union legislature the task of rule-making in the field of organisation of working time conferred on it by the Treaties and observes the necessary self-restraint in developing general principles of Union law which might run counter to the legislature's aims.[131] Thus, the Advocate General directly engages with the nature of the interactions between the primary sources of Union law - the general principles of Union law on the one hand, and the Union political institutions' competences on the other hand – so as to emphasise the *political* nature of such decisions about the general principles of Union law.

Second, in *NCC Construction Danmark*, the Court emphasised that, in the absence of legislative choices, the application of the general principle of equality is confined to constitutional questions.[132] Under Danish law, a construction business had to pay VAT on supplies relating to construction effected on its own account (self-supply), whereas the subsequent sale of buildings thus constructed was an exempt transaction. This meant that, in accordance with Article 17 of the Sixth VAT Directive, if a construction business paid VAT for goods and services used for both the construction of a building and its subsequent sale, then it could only deduct the VAT charged on those goods and

[130] E.g., the recognition of a general principle of equal treatment of shareholders would provide for the same legal consequences as would Article 5(1) of the Takeover Directive. The AG explained that that could not have been the intention of the legislature, since otherwise it would not have been necessary to adopt specific rules. See, Case C-101/08, *Audiolux,* EU:C:2009:410 at para 83.
[131] At para 107.
[132] Case C-174/08, *NCC Construction Danmark,* EU:C:2009:699

services in relation to its taxable activities.[133] The applicant argued that the Sixth VAT Directive had not been properly transposed into Danish law. It contended that the right to a deduction of VAT had been infringed by Denmark, since the authorities of that Member State had legislated in a way that subjected the applicant to less advantageous treatment (partial deduction) than that to which building businesses were entitled under the Sixth VAT Directive (full deduction). The Court observed that the right to deduction is a fundamental principle underlying the common EU system of VAT: it is the embodiment of the general principle of equality. But for the Court in contrast to the general principle of equality which has a constitutional status, the right to deduction is grounded in secondary law.[134] Since the Danish legislature had exercised its legislative discretion in compliance with the Sixth VAT Directive, Denmark was entitled to impose a limitation on the right to deduction for goods and services used for both exempt and taxable activities. Moreover, the Court pointed out that the general principle of equality read in the context of the common VAT system only required Denmark to treat comparable economic operators alike. This was indeed the case, since the first sale of a building affected by both construction businesses and property developers was exempted from VAT.

It follows from *Audiolux* and *NCC Construction Danmark* that it falls to the Union legislature (or, where appropriate, to the national legislature) to identify the criteria on which differentiation between individual cases can legitimately be based. In this sense, a distinction seems to emerge from the case law. For example, it seems that the general principle of equality may be relied upon without further legislative intervention in relation to constitutionally prohibited forms of discrimination (e.g. nationality, sex, age).[135] The distinction between constitutionally prohibited forms of discrimination and other sets of circumstances calling for legislative intervention is familiar and speaks to the separation between 'constitutional' and 'ordinary' law that holds in domestic systems.[136] What is clear here is that the general principle of equality cannot be relied upon as a replacement for legislative choices: thus, it is not used in the same way as certain free movement provisions are in Section 4: as a medium for judicial

[133] Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, OJ 1977 L 145.
[134] At para 42.
[135] See, Case C-144/04, *Mangold*, EU:C:2005:709. The Court has also made use of the Charter to develop general principles of Union law. See Case C-432/05, *Unibet*, EU:C:2007:163, para 37; Case C-303/05, *Advocaten voor de Wereld*, EU:C:2007:261, para 46; and Case C-12/08, *Mono Car Styling*, EU:C:2009:466, para 47.
[136] See, the introductory chapter to this thesis in particular pg.23

policy choices. Instead, where legislative discretion is involved, the role of the general principle of Union law is to review the choices made by the legislature.[137]

Even still, the Court has not always been fully transparent as to how it develops general principles of Union law in relation to 'constitutionally-prohibited' forms of discrimination. Some of its sources of inspiration include the common constitutional traditions of the Member States, which for the Court do not need to be universal common traditions of all Member States.[138] For instance, in *Mangold* the Court recognised that the general principle of equal treatment on the grounds of age was able to exist independently from Union legislation as a matter of substantive primary law. For the Court, Directive 2000/78 did not itself lay down the principle of equal treatment in the field of employment and occupation.[139] Indeed, the sole purpose of the Directive as expressed in its Article 1 is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation', the source of the principle underlying the prohibition of those forms of discrimination being found in various international instruments and in the constitutional traditions common to the Member States.[140]

In its *Honeywell* judgment the German Constitutional Court contemplated how age discrimination as general principle of Union law was derived 'from international agreements and constitutional traditions common to the Member States.'[141] In particular, it found it was 'not reasonable' to declare age as the application of the general principle of equality, as such it would require further justification which is not contained in the general principle of Union law. Further, for the German Constitutional Court it is 'alien to the common constitutional traditions,' particularly in view of the major problems for older unemployed persons**.** More specifically, only two national constitutions (Portugal and Finland) recognize the principle, whilst the international instruments to which the Member States are signatories refer to the principle of

[137] Lenaerts and Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 CMLRev 1629

[138] Divergences between national legal systems may not automatically rule out the incorporation into the EU legal order of a legal principle which is recognized in a minority of Member States. Incorporation may take place where 'such a legal principle is of particular significance [for the project of European integration], or where it constitutes a growing trend.' See Opinion of A.G. Kokott in Case C-550/07 P, *Akzo Nobel Chemicals*, EU:C:2010:229, paras. 93–98.

[139] Directive 2000/78/ EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16

[140] See also regarding the source of inspiration in the Charter. In Case C-555/07, *Kükükdeveci*, EU:C:2010:21 the Court acknowledged the existence of a principle of non-discrimination on grounds of age as a general principle of EU law, to which Directive 2000/78 gives specific expression. The Court also noted under Article 21(1), '[a]ny discrimination based on … age … shall be prohibited'.

[141] Case 2 BVR 2661/06, Decision of 6 July 2010, NJW 2010, 3422.

equality in general, but remain silent on the principle of non-discrimination on the specific grounds of age.[142] Advocate General Geelhoed in *Chacón Navas* criticized the Court for deducing the principle of non-discrimination on grounds of age from the principle of equality along similar lines.[143] He argued that it falls to the EU legislature and, where appropriate, to the national legislature, to identify the criterion on which differentiation between individual situations cannot legitimately be based. Thus such developments *require the making of policy choices* – for which only the legislature is competent.

The second inquiry is the judicial approach to determining whether, and when, to bestow direct effect on general principles of Union law. In some circumstances, the Court has explained that certain principles are not sufficiently clear, precise and unconditional so as to be capable of producing direct effect. The result is that the introduction of secondary legislation is necessary to deal with specific categories and policy areas.[144] But at other times the Court has recognised certain general principles as directly effective. For Lenearts, as general principles of Union law enjoy a constitutional status, whether a general principle produces horizontal direct effect is a question of primary law interpretation which fall within the Court's jurisdiction.[145] It is thus a decision to be taken outside the political process. To support this argument reference is made to *Defrenne* and *Angonese.* In *Defrenne,* the Court held that the general principle of equal pay for equal work – grounded in now 157 TFEU – may produce horizontal direct effect.[146] After looking at the aim, the nature and the place of the principle of equal pay for equal work in the scheme of the Treaty, the Court held that this principle is 'mandatory in nature' and accordingly, applies to public authorities and private individuals alike. By contrast, not only was Directive 75/117 - which sought to improve the legal protection of workers suffering from unequal pay caused by sex discrimination - irrelevant to determine whether the principle of equal pay for equal work could produce horizontal direct effect, the Court pointed out that Directive 75/117 could not reduce the effectiveness and the temporal scope of that

[142] Herdegen, 'General principles of EU law: The methodological challenge' in Bernitz, Nergelius, and Cardner, *General Principles of EC law in a Process of Development* (Kluwer Law International, 2008), and also Jans, 'The effect in national legal systems of the prohibition of discrimination on grounds of age as a general principle of community law' (2007) 34 LIEI 65.
[143] Opinion A.G. Geelhoed in Case C-13/05, *Chacón Navas*, EU:C:2006:184, paras. 53–54.
[144] See, the distinction between genuinely constitutional principles and those which require legislative furtherance in Lenearts, cited supra n.137.
[145] Lenearts, cited supra n.137.
[146] Case 43/75, *Defrenne*, EU:C:1976:56

principle.[147] The Court drew a distinction between situations where a 'purely legal analysis' sufficed to detect the presence of sex discrimination, and complex situations where such a presence could not be ascertained unless legislative measures were adopted. While in relation to the former type of situations, the Court is in a position to hold that the general principle of equal pay for equal work produces horizontal direct effect, in the latter type of situations the Court is not.

In Angonese the Court observed that Regulation No. 1612/68 - which implemented the principle of free movement of workers laid down in 45 TFEU - was not applicable to a competition for a post organized by a private bank.[148] This circumstance, however, did not prevent the principle of the free movement of workers – a specific application of the general principle of non-discrimination on grounds of nationality – from producing horizontal direct effect. The Court reasoned that its findings in *Defrenne* could apply to the free movement of workers, since both principles are 'mandatory in nature' and seek to combat discrimination, albeit based on different grounds, on the labour market.[149]

This section has some important implications for our understanding of the relationship between directly effective provisions under Union law and the competence provisions as sources of Union primary law. It thus directly feeds into questions about the horizontal allocation of powers between the Court and the Union's political institutions. By contrast to Section 4.1 however the Court demonstrates a greater awareness of the role of the Union's regulatory competences and thus of the role of the Union's political actors in this context. Particularly with the introduction of general principles of Union law, the Court has (at least implicitly) developed a distinction between constitutionally-prohibited forms of discrimination and forms of discrimination that require legislative choices of the kind the Court is not competent to make.

5.2) The 'presence' of Union legislation: does the Court show respect for legislative policy choices in the operationalisation of Union primary law?

[147] See also Case 96/80, *Jenkins*, EU:C:1981:80, para 22 and Case C-17/05, *Cadman*, EU:C:2006:633, para 29. Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women OJ L 45, 19.2.1975.
[148] Case C-281/98, *Angonese*, EU:C:2000:296
[149] At para 34.

The focus of this section rests with the role of the Court when it comes to managing interactions between the general principles of Union law and the exercise of the Union's regulatory competences. In particular, it addresses questions about the role of the Union's regulatory competences in the primary law framework. The main examples come from the field of equal treatment, given that the Union's political institutions are competent under the Treaty to adopt measures (and have adopted measures) in relation to anti-discrimination. The legal basis available to the political institutions is Article 19 TFEU. For the successful adoption of legislation, unanimity within the Council is required so as to ensure Member States' competences are safeguarded.

The Court has employed similar techniques to those that have already been discussed in Section 4 with respect to the relationship between the free movement provisions and the Union's regulatory competences. In particular, the Court has employed the tools of annulment, 'emasculatory' interpretation, and (possibly) has embarked on a process of developing a parallel system of entitlements to that contained in Union legislation. Indeed, the Court tends to approach such cases through the lens of the relationship between Union primary law and Union secondary law and therefore – like in Section 4 – it is clear that the judicial techniques achieve the same result: to marginalise the role of the Union's political competences as primary sources of Union law available to operationalise the Union's objectives.

A common theme across the chapter is the influential role of direct effect as a means for the Court to make policy choices and to embed such choices as primary law understandings. Nevertheless, a key variable here is the role of other constitutional actors – not just the Court – in influencing and perhaps also creating 'hierarchy of norms' problems. Indeed, the willingness of the Court to 'amend' legislative acts to ensure that they fully respect the Union's constitutional framework in light of the general principles of Union law is a relatively recent phenomenon and the entry into force of the Treaty of Lisbon is an important catalyst in this regard. In particular, the legally binding status of the Charter has improved the centrality of fundamental rights, reinforcing their visibility in the legal discourse.[150] This has perhaps led to a stronger

[150] See, particularly, with regard to data protection in cases like Case C-131/12, *Google Spain*, EU:C:2014:317, and the annulment of legislation in Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*, EU:C:2014:238.

'imperative' to interpret Union measures in light of rights guaranteed by the Charter.[151] More broadly, this provides evidence of the interesting (and again common) phenomenon of the 'positivisation' of rights in constitutional frameworks.[152] In parliamentary systems, rights enter into the legal order by virtue of legislative action, rather than by virtue of higher status law (where the positive source of individual rights is the constitution.) But some constitutions do not only provide protection of constitutional rights by constitutional courts, but also command the legislature to create the conditions necessary for the enjoyment of some rights and to promote and protect other rights: this is the case within the EU with, for example, non-discrimination grounds covered in the Charter. It is contended that, due to placing certain rights on a positive constitutional footing, courts develop, or are given, the authority to command legislatures to perform constitutional duties and to fix the parameters for legislative activity.[153] The higher status of such norms is broadly accepted in the case law in the Union context – thus minimising the role of the primary legal authority of the Union's political institutions to determine how, and indeed when, to intervene in certain policy areas.[154]

5.2.1) Annulment of Union legislation

One of the best examples of the use of general principles of Union law in order to annul Union legislation is *Test Achats*.[155] In the case, the Court partially annulled Directive 2004/113 on equal treatment in insurance schemes.[156] The case serves to expose the very real tensions between the Court and the legislature about the scope of their respective competences. The main site for conflict related to the legislature's views on how to achieve the goal of non-discrimination in the insurance market - as expressed in the Directive - and the Court's own views - on the basis of its interpretation of the general principle of equal treatment - of how to achieve that result. The question was whether it was compatible with the general principle of equal treatment for the Directive to take the sex of insured persons into account as a risk factor in the formulation of private insurance contracts: Article 5(2) allowed for differences in treatment in relation to sex in respect of insurance premiums and

[151] See AG Cruz Villalón, in Case C-306/09, *B*, EU:C:2010:404
[152] Loughlin, *The Idea of Public Law* (OUP, 2003)
[153] See, Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP, 2000)
[154] Joined Cases C-92/09 and C-93/09, *Volker und Markus Schecke and Eifert*, EU:C:2010:662
[155] Case C-236/09, *Association Belge des Consommateurs Test-Achats and Others*, EU:C:2011:100.
[156] Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37).

benefits if sex is a determining risk factor and that can be substantiated by accurate and relevant actuarial and statistical data. The Court found this provision of the Directive to be invalid since it was incompatible with the principle of equal treatment, as understood and assessed by the Court.

For the Council and the Commission, the legal basis on which the Directive was based (then Article 13(1) EC), was structured in such a way that the Union legislature had a largely free hand to determine the content of measures to combat discrimination.[157] In particular, the Council emphasised it was a provision under which the Council 'may' take action to combat discrimination, so that there was discretion regarding the appropriateness, material scope and content of any anti-discrimination provisions. This is a helpful example for the issues discussed in this context since it is an explicit recognition by the Union's political institutions of the role of the competence provisions *as Union primary sources* and as a means (perhaps the governing means) to concretise the Union's anti-discrimination objectives. But, in response to this argument, the Advocate General explained that with Directive 2004/113 the Council made the conscious decision to adopt anti-discrimination legislation in the field of insurance, so that its provisions must withstand examination against the yardstick of higher-ranking EU primary law (particularly fundamental rights).[158] As regards to the legal basis of Article 13(1), the words that action must be 'appropriate' for combating discrimination would not provide a licence for measures which themselves lead to discrimination.

In terms of the relationship between the general principles of Union law and the legislature's competence, the Advocate General explained that the prohibition against discrimination on the grounds of sex does not have to be spelled out by the legislature. The fact that the legislature resorts to secondary measures to promote equal treatment and combat discrimination would not qualify the importance of the equal treatment principle as a fundamental right and as a constitutional principle. Therefore, any 'action' taken within the meaning of Article 13(1) EC to combat discrimination and to promote equality between men and women must accord with the requirements of the equal treatment principle as both a general principle of Union law and as a Charter right. The Advocate General was aware of the need for the Council to enjoy a degree

[157] Judgment, at para 33.
[158] Case C-236/09, *Association Belge des Consommateurs Test-Achats and Others*, ECLI:EU:C:2010:564.

of discretion in the exercise of its conferred powers, as the establishment of framework conditions (involving political, economic and social choices) may require complex assessments. Nevertheless, such discretion would not be boundless, such that its exercise cannot have the effect of frustrating the implementation of the fundamental principles of EU, including the specific provisions on non-discrimination.[159]

The Court's reasoning – but not the result – differed from that of the Advocate General. For the Court, as Article 6(2) TEU was mentioned explicitly in the Directive's preamble (Recital 14) – providing that the EU is to respect fundamental rights – Articles 21 and 23 of the Charter would provide the benchmark to assess the validity of the Directive. The Court offered a general discussion of the legal basis used to adopt the Directive - now Article 19 TFEU - in relation to its place and its ramifications within the system of the Treaties. First, the Court acknowledged that the equality of treatment may be achieved gradually.[160] Second, the EU legislature may determine when it will take action, having regard to the development of economic and social conditions with the EU. Third, once the legislature has decided to act, it must act in a coherent manner. Fourth, the possibility of providing for transitional periods or derogations of limited scope is not excluded. In terms of the application of these four considerations to the case, the Court found that the there was widespread use of actuarial factors related to sex in the provision of insurance services at the time the Directive was adopted. It was therefore permissible for the EU legislature to implement the principle of equality for men and women gradually with appropriate transitional periods, including in relation to the application of the rule of unisex premiums and benefits. However, Article 5(2) of the Directive permitted any Member State choosing to make use of the option to allow insurers to apply unequal treatment *without temporal limit*. Thus, the absence of a temporal limit led to a breach of Union law. The risk was that EU law may permit the derogation provided for in Article 5(2)

[159] See, Case C-144/04, *Mangold*, EU:C:2005:709, Case C-88/08, *Hutter*, EU:C:2009:381 at paras 45-50, *Case C-555/07, Kükükdeveci*, EU:C:2010:21, at paras 38-42.

[160] See also Case C-249/96, *Grant*, EU:C:1998:63 where the Court refused to interpret the notion of discrimination based on sex as covering discrimination against an employee based on sexual orientation. At the time, EU law did not cover discrimination based on sexual orientation. In light of the divergences in national law, 'in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex. Consequently, an employer is not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex.' Legislative action was taken, with the adoption of Directive 2000/78/ EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16, and Art. 21 of the Charter. Guided by these legislative choices, the Court extended EU law protection to same-sex partnerships. See Case C-267/06, *Maruko*, EU:C:2008:179, and Case C-673/16, *Coman*, EU:C:2018:385.

to persist indefinitely, contrary to equal treatment objective and Articles 21 and 23 of the Charter.

The Court's comments on the constitutional framework for legislative action under Article 19 TFEU are quite significant. In its analysis of the framework, the Court acknowledged the existence of a need for the *gradual* implementation of the equal treatment principle and non-discrimination through secondary legislation. This seems like a pragmatic approach on the part of the Court, which is informed by the complexity of the area of law and the political nature of the legislative process. In practical terms, it would not be possible for the Union legislature to be obliged to tackle all issues relevant to ensuring equal treatment in a comprehensive manner immediately.

Still, notwithstanding this pragmatic approach on the part of the Court, the judgment falls into a line of case law where a Directive is considered by the Court to be an expression of a broader general principle of Union law. This is significant as the Court retains definitional control over the general principle in the exercise of its interpretive competence.[161] It is as a consequence of this 'sanctification' that if the legislative embodiment of the general principle falls short of accurately capturing its contents (in the Court's view), then it may be annulled. Moreover, if the Directive is considered to embody the Court's understanding of the general principle of Union law, its 'entrenchment' may mean that any attempt by the political institutions to amend it could violate primary law.[162] Such a result has the effect of considerably constraining the discretion left to the Union legislature to make policy choices in relation to anti-discrimination matters under Article 19 TFEU. It thus elevates the (directly effective) general principles of Union law to an elevated position in the Union's 'hierarchy of norms.'

5.2.2) Emasculatory interpretation

The use of the general principle of equal treatment in the case law is also insightful in circumstances where the Court does not find Union legislative provisions to be invalid. There is clearly a fine line between interpreting legislation so as to ensure that it is consistent with the general principles of Union law, on the one hand, and amending

[161] Cases like Case C-402/07, *Sturgeon,* EU:C:2009:716 and Case C-144/04, *Mangold,* EU:C:2005:709 follow a similar path.
[162] This is the view taken by the Advocate General in Case C-282/10, *Dominguez,* EU:C:2011:559 at para 157.

the substance of the legislation itself, on the other hand. Indeed, to some annulment is a preferable solution in circumstances where Union legislation is deemed inconsistent with the general principles (perhaps even though they are interpreted by the Court.)[163] As has already been noted in Section 4, annulment offers the issue back to the Union's political actors to amend the legislation, if they so desire. By contrast, the interpretation and/or rewriting of legislation removes the issue from the direct control of the Union's political institutions contrary to the framework of regulatory competence.

This delicate boundary between interpretation and amendment - and the impact the demarcation of this boundary has on the horizontal allocation of powers within the Union - is evident in the *Sturgeon* case.[164] The case concerned the interpretation of Regulation 261/2004, which grants passengers of cancelled flights certain rights, including a right to compensation.[165] The Court held that although it did not 'expressly follow from the wording' of the Regulation that passengers of delayed flights had a right to compensation; such passengers were to be treated for the purposes of the application of the right to compensation as passengers whose flights are cancelled. As a result, they could rely on the right to compensation laid down in Article 7 'where they suffer, on account of such flights, a loss of time equal to or in excess of three hours.'[166] It is interesting then that whilst Advocate General Sharpston also regarded the exclusion of delays irreconcilable with the principle of equal treatment, she ultimately concluded that it would not be possible to solve this incompatibility by interpreting the Regulation so as to provide compensation also in the case of delays without going beyond the bounds of the judicial function and trespassing on the legislature's authority as envisaged under the Treaty. Instead, for the Advocate General, the violation affected the validity of the Regulation.[167]

The Court essentially employed two lines of reasoning to reach its conclusion. First, the Court claimed that 'as the notion of long delay is mentioned in the context of extraordinary circumstances, it must be held that the legislature also linked that notion

[163] See de Visser, cited supra n.84.
[164] Case C-402/07, *Sturgeon*, EU:C:2009:716.
[165] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, [2004] OJ L 46
[166] Judgment, para 57.
[167] Case C-402/07, *Sturgeon*, EU:C:2009:416

to the right to compensation.'[168] This reasoning is based on the wording of the preamble and the Court used the recitals to reach such a conclusion beyond the text of the Regulation. The Court's second line of reasoning was based on the general principle of equal treatment. The situation of passengers whose flights are delayed was compared to that of passengers whose flights are cancelled. The Court considered that the damage redressed by compensation - loss of time - is suffered by both types of passengers. It would therefore amount to an unjustifiable difference in treatment to deny compensation to passengers of delayed flights, especially since the aim of the Regulation is to increase protection for all air passengers.

In the literature, the 'hierarchy of norms' issue within Union primary law in *Sturgeon* is generally dismissed. Indeed, for some, any dissatisfaction with the case is not related to the finding that the Regulation is inconsistent with the principle of equal treatment *per se.* It is generally accepted that the principle enjoys a higher ranking in the 'hierarchy of norms,' and as a result secondary law can be required to comply with higher ranking law. Rather, the concern lies in the choice not to invalidate the relevant provisions of the Regulation, but upholding it and effectively writing in a new provision.[169] The implication is that it is not clear that the Court reached its decision beyond what is normal in a system that allows for judicial review: legislative competence does not encompass infringing constitutional principles. Moreover, most national constitutional courts aim to avoid annulment and use consistent interpretation – 'adding in' or 'reading down' legislative provisions – as a common technique to avoid conflict with the legislature.[170] It is true that problems with substantive judicial review are common across Europe and place the legislature and the Court in positions of conflict.[171] Nevertheless, this chapter contends that this view seems to take for granted the specific nature of the Union legal order. This includes the nature of the Union's competences as *primary sources of law* and the question of the 'contents' of the principles of Union primary law which secondary legislation ought to comply with. Surely the Court's stipulations about the contents of the general principle of equal treatment are evidence of substantive policy choices, that the Union legislature is better placed to deal with? Indeed, the directly effective nature of such prescriptions

[168] Judgment, para 43.
[169] Garben, 'Sky-high controversy and high-flying claims? the Sturgeon case law in light of judicial activism, euroscepticism and eurolegalism' (2013) 50 CMLRev 15
[170] de Visser, cited supra n.84.
[171] See, generally, Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 2000).

seems to afford much greater definitional control to the Court. This view therefore (incorrectly) elides any consideration of the relations between Union primary norms: in particular as regards the primary legal competences of the Union's political institutions.

A similar case is *Zoi Chatzi* in which the Court was asked to decide whether the birth of twins created a right to a double amount of parental leave under EU legislation.[172] Directive 96/34/EC did not explicitly contemplate the case of twins and, with one exception, the intervening governments all submitted that doubling of parental leave was not possible.[173] The Court found that Member States enjoy wide discretion as regards regulation of parental leave and that they were under no obligation under the measure to provide for twice the amount of normal leave. Nevertheless, it proceeded to recognise an (unwritten) positive action requirement incumbent on national legislatures to establish a parental leave regime which, according to the situation obtaining in the Member State concerned, ensures that the parents of twins receive treatment that takes due account of their particular needs. This obligation was derived from reading the Union measures in light of the constitutional principle of equal treatment. Again, the Court's policy-making platform of direct effect allows it to make policy choices that, under the Treaties, is a task left to the Union's political actors.

5.2.3) A possible parallel system of entitlements?

The use of the general principle of equal treatment in the case law is again evident in a situation where the Court does not find the legislative provisions to be invalid, but extends certain entitlements to equal treatment beyond the terms of Union legislation. For example, a contentious issue is whether individuals are, or should be, able to rely on the general principles of Union law *before* the transposition period of Union legislation has expired, or even beyond the material scope of the Union legislation. Objections to the use of the general principles in such situations relate to the allocation of powers, and how such use may disturb the envisaged balance under the Treaty, particularly through the Union's primary legal competences.[174] Indeed, Advocate

[172] Case C-149/10, *Zoi Chatzi*, EU:C:2010:534.
[173] Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ 1996 L 145, p. 4) as amended by Council Directive 97/75/EC of 15 December 1997 (OJ 1998 L 10, p. 24)
[174] E.g. AG Kokott explained in Case C-321/05, *Kofoed*, EU:C:2007:408 that parties should not be able to rely on a general principle of EU law where the latter is given specific effect in a directive. Since the content of general principles is 'much less clear and precise' 'there would [otherwise] be a danger ... that the harmonization objective of [the] Directive … would be undermined and the legal certainty … which it seeks to achieve would be jeopardized.'

General Mázak in *Palacios de la Villa* warned against relying on general principles instead of – more specific – secondary legislation. For the Advocate General, such reliance on the general principles of Union law would undermine the limitations which Directives entail, notably with regard to horizontal direct effect.[175] In terms of the horizontal distribution of power laid down in Article 19 TFEU within the Union, such a situation would render meaningless the Union political institution's choice to enact a Directive, which is known to lack horizontal direct effect in advance.[176] It is therefore a question of principle whether non-directly effective provisions of Union law should be capable of providing a basis for applying directly effective general principles, since it may remove policy choices from contestation in a political domain, contrary to the Treaty competence framework.[177]

For the Court, it now seems clear that the general principle of equal treatment operates alongside of equal treatment Directives. In *Mangold, Kükükdeveci,* and *AMS*, reference is made by the Court to primary law (the general principles of EU law), rather than to EU legislation in order to be able to impose EU law standards on private parties.[178] This technique provides a way of circumventing the lack of horizontal direct effect of Directives, despite the fact that the choice of such a legal instrument was perhaps deliberate by the Union political institutions in the exercise of their regulatory competences. For instance, in *Mangold* the Court dealt with a dispute between two private parties, the outcome of which hinged upon the legality of a national measure with the general principle of equal treatment on the grounds of age. The Court found that the national rules amounted to unjustified discrimination within the terms of Directive 2000/78, but that there were two obstacles to the potential direct effect of an unimplemented Directive within national legal systems: first, the deadline for the transposition of the Directive had not (at the time of the case) expired; and second, the dispute was horizontal in nature, since it involved a private employer discriminating against its employee and, according to the Court's case law, Directives cannot of

[175] The Court deployed the same argument to reject the horizontal direct effect of directives in Case C-91/92, *Faccini Dori,* EU:C:1994:292: '[t]he effect of extending that case law to the sphere of relations between individuals would be to recognize a power in the [Union] to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.'
[176] The Advocate General also explained that the vertical allocation of powers would be threatened because the unanimity procedure protects the competences of the Member States. Case C-411/05, *Palacios de la Villa,* EU:C:2007:106.
[177] Dougan and Spaventa, 'Educating Rudy and the (non-)English Patient: A Double Bill on Residency Rights Under Article 18 EC' (2003) 28 ELRev 699.
[178] Case C-144/04, *Mangold*, EU:C:2005:709, Case C-555/07, *Kükükdeveci*, EU:C:2010:21 and Case C-176/12, *AMS*, EU:C:2014:2

themselves be relied upon against individuals.[179] Nevertheless, the Court found that non-discrimination on grounds of age was to be regarded as general principle of Union law such that the Directive did not itself lay down the principle of equal treatment as regards employment and occupation. As a result, observance of the general principle would not be conditional on the expiration of the transposition period. The general principle, and the ensuing rights to equal treatment, could therefore be claimed independently of the secondary legislation (and its temporal scope) which had been introduced by the institutions to lay down a general framework for combating discrimination on the grounds of age.

Nevertheless, there is an important limit to the 'parallel' application of the general principles of Union law where the general principles cannot be interpreted so as to contain the same subjective rights as a provision of secondary legislation. In *Kücükdeveci* the Court made consistent reference to the general principle of equal treatment and the Directive, implying that they were intrinsically connected.[180] As a result, the horizontal direct effect of the general principle of equal treatment is unlikely in the absence of legislative guidance.[181] In *Kücükdeveci*, Advocate General Bot argued that the horizontal application of the general principle of non-discrimination on grounds of age did not encroach upon the powers of the EU legislature.[182] He explained that the yardstick for evaluating whether national law complies with EU law remains the Directive and not the general principle enshrined therein. It is only at a later stage that the general principle might become relevant: when assessing the implications that flow from the fact that a national provision is in breach of the Directive. In examining whether a national provision is discriminatory, the Court will confine itself to interpreting the Directive: taking due account of the limitations or derogations to the principle of equal treatment introduced by the EU legislature. For the Advocate General this two-step analysis does not impinge upon the prerogatives of the EU legislature. In this sense, a Directive implementing a general principle should facilitate, rather than limit, 'the application and implementation of the general principle' contained therein.[183] And, in order not to upset the vertical and horizontal allocation of powers, the general principle must not only be 'operational' – contain

[179] Case C-91/92, *Faccini Dori*, EU:C:1994:292
[180] Judgment, particularly paras 50-54.
[181] de Mol, 'Kücükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law' (2010) 6 EUConst 293
[182] Case C-555/07, *Kükükdeveci*, EU:C:2009:429, at paras 29-34.
[183] Prechal, 'Competence creep and general principles of law' (2010) 3 Review of European Administrative Law 8.

judicially manageable standards –, but the Court should also follow 'very closely the letter of the Directive, … remain[ing] nearly entirely within the scope of what the legislature provided for.'[184] This refined approach therefore alludes to an appreciation by the Court of the primary legal authority of the Union's political actors.

5.2.4) Summary

On the whole the problems with substantive judicial review again pervade the discussion. On the one hand, within the current paradigm, the Court has the authority to ensure that the EU legislature complies with general principles of Union law as Union primary law. On the other hand, there is a delicate balance to be struck with the Union political institution's competences. Thus the Court must be attuned to the possibility of/or actual introduction of political choices, and not substitute or constrain them for its own preferences. To some this means that, when having recourse to general principles, the Court must distinguish between matters pertaining to constitutional law and those which are subject to legislative discretion.[185] *Audiolux* and *Kücükdeveci* are used as evidence that the Court pursues such a distinction. In *Audiolux*, the Court held that the principle of equality only applies to constitutionally prohibited forms of discrimination (on grounds of nationality, sex or age), but not to situations of such degree of specificity that their formulation inevitably involves legislative choices. Likewise, in *Kücükdeveci*, the Court applied the principle of non-discrimination on grounds of age as 'given expression in Directive 2000/78' in order to assess the compatibility of a national measure with EU law. In so doing, it appears that, insofar as secondary legislation codifying a general principle is not in breach of the latter but respects its essential content, the Court will be deferential to solutions put forward by the Union's political actors. But the analysis then tends to fall back on familiar (and uncontested) territory. Thus, once it is determined that a national measure infringes secondary legislation embedding a general principle; the consequences that flow from such determination do not pertain to the powers of the EU legislature. We see here familiar questions posed by the thesis about the contents of the 'constitutional or primary law principles:' who determines their contents and

[184] Lenearts, cited supra n.137.
[185] Lenearts, cited supra n.137.

how? For the most part, the Court assumes a central role vis-à-vis the Union's political actors in their determination through the vehicle of direct effect.

6) What are the constitutional consequences of the judicial approach?

In terms of *how* the Court approaches the interactions between the Union's primary legal sources in the context of the operationalisation of Union law, the perspectives discussed in Section 2 ought to be recalled. The Court on the whole hesitates to opt unequivocally for one model: the case law does not straightforwardly conform to either the 'top-down' (Court-led) approach or the 'bottom-up' (Union political actor-led) approach for decisions about how to operationalise Union primary law. At times, the Court appears to adopt an interventionist stance – imposing its own view of how the exercise of regulatory competences should adhere to the Union's primary legal obligations (*Vatsouras, Sturgeon.*) But, at other times, the Court explicitly defers to the Union political institutions' authority (*Casati, Audiolux*.) Yet, it is rarely possible to ascertain any attempts on the part of the Court to articulate the rationale which informs its approach.

In practice, the tensions at the level of Union primary law between directly effective obligations and provisions on regulatory competences are often not directly confronted by the Court, or in the significant body of literature in this area. As such, the question of ultimate authority for the operationalisation of Union primary law and questions about the hierarchy between these primary legal provisions is elided. But it is important to consider the outcome of the interplay between the Union's primary law materials. Indeed, whilst there may be very few direct constitutional conflicts between the Court and the Union's political institutions, the approach(es) employed in the case law can still subtly alter the envisaged effects of the political actors' views, and thus reveal something about the role of their Treaty-allocated competences in the broader Union legal framework. A general pattern is that the Court's interpretation of Union primary law emerges as the 'superior' source (including the second-order principles and entitlements identified through the interpretive process), to which the Union political institutions' competences are ultimately conditioned by: both before the exercise of their competences and subsequent to their exercise. It makes use of techniques which enable it to have a substantial role in the context of operationalising

Union law, and in some cases arrogates a greater role for itself than that of the Union's political institutions.

One of the most important themes in the chapter is the 'over-constitutionalisation' of Union primary law.[186] This is true of the breadth and contents of the Treaties, particularly as regards the way in which the Treaties are interpreted and given further substance by the Court. Constitutionalism is based on a distinction between a constitution on the one hand – providing a basic structure and guiding principles which serve as the relevant institutional framework for the political process - and political decisions – as policy choices or 'ordinary law' adopted by legislation to fill spaces left in the constitutional framework -, on the other hand.[187] Thus, in most domestic constitutional systems, laws with social and political importance are the product of political interventions and political actors are rarely, if ever, preventing from changing the course of the policy trajectory. In the Union context, however, this distinction is blurred, if it exists at all. As this chapter demonstrates, the Court often interprets Union primary law in a way that exposes (and arguably makes) certain policy choices, which, due to their primary law status, may not be amenable to legislative amendment, or at least be made much more difficult to alter through the legislative process.

A question here is whether the central role of the Court is the *consequence* of 'hierarchy of norms' inquiries in the Union, or whether it is the *cause* of the 'hierarchy of norms' as a problem for the legal order. On the one hand, the open-textured nature of some of the Union's primary norms – such as the obligation to secure free movement - facilitates the Court in interpreting them in a manner which (perhaps unintentionally) reduces the political space left for the Union's institutions under the regulatory competences.[188] Moreover, the introduction of the Charter as formal Union primary law has increased the prominence of fundamental rights discourse in the EU. On the other hand, the judicial development and elaboration of directly effective provisions profoundly impacts the existing framework. This is a subversion of the situation under the Treaty, which attributes to the political actors a (on a literal reading quite substantial) role to inform the scope of the Union's primary law objectives

[186] Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21 ELJ 460
[187] Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart Publishing, 2000)
[188] 'As a traité cadre, the [TFEU] provides no more than a framework:' Tridimas, *The General Principles of EU Law* (OUP, 2006). To some the vague nature of the provisions calls for judicial intervention: its provisions are broadly drafted, vesting the Court with wide powers to develop a 'common law' that prevents constitutional or legislative gaps from impeding the achievement of Union objectives. See, e.g., Lenaerts, 'Federalism and the rule of law: Perspectives from the European Court of Justice' (2010) 33 Fordham International Law Journal 1338.

through a framework of regulatory competences. And, even if in principle such interpretations can be altered through legislation in purely legal terms, legislative provisions are still potentially subject to judicial interpretation and even perhaps annulment: so the judicial vision of directly effective primary law may end up conditioning the legislature's discretion.[189] This is a consequence of understanding the interactions in this context purely as a matter of the relationship between Union primary law and Union secondary law.

This chapter reveals that the 'over-constitutionalised' nature of Union law is to a great extent a *product* of the role of the Court in the 'constitutionalisation' of the Treaties, with the introduction of far-reaching obligations under directly effective norms.[190] Identifying the free movement provisions and the general principles of Union law as directly effective has significantly affected the Treaty framework on the responsibility for developing the internal market and for ensuring equal treatment. The resultant changing dynamic between the Union's political branches (on the one hand) and the Court (on the other hand) is marked.[191] Indeed, through the medium of direct effect the construction of the definitional framework of certain Union primary norms is at least partly transferred from the Union legislature to the judiciary.

This therefore exposes the difficulties when seeking to approach the main research question in this chapter: as exploring a possible hierarchy within Union primary law. It is beyond doubt that the Court has a role in the interpretation and judicial review of Union law. Indeed, in reviewing secondary legislation the Treaty affords the Court a role in assessing the compliance of such legislation with the Treaties. That the Court is frequently criticised for its liberal use of its authority is not necessarily surprising.[192] After all, the problems with substantive judicial review (and its possibly expansive nature) are familiar to most domestic constitutional lawyers.[193] But in the Union context there are specific problems which must be grappled with in order fully to understand the present situation. Indeed, the breadth of what constitutes 'higher status' Union primary law makes this assessment more difficult: what must the Union

[189] For example, there is a need to account for the practical political hurdles involved in initiating the legislative process and obtaining a broad enough political consensus to satisfy the relevant thresholds.
[190] See similarly, Horsley, cited supra n.7.
[191] Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21(4) ELJ 460.
[192] E.g. Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff, 1986), Neill, *The European Court of Justice: A Case Study in Judicial Activism* (European Policy Forum, 1995), Adams, de Waele, Meeusen, & Straetmans (Eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (2013, Hart Publishing).
[193] See, Tushnet, cited supra n.171.

legislature comply with, and what might this mean for its primary legal role under the competence provisions to inform the development of, and define the scope of, the Union's objectives?

It is the case from the analysis above that the task of assessing compliance with Union primary law includes an assessment of compliance with many 'second-order' principles developed and introduced by the Court on the basis of directly effective provisions. The breadth of what constitutes Union primary law in the view of the Court means that substantive policy choices become entrenched as they are often understood by the Court as 'constitutionally-mandated,' and thus inevitably enjoy an elevated legal status in the broader constitutional framework. And given the *accepted* hierarchy between Union primary law and Union secondary law, such developments are difficult to respond to through avenues which are deemed of a lesser hierarchical status. As a result, the Court is able (indirectly) to question the way that the Union political institutions' choose to exercise the competences conferred on them by the Treaty. This is despite the fact that the Treaty itself specifies that the Union's political institutions have a role to inform and to develop the detailed contents of Union rights and entitlements.

The nature of the Court's interpretations of directly effective obligations both in the absence or presence of legislation are revealing as to its law-making role in the Union framework. For example, 'in absence of Union legislation' – in cases like *Cassis* – the Court creates an impetus through the case law for legislative action to address differences in national laws that impede the development of the common market. But, through the principle of mutual recognition, the Court also reduces the need for Union-level legislation. Moreover, 'in the presence' of Union legislation the Court has made attempts to interpret legislative measures in accordance with its own view of directly effective primary law. If it is unable to do so it has other options, which are still informed by the Court's view about the contents and scope of Union primary law and the priority of the directly effective provisions: annulment or avoidance. Although this judicial 'power of suggestion' over what Union primary law should look like may not bind the Union's political institutions *per se,* there is evidence that the Union's

political institutions tend to codify and even further the Court's interpretations.[194] The way the Court interprets primary law – whether its specifications are actually binding or whether they are passively treated as such by the Union legislature – ultimately transfers the power to operationalise Union law to the judiciary.

7) Conclusion

This chapter illustrates that there is little evidence of any coherent conception of the role of the Court and the role of the Union's political institutions in the operationalisation of Union primary law. As a result, the appropriate relation between the Union's primary norms - the provisions on regulatory competence and directly effective obligations – is not easy to identify. This may well be a product of the accepted categorisation of these interactions in the literature (and implicitly in the case law) as a 'hierarchy' between Union primary and Union secondary law. Thus, an important source of constitutional uncertainty arising from the ambiguous nature of the relationship between the Union's 'primary legal sources' is overlooked.

On the face of it, the Treaty offers some guidance to suggest that the competence provisions are the superior source for operationalising the bare Union objectives in the Treaty. After all, the Treaty contains objectives which the Treaty envisages are to be concretised through the framework of regulatory competence. But, the Court has created a parallel system through which to give effect to the Union's objectives. Indeed, through the medium of direct effect bare principles in the Treaties can be fleshed out through the case law. As a result, new questions and potential problems are raised for an inquiry into the 'hierarchy of norms.' The Treaty makes no reference to directly effective provisions, but the Court recognises such provisions as Union primary law and the literature tends to accept this as such. Without a formal benchmark, the Court is capable of drawing various different inferences from the 'absence' and the 'presence' of secondary legislation to justify its conclusions in particular cases on the basis of its interpretation of directly effective obligations. For the most part, the Court's interpretations become central and influence the ability of

[194] See, especially, the Citizens' Rights Directive and the Patients' Rights Directives which are mostly codifications of the case law (with a few exceptions.) E.g. the adoption of the Directive on cross-border care is a direct outcome of judicial decisions, starting with Case C-158/96, *Kohll,* EU:C:1998:171.

the Union legislature successfully to act to shape the Union's policy trajectory in the operationalisation of Union primary law.

In terms of the central question of the thesis about *how* the Union's primary legal sources are organised, the Court is not always clear about how the Union's direct obligations and the regulatory competences relates to one another. Indeed there is evidence of an inconsistent approach in the case law. However, on the whole is the situation is framed as a hierarchy between Union primary and Union secondary law. The Court's tendency to frame these situations in this manner immediately places the competence provisions at a disadvantage. And, as a result, the Court seems to favour its own interpretation of directly effective provisions over and above any stipulations of the Union's political actors. This means that the Court – and the broader literature – does not consider important prior questions: *why* do the Union's political institutions need to comply with all of the prescriptions from the Court's interpretation of the directly effective provisions; *who* is in control of the prescriptions and thus the operationalisation of Union primary law?

These last questions feed into the analysis of the second central question of the thesis: *what* are the constitutional implications of the relationship between the Union's direct obligations and the Union's competence provisions within the Union legal order? This chapter argues that relegating many of the disputes in this context to an analysis of the relationship between Union primary and secondary law elides questions about the relationship between the Union's primary legal sources. This is not to say that Union secondary legislation should not be assessed for compliance with Union primary law, the question is about the contents and scope of the 'higher' primary principles. The current practice has important implications for the horizontal allocation of powers across the Union. Indeed, the process ultimately reduces the discretion of the Union's political institutions (as explicitly acknowledged in the Treaty) and, at the same time, reveals wider problems about substantive judicial review.

It is clear that there is significant potential for tension when it comes to demarcating the proper realm for political judgment and the appropriate place of primary (and directly effective) Treaty rules in guiding the development of the internal market and other of the Union's primary law objectives. From the examples explored, the situation at present seems to subvert the traditional role and understanding of the competence

provisions as existing to allow the Union's political institutions to *inform* the contents of Union primary law, to a place whereby such competences are available to *implement* the 'contents' of directly effective primary law as it is interpreted by the Court. As has been discussed, the 'contents' of Union primary law are wide-reaching: encompassing what, in many domestic frameworks, are policy choices designed to adapt to changing circumstances. In the Union context, certain policy choices now seem ingrained as principles of Union primary law, particularly through the Court's approach. This ultimately reduces the room for the Union legal framework to adapt to changing political circumstances: instead, politics is reduced to an execution of the constitutional prescriptions laid down by the Court in the case law. This is a result of exploring and perceiving of such issues as a simple hierarchy between Union primary and Union secondary law.

The chapter very clearly reinforces the three findings of the thesis. First, there is no clear 'hierarchy of norms' in this context: at times, the Court acknowledges the value of the regulatory competence provisions in the Treaty in cases like *Cassis* and thus leaves a role for the Union's political actors. Yet, at other times, the Court overlooks the hierarchy issues entirely, treating cases instead as a matter of assessing whether and how secondary legislation complies with Union primary principles. Overall, the Court – although not always consistently – seems to favour its interpretation of the directly effective provisions. Whilst its interpretations are not always afforded an explicit priority, the result of the vast majority of the case law is to, in more subtle ways, ensure its appraisal takes precedence.

This ties in to the second key finding of the thesis: the expanding scope of Union primary law. The proliferation of Union primary law - particularly the elaboration of directly effective provisions by the Court - has led to a situation where clear policy choices are enshrined in the Treaties through judicial interpretation. This is the case both with the general principles of Union law and with the free movement provisions. After all, such choices are not written into the Treaties by the Member States and the structure of the Treaties suggests that such choices are left to the Union's political actors. Indeed, our analysis of the judicial ordering of Union primary norms in this context is premised on a series of prior judicial choices about the nature of the Union legal order. Indeed, it is through the introduction of direct effect that the Court has constructed a parallel framework for operationalising Union primary law. On the one

hand, the Court has established certain Union primary norms can produce direct effect, so that there is generally no need for intervention by the Union's political institutions to make them legally 'complete.' But the institutions also have competence in these areas which was, at least originally, designed to enable them to inform and operationalise the primary law provisions, rather than to comply with the judicial conception of such principles. This latter point is almost entirely overlooked under the current judicial approach to managing the tensions between directly effective provisions and Union competences.

These two findings taken together reinforce the third key finding of the thesis: the central role of the Court. On one level, the Court's formative role in recognising the Treaty provisions (and other primary norms) as directly effective is crucial in this context. Indeed, according to the Treaty the free movement provisions are merely programmatic – it is the Court that has provided them with their substance. The authority of the Court to do so stems from the findings that such Treaty provisions are capable of producing direct effect. Even if the directly effective nature of such provisions is accepted, it does not extinguish the need to account for the interactions between norms that are (without any indications or explanations to the contrary) of apparently equal value. In this context, we see the Court almost as a *cause* of the 'hierarchy of norms' problems – indeed, the very creation of directly effective provisions overlooked (and their development continues to overlook) the primary legal basis of the regulatory competences, such that now secondary legislation must comply with directly effective primary legal prescriptions. Therefore, it is not that the review of the 'hierarchy of norms' in this context exposes the centrality of the Court; it is that the Court exposes the 'hierarchy of norms' as a problem for the Union legal order. On a second level, it is clear that the Court has a central role in the operationalisation of Union law vis-à-vis political actors. On a third level, the findings therefore feed into debates about the legitimacy of the Court and its policy-making role. This is particularly true of its actions that are contrary to the Treaty framework.[195]

[195] See, also, Horsley, cited supra n.7.

Chapter two: the relations between the Union's primary legal sources in the context of the enforcement of Union law

This chapter explores the interactions between different sources of Union primary law in the context of *the enforcement of Union law*. The Union's primary sources at stake are the general principles of Union law and the foundational principles of Union law which underpin the effective enforcement of EU law. The foundational principles include primacy and direct effect, and thus form part of the judicial *foundations* responsible for the transformation of the Union legal order.[1] The interactions between these sources of Union primary law are important as it is possible that they could give rise to contrasting legal consequences, which need to be reconciled in the context of a substantive dispute. As a result, the chapter explores *how* the Court frames the relations between Union primary norms in the context of the enforcement of Union law and identifies two different models to this effect. The chapter then assesses *what* the implications of the way the Court structures the relations, and juxtaposes two different models, are for the Union's constitutional architecture.

This chapter essentially assesses a procedural question: can 'the law at the EU level' be *enforced at the national level?* To this effect, the Court must consider whether, and if so how, it is possible to qualify the enforcement of EU law obligations by reference to (possibly) 'higher' or more fundamental interests. We are particularly concerned with the interactions between the foundational obligations of Union law (direct effect and primacy) and the general principle of legal certainty. Both sources are recognised as holding a place within the Union's primary law framework, be it of a written or an unwritten nature.[2] But it is not clear how to resolve any tensions between these norms should they interact. The chapter seeks to identify *how* - or the techniques through which - the Court determines the relationship between these sources.

The chapter captures two framing models which reflect *how* the Court addresses such disputes. The first model is referred to as the 'Union-national' frame. Essentially, under this model, the compatibility issue is treated as though it arises 'externally' from the national legal order between a Union interest (in the enforcement of Union law)

[1] See, e.g., Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403
[2] The Court recognised that legal certainty is protected as a general principle of Union law in Joined Case 42/59 and 49/59, *SNUPAT*, EU:C:1961:5. Primacy is regarded as one of the foundational principles of the EU legal order, from its conception in Case 6/64, *Costa v ENEL*, EU:C:1964:66.

and a national interest (in the non-enforcement of Union law.) Here national choices are accommodated within the Union framework as far as is possible. The second model is termed the 'Union-Union' frame. This is due to the fact that the compatibility issue between Union and national law is treated as 'internal' to the Union legal order, as it involves two competing Union primary interests and the Court's approach provides an outcome which is to be implemented at the national level. Although both of these models are identifiable in the case law, it is difficult to predict when either will be employed by the Court. Moreover, when considering the potential 'factors' that may have influenced the way that the Court structures the relations between these primary norms, none offer a convincing picture of the reasons for, and drivers behind, the existence and/or use of the models. It therefore becomes even more important for the chapter to explore *what* the constitutional implications of the way the Court approaches these disputes are for the Union legal order.

Indeed, the judicial 'choice' between the different methods poses a series of inter-related constitutional questions and tells us something about the *three key lessons* of the thesis. To start with *the first key lesson*, similar to chapter one, the chapter confirms that there is no clear formal 'hierarchy' between the foundational principles and legal certainty, not least due to the unwritten nature of such sources. It is therefore for the Court (without any determinative benchmark) to arrange these norms and to reveal, in its view, the appropriate relationship between the primary legal sources. In terms of the *second key lesson*, the reason behind both the interest in these interactions and their prevalence within the Union legal order relates to the increasingly broad category of norms recognised as Union primary law and the Court's broad understanding of the scope of such norms. *The final lesson* is that the Court assumes a central role in organising Union primary law in this context. Indeed, the manner in which Union primary law is arranged by the Court points to a particular conception of how power ought to be allocated for the enforcement of Union law: with a priority falling to the Union Court. Such an important issue quite naturally demands that the Court articulate a cogent rationale for its approach. The finding that the Court is not consistent in its approach is interesting, since its approach affects the level of discretion left to the national legal order on a vertical level in relation to the enforcement of Union law.

The chapter is structured as follows. Section 1 provides an overview to the inquiry about the relationship between the foundational principles of Union law and the

general principles of Union law. It introduces the literature on this issue, and it aims to conceptualise the key legal issues. Section 2 moves on to discuss the first key question of the thesis: *how* are the sources of Union primary law arranged in this context? Section 3 aims to consider the second key question of the thesis: *what* are the implications of the findings from a constitutional perspective? Section 4 serves as a brief overview of the key findings of this chapter which are interesting for the thesis as a whole.

1) The basic framework: setting out the relevant framing 'issues'

By way of background, with the interactions between the unwritten sources *inter se* there is no explicit hierarchy between any of these materials - or indeed any internal benchmarks to assist in their reconciliation - that can be discerned from the Treaty. Yet, the different legal consequences of these norms give rise to a significant potential for tension in practice. For example, the general principle of legal certainty might lean in favour of preserving the finality of a decision at the national level, irrespective of its incompatibility with EU law. Yet, that outcome could work to frustrate the enforcement of Union law, given that primacy mandates that all inconsistent national law must be set aside in favour of EU law.[3] An important question therefore relates to the status of both the foundational obligations and the general principle of legal certainty within the Union legal order. For the Court, legal certainty is not absolute.[4] But, it is less clear what the position of the foundational obligations is in relation to other values that are situated at the level of primary law. For instance, the Court has only ever implicitly suggested that there may be a more conditional understanding of the principle of primacy in specific cases.[5] As the reconciliation of the interactions between the foundational obligations and the general principles of Union law is completely unresolved on a textual level, it is a matter that requires practical resolution. Therefore, the identification of the template employed by the Court in order to organise Union primary law is important in this context.

[3] See the case law on the finality of administrative decisions, discussed pgs.109-113.
[4] Joined Case 42/59 and 49/59, *SNUPAT*, EU:C:1961:5.
[5] E.g., in Case C-108/01, *Consorzio del Prosciutto di Parma*, EU:C:2003:296, the Court held that valid EU Regulations cannot be enforced within the national legal order where they have not been correctly published. The Court does not suggest that legal certainty modifies the full effects of primacy, but this is the logical implication of its conclusions. See, also, the 'implied' right to derogate from commitments under directives recognized in Case C-57/89, *Commission* v *Germany*, EU:C:1991:89.

1.1) The literature on the relationship between the general principles of Union law and Union obligations

The existing literature is relevant on two levels: first, to conceptualise the relevant interactions and second to offer a critique of the current approach of the Union to managing such interactions.

First, the literature offers possible ways to conceptualise the relevant interactions. The theories are primarily related to the nature of the Union's primary law rules or principles. So, for example, through the work of Alexy it is possible to distinguish the possible effects of the general principles from specific rules or obligations. General principles, unlike rules, do not usually require one specific answer, but instead provide a direction and a justification for different sets of answers.[6] Under this appraisal, the foundational obligations under Union law should exert stronger legal effects than the general principles of Union law given their specificity compared to the general principles of Union law. However, it is yet to be explored in a comprehensive manner whether that is in fact the case in the Union context.

Second, concerns have been expressed about how the nature and role of the principle of primacy as a foundation of the Union legal order (at least for the Court) may be undermined by the application of the principle of legal certainty.[7] These concerns relate to the (possible) severity of the effects that may materialise when the Court attempts to resolve the tensions between these norms. For example, through the application of legal certainty situations which are 'incompatible' with EU law might be maintained in the national legal order; an individual may be unable to rely on the interpretation of EU law delivered by the Court; the national court may not have to fulfil its obligation to ensure the correct application of EU law; and the effective judicial protection of rights derived under the direct effect of EU law may not be adequately secured, especially as the non-imposition of an obligation under EU law may correspondingly deprive an individual of their rights. Overall, the practical effect of such instances might be thought of as damaging: in some circumstances, a national

[6] See, the distinction between rules and principles and their legal effects in Alexy, *A Theory of Constitutional Rights* (OUP, 2010).
[7] See, the Opinion of Advocate General Bot in Case C-409/06, *Winner Wetten*, EU:C:2010:38. Concern was expressed over allowing for an exception on a temporary basis to the setting aside of a national law that was deemed to be incompatible with the free movement provisions due to the Union's foundational principles including primacy, direct effect and effective judicial protection.

judge can effectively get the law wrong and a national procedural provision/practice can have the effect of perpetuating a situation that is incompatible with EU law, whilst those individuals that might be affected by the incompatibility must live with the consequences.[8]

Such critiques are convincing to some extent: they reflect discrete problems within themselves as regards the organisation of the Union primary law. However, the focus of the contribution is not to focus on discrete issues when Union primary norms interact. Nor is the purpose to argue in support of a particular normative position: for example that primacy should receive greater protection in the legal order owing to its assumed 'special' or foundational status as a specific rule in the Union legal order. The focus rather differently lies with *how the Court* constructs the relations between Union sources when attempting to resolve any tensions between them in practice and *what* the implications of its appraisal may be from a constitutional perspective. The findings may serve to allay some of the concerns expressed in specific instances by taking into consideration the constitutional architecture as a whole.

1.2) Conceptualizing the legal issues on the basis of the case law: the 'framing' question

It is useful to provide a brief outline of the situations where the foundational obligations and the general principle of legal certainty interact with each other in the context of the enforcement of Union law.

1.2.1) The determination of whether EU law can be enforced within the national legal order: the foundational principles vs. legal certainty

The main focus of this chapter is the determination of whether Union law can be 'enforced' within the national legal order. In these circumstances, having established that national law is incompatible with the substantive requirements of EU law and that the Member State is in breach of its EU law obligations, the next question that confronts the Court concerns the possible *legal effects* of the 'breach' at the national level. Union primary norms frequently constitute opposing forces in the case law, so

[8] However, where EU law cannot be enforced in full the individual may obtain protection of their rights indirectly by obtaining reparation from the State. This is the case where EU law cannot be enforced due to the absence of horizontal direct effect of Directives, or where the national rules on res judicata prevent the national court from reopening a final decision in order to correctly apply EU law. See, e.g., Case C-69/14, *Târşia,* EU:C:2015:662.

that the Court has the task of balancing the tensions between legality and legal certainty, and determining the weight that should be accorded to those interests.

In order to ascertain whether EU law can be enforced at the national level, the Court interprets the general principles of Union law, in particular legal certainty, in light of the foundational principles which furnish the Member States with procedural obligations in the enforcement of EU law. As a result, the Court might be inclined to 'tolerate' certain breaches of Union law in the interests of legal certainty, which may (provisionally) assume priority over the foundational obligations and the enforcement of Union law. The Court's analysis has no bearing on the substance of 'the law' itself: instead, the assessment is concerned with whether there are any obstacles to its enforcement, and whether such obstacles are permissible under EU primary law. Therefore, the assessment of whether the law can be enforced is not a question of the validity of a Union norm, but an interpretive question about whether it should be enforced in particular circumstances. Moreover, the Court strives to limit the consequences of an accepted breach and its resultant obligations for the national courts in light of legal certainty, only insofar as is necessary and in a way which seeks to reconcile that result with the Union's foundational obligations. Thus, a common thread in the case law is that the negative consequences for the correct application of EU law should only be able to persist for a temporary period: eventually, the 'substantive' law ought to be enforced within the national legal order.[9]

Concerns in relation to safeguarding legal certainty may be reflected exclusively at the EU level, or they may be reflected within the national legal order. Starting with the protection of legal certainty in the national legal order, the general position as regards the 'enforcement' of Union law is that a rule as interpreted by the Court must be applied even to legal relationships which arose or were formed before the Court gave its ruling on the question on interpretation.[10] However, *Kühne & Heitz* raised the question of whether that obligation must be complied with, notwithstanding that an administrative decision had become final, in order to take account of a preliminary

[9] E.g. Case 161/06, *Skoma-Lux*, EU:C:2007:773 concerned the validity of a regulation which had not been published in the language of a Member State. The fact that the regulation is not enforceable against individuals in a Member State in the language of which it has not been published would have no bearing on the fact that its provisions are binding on the Member State concerned. The effect of the ruling would be to delay the enforceability of the obligations which a Regulation imposes on individuals in a Member State until those individuals can acquaint themselves with it in an official manner.
[10] Case C-50/96, *Deutsche Telekom*, EU:C:2000:72

ruling by the Court.[11] The Court responded by outlining that legal certainty is one of the general principles recognised by Union law, to which the finality of an administrative decision contributes. It therefore follows that Union law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final.

In other situations, the Court has allowed for a suspension of the obligation incumbent on the national court to ensure the correct application of EU law (by complying with the Court's interpretation), in the interests of legal certainty. Such interests tend to be reflected in national procedural norms. Thus, rules which have the aim of protecting the principle of legal certainty and to ensure the stability of legal relations could be upheld as compatible with EU law, even though they may limit the opportunities for individuals to enforce EU law. This includes national rules on *res judicata*, and limitation periods. For instance, the normal effect of the expiry of limitation periods under national law – which has been accepted by the Court – is to deprive the applicant of any possibility of asserting their rights under EU law, in the interests of legal certainty.[12] Moreover, as regards rules on *res judicata*, the Court is prepared, in some circumstances, to suspend the full application of EU law so as to allow such rules to remain in force, even when they serve to protect an incompatible national judgment from being reviewed, as it has effectively become 'untouchable' under national law.[13]

Another relevant configuration as regards the compatibility of national practices with EU law is when the Court gives an interpretation of EU law which the Member States argue should be limited as regards its temporal effects, due to overriding considerations of legal certainty.[14] In these circumstances, the general principle of legal certainty may be used to allow an (incompatible) national norm (or practice) to continue to apply, even when it might undermine the effectiveness of an EU obligation or right. Thus, the Court might be moved to restrict the possibility, in principle, for an individual to rely on a provision that the Court has interpreted with a view to calling into question legal relationships established in good faith, and as a consequence

[11] Case C-453/00, *Kühne & Heitz*, EU:C:2004:17
[12] See, Case C-63/08, *Pontin*, EU:C:2009:666 and Case C-69/10, *Samba Diouf*, EU:C:2011:524. This is subject to compliance with the principles of effectiveness and equivalence; Case C-640/13 *Commission v UK*, EU:C:2014:2457 paras 31-35, Case C-362/12 *Test Claimants in the Franked Investment Income Group Litigation*, EU:C:2013:834, para 35.
[13] See cases such as Case C-69/14, *Târşia,* EU:C:2015:662.
[14] The Court has been able to limit the (retroactive) effects of a judgment/preliminary reference in time (despite non-compliance with Treaty obligations), and to restrict the ability of individuals to rely on its interpretation of the Treaty from a preliminary reference, in the interests of legal certainty; Case C-82/12, *Transportes Jordi Besora*, EU:C:2014:108.

allowing for derogations from the principles of direct effect and primacy for a temporary period. So, despite the Court having identified instances of non-compliance with Treaty obligations at the national level, it is possible to limit the retroactive effects of its judgment in time in the interests of legal certainty. For instance, in *UNIS* the Court held that the interest in preventing legal uncertainty may justify putting the stability of contractual arrangements already in the course of performance in the area of public procurement *before* the observance of EU law.[15]

There are also a set of interactions between legal certainty and the obligations underpinning the enforcement of Union law that are 'internal' to the EU legal order. For example, legal certainty is one of the proffered reasons for the absence of horizontal direct effect for Directives prior to their implementation in the national legal order.[16] Moreover, even though an EU act may be unlawful in annulment proceedings, the Court can decide that some of its legal consequences shall nevertheless lawfully take effect. On the basis of Article 264(2) TFEU the Court is able to suspend in time the effects of an annulment of EU secondary legislation, until such a time as the legal 'gap' is filled by subsequent legislative action.[17] A further example is where the Court seeks to ascertain whether, and if so when, a Member State may apply provisions of EU legislation against an individual in order to impose obligations upon them *before* they have been published in their official language. The Court has the task of determining the consequences of non-publication of EU legislation in the official language(s) of the Union. On the one hand, the publication of secondary law in the Official Journal does acquire a particular significance in the legal order: the principle of legal certainty requires that individuals who are subject to the law are able to acquaint themselves with the applicable rules. On the other hand, it is in the interests of the effective enforcement of EU law that valid EU legislation be enforced against individuals from the date of its adoption.[18] The Court has balanced these interests so

[15] Case C-25/14, *UNIS*, EU:C:2015:82
[16] See, Case C-201/02, *Delena Wells*, EU:C:2003:502.
[17] See the Opinion of AG Sharpston in Case C-660/13, *Council v Commission*, EU:C:2015:787 who explained that the Court's ability to exercise its discretion pursuant to Article 264(2) TFEU to maintain the effects of decision until such time as it is replaced can be based on considerations of legal certainty.
[18] See, the Opinion of Advocate General Kokott in Case C-161/06, *Skoma-Lux*, EU:C:2007:525: 'to make the validity of acts of general application contingent on their correct publication in all languages would expose their effectiveness to a *disproportionate risk.*'

as to, on the whole,[19] hold that the proper publication of EU legislation is a condition for its enforceability.[20]

In these circumstances, the Court is open to accepting that there is an incompatibility with EU law arising under a national (or even an EU) law or practice. But it is nevertheless then inclined to moderate or to suspend the normal legal consequences of a breach of EU law which are mandated by the foundational principles. The common theme is that a breach of EU law may therefore essentially be protected, and its effects mitigated, by the application of another primary legal source: the general principle of legal certainty. This has the result of restricting the opportunities for individuals to rely on EU law before the national court.

1.3) How does the Court arrange the general principles of Union law and the foundational principles?

In order to explore how the Court makes the 'determination' of whether EU law can be enforced within the national legal order, it is necessary to analyse the case law, and if possible, to identify any common patterns of the judicial practice. Given the nature of Union law - and its system of decentralised enforcement - of particular significance is how the Court attempts to guide the national authorities in the resolution of tensions between the competing values protected within the EU legal order. For example, is the Court prescriptive as to whether national law is compatible with EU law? Or, on the other hand, does the Court seek to encourage the national authorities to conduct their own assessment by taking account of the relevant interests, and by offering a bare structure for the assessment from Union primary law?

1.3.1) Explanation of the two models

[19] There are some exceptions to this general stance. See the Court's explanation of this point in Case 161/06, *Skoma-Lux*, EU:C:2007:773. The Member States are not, under EU law, obliged to call in question the administrative or judicial decisions taken on the basis of such rules where those decisions have become definitive under the applicable national rules. That would be otherwise only in exceptional circumstances where there have been administrative or judicial decisions, in particular of a coercive nature, which would compromise fundamental rights.

[20] This finding does not affect the validity of the legislation. For example, the Court has derived rights for Turkish workers from the rules of Decision 1180 of the EEC-Turkey Association Council. The Court found in Case C-192/89, *Sevince*, EU:C:1990:322 at [24] that although non-publication of those decisions may prevent their imposing obligations on a private individual, that individual is not thereby deprived of the power to invoke, in dealings with a public authority, the rights which those decisions confer on him. Thus, since an individual may thus also rely on unpublished acts of EU law – at least vis-à-vis the State – publication is not a requirement for their validity.

This section briefly introduces the two framing 'models' that can be inferred from the case law as to the relationship between the Union's foundational principles and legal certainty. These models capture how the Court has chosen to approach its assessment of whether EU law can be enforced within the national legal order. Rather than constructing 'abstract' models that could (or ought to) be employed by the Court in order to address the enforcement issue, the focus of this piece lies with conceptualising the approach(es) that have been adopted in practice. It is these methods that give rise to the most interesting questions and have the most pertinent implications as regards the relationship between Union primary law and, more generally, for EU constitutional law.

On the one hand, the Court seems to frame its analysis through what is described as the 'Union-national' model in order to reach a conclusion on the enforcement of Union law. The restriction of a Union obligation stems from national law, although the restrictive rules or practices may reflect a primary Union interest, such as the desire to safeguard legal certainty. Under this approach, the Court structures its determination of whether the choice to protect a particular interest under national law can be accommodated within the EU framework, even though it might restrict an EU law obligation.[21] Overall, it is the *national choice* to protect an interest that is assessed for its compatibility with a Union obligation. The Court's role is essentially supervisory, insofar as it 'vets' national rules before they can be understood as a possible justification for a restriction of a Union obligation. The final assessment about whether such rules are compatible with EU law is usually deferred to the national court, which assumes the task of reconciling the relevant interests in accordance with the general principles of Union law, in particular equivalence and effectiveness.[22] This is a 'bottom-up' model as the exercise is largely conducted on an external basis: the national courts assess whether the national rules or practices comply with the (generally negative) standards of EU law.[23] There is no absolute requirement or

[21] This approach has been adopted in the case of national procedural time limits, as in order for those limits to comply with the principle of effectiveness they must constitute a reasonable period of time. See, e.g., Case C-78/98, *Preston,* EU:C:2000:247.
[22] E.g. the Court has signalled that national courts should be trusted to deal with the conditions for establishing State liability. In Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur SA v Germany/ex p. Factortame a.o.,* EU:C:1996:79.
the Court confirmed national causation rules apply (subject to equivalence and effectiveness). Moreover, reparation will be made in accordance with national rules on liability (e.g. damages, procedure) subject to the EU principles: Case C-94-5/95 *Bonifaci* ECLI:EU:C:1997:348.
[23] As regards national rules on the enforcement of EU rights and obligations, the traditional approach is considered to impose only minimum 'negative' standards. See, Eliantonio, *Europeanisation of Administrative Justice? The Influence of the ECJ's Case Law in Italy, Germany and England* (Groningen: Europa Law Publishing, 2008), p.295.

standard of behaviour required of the national legal order on the basis of an 'internal' determination of the balance between the interests at the Union level.

However, the judicial approach in other cases is better explained through a second framing model: the 'Union-Union' model. This model encapsulates a largely 'internal' balancing exercise between Union primary norms to determine when one rule or principle may be offset by another. The compatibility issue is almost treated as one that is 'internal' to the Union legal order and a problem which can be dealt with by the Court as it involves two Union primary law interests. The outcome is determined through a centralised assessment of what primary law interest should take priority in a particular set of circumstances and is to be *implemented* at the national level. By contrast to the first model, under this understanding the Court essentially treats (possibly diverse) national rules as though they are of marginal importance to its overall assessment. In so doing, any national concerns – related to legal certainty – are essentially translated into Union primary law concerns. As the nature of the determination is 'internal' to the Union, it is possible that the Court may recognise uniform criteria for all the Member States for the enforcement of Union law within the national legal order. The result is that the Court has a monopoly over determining the relations between the foundational principles and legal certainty. As such this is a largely 'top-down' model: the assessment occurs at the Union level and the 'pre-determined' outcome must be complied with at the national level.

1.4) What are the constitutional consequences of the Court's approach?

The distinction between the models is important for a number of reasons. After all, as these models originate from the case law it could at least be expected that the Court is aware of the relevant conceptual differences between them, particularly due to their different outcomes and constitutional implications.

First, the way in which the interactions between Union primary norms are dealt with at the Union level feeds into the overall legitimacy of the adjudicatory process.[24] This theme touches upon the question of *which actor(s)* determine(s) (or ought to determine) the relationship between the Union's primary norms. It is closely related to the discussion of the third thematic finding of the thesis about the role of the Court

[24] This is a common theme in the literature of the role of the Court in the EU see, e.g., Horsley, *The Court of Justice of the European Union as an Institutional Actor* (CUP, 2018)

both on the vertical level - the relations between the EU and its Member States - and on the horizontal level - the relations between the Court and the Union's political institutions. It is particularly important to consider how much control the Court retains, and thus its centrality, in the organisation of Union primary norms vis-à-vis the Union's political actors. This is all the more pervasive due to the *nature of primary law*: if a situation is categorised as a matter of primary law, or if the Court assumes control over the exercise of defining primary law, then it becomes difficult to construct a response to an interpretation or an outcome which is considered unsatisfactory at the domestic level, or indeed by the Union's political institutions.[25] In some situations at least, this dissatisfaction would have to receive its expression through amendment of the Treaty.[26] Thus, the discretion left to the political actors under the Treaties may be curtailed in practice.

Second, the methodology that the Court employs has a bearing on the predictability of practical legal outcomes. This depends upon the consistency of the case law, and the articulation of a clear rationale for the use of either framing model on the part of the Court. After all, the way in which these legal issues are addressed may have the effect of determining the standards against which national measures or practices are assessed in the context of the compatibility dispute. On the one hand, an approach which aligns with the 'Union-Union' frame may lead to a situation where there is a positive duty to achieve a certain result in the national legal order on the basis of how Union primary norms have been organised by the Court. On the other hand, an approach which more closely reflects the 'Union-national' model would seem to at most lead to a set of negative obligations, with which existing national standards must comply. Under the latter circumstances, therefore, the national legal order only needs to exercise its (retained) discretion in accordance with a set of the minimum requirements under Union law.[27]

Third, the case law may shed light on whether there is a 'hierarchy of primary norms.' This allows us to consider the role that certain primary norms play in the legal order, at least from the perspective of the Court. In particular, the chapter explores whether

[25] See, the Proposal for the 'Monti II' Regulation discussed previously in Chapter 1, pg.57.
[26] There are examples of situations when Member States have responded to the Court's judgments, which they viewed unfavourably. See the 'Barber' Protocol discussed further pgs.195-197.
[27] For example, the effectiveness of EU law is supervised by EU and national courts. But it is for the national court to decide what the practical consequences are when a Member State fails to fulfil its obligations under EU law: Temple Lang, 'The Duties of National Courts under Community Constitutional Law' (1997) 22 ELRev 3

any norms are consistently placed on a higher footing than others in the context of the enforcement of Union law. It is also important to explore the consequences of a possible elevated status, including for example *the non-enforcement of Union rights and obligations* due to the 'suspensive' effects of legal certainty.

It is therefore clear that the judicial approach could have important implications not only as regards the question of the relations between the Union's primary legal sources, but also for EU constitutional law more generally.

2) <u>How does the Court structure the relations between the foundational obligations and the general principles of Union law?</u>

The case law illustrates that two balancing methodologies reflect the judicial approach in the majority of situations we are concerned with for the purposes of the enforcement of Union law. Yet, as will become clear, it is unpredictable on the basis of the available evidence when, and why, either will be followed in compatibility disputes of the same or of a similar nature. Predictably perhaps, in some circumstances, the Court seems to be uncertain itself of how to approach such issues so that the boundaries between the 'framing' models are quite blurred. It is therefore not possible to look for any concrete answers about what the position of the Court tells us about the relations between different primary norms, as it does not seem to be the case that it fully appreciates its methodological choices and their attendant consequences. Nevertheless, as the case law does demonstrate both models, they are useful to explore for their possible justification and also whether their use benefits from *any* degree of predictability.

2.1) Examples of the 'Union-national' frame

In the majority of cases, the Court appears to frame its assessment of the relations between the foundational principles and legal certainty in a way which aligns with the 'Union-national' model. In other words, it appears to view the matter as one of determining the validity of national law, rather than of providing a definition of Union primary law which must be implemented at the national level. Furthermore, it is important to explain the rationale underpinning, or the factors informing, the judicial choice to employ this framework. The rationale furnishes the analysis with a fairly durable basis upon which to scrutinise any departures from the traditional framework, as it has been understood by the Court.

2.1.1) The emergence of the 'Union-national' model in the case law

There are clear examples of the 'Union-national' framing model in the case law on the determination of whether 'EU law' may be enforced within the national legal order. This is to be distinguished from any 'limits' to the enforcement of Union law, or more specifically to the principle of primacy, that stem 'directly' from national constitutional law.[28] Such circumstances perhaps reflect a 'national-Union' understanding as regards the possibilities for qualifying the Union's foundational principles. This section considers the interactions between the general principle of legal certainty and the foundational principles, specifically in relation to national procedural rules that might reflect the interest in ensuring legal certainty but which may also present an obstacle to the enforcement of a Union obligation in the national legal order. Indeed, it is possible that procedural rules and/or practices might have the effect that certain substantive rights enjoyed under Union law cannot be fully exercised.

The Court's traditional approach to balancing the Union's enforcement principles, including primacy, and counter-veiling procedural concerns that exist at the national level, such as legal certainty, is informed by its decisions in *Rewe* and *Comet.*[29] These cases involved a challenge by an individual to recover charges which had been levied by the Member State unlawfully, but whose claim was rejected at the national level as procedural rules required such assessments to be challenged within one month, for reasons relating to legal certainty. The Court held that in the absence of legislation on procedural and remedial rules, the Member States remain free to set their own rules to ensure the effective enforcement of EU rights and obligations in their legal order.[30] As a result, the Member States acquire a considerable degree of discretion in the formulation of such rules. Still, and notwithstanding this presumption of national procedural autonomy, the general principles of Union law (effectiveness and equivalence)[31] and the Union's system of fundamental rights protection (e.g. right of

[28] This includes the German Constitutional Court in e.g., *Brunner v European Union Treaty (Maastricht)* BVerfG, 2 BvR 2134/92 and 2159/92 [1994] 1 C.M.L.R. 57, and the indications from the UK Supreme Court as to the possibility of refusing to enforce certain provisions or interpretations of Union law in *HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

[29] Case 33/76, *Rewe*, EU:C:1976:188, Case 45/76, *Comet*, EU:C:1976:191.

[30] The procedural realm is an area where due to the present state of EU law – particularly the legislative environment - restrictions on EU rights may stem from national law. Generally, there is no developed procedural system to which primacy can apply to: thus, the EU can only ensure minimum standards of protection.

[31] The principle of effectiveness aims to address the possibility that national systems of judicial protection falls short of standards of enforcement expected under EU law i.e. by virtue of rendering it impossible or excessively difficult for individuals

access to a court under Article 47 CFR) apply to national choices about the remedies and procedures for dealing with a breach of EU law.[32]

On the basis of this understanding, the Court has generally followed a consistent path in the context of the enforcement of Union law. Any limits which stem from Union law are merely 'negative,' such that Member States must ensure that their rules comply with the minimum standards of effectiveness and equivalence in the exercise of the discretion enjoyed under EU law.[33] This approach is reinforced by the treatment of national rules which through their application might be capable of limiting the opportunities to enforce EU law.[34] For example, the normal effect of the expiry of limitation periods under national law is to deprive the applicant of the possibility of asserting their rights under EU law, in the interests of legal certainty. This outcome has been accepted in cases such as *Fantask* and *Palmasani*: EU law does not prevent Member States from relying on limitation periods to resist claims based on EU law – even if the Member State is in breach of its obligations under the Treaty and/or Union legislation - on the proviso that the national choices comply with the general principles of equivalence and effectiveness.[35] It is therefore possible to accommodate national procedural standards, even if they differ. The role of the general principles of Union law is to mediate between the requirements of the Union and national legal orders, so as to determine whether they can work together. This is particularly true of the principle of effectiveness which is used in the context of the enforcement of Union law to assess whether a national interest - in securing legal certainty - can be reconciled with a primary law obligation in view of its potentially restrictive effects. Thus, legal certainty features in this context insofar as it reflects an interest that is pursued by national law, and not as an independent value of Union primary law.

to exercise their rights. The principle of equivalence ensures that standards of judicial protection at the domestic level are extended on an equal basis to benefit EU nationals as well as the Member State's own nationals.

[32] E.g., Case 222/84, *Johnston*, EU:C:1986:206; Case C-279/09, *DEB*, EU:C:2010:811; Case C-416/10, *Križan*, EU:C:2013:8; Case C-23/12, *Zakaria*, EU:C:2013:24; Case C-562/12, *Liivimaa Lihaveis*, EU:C:2014:2229; Case C-349/07, *Sopropé*, EU:C:2008:746; Case C-277/11, *MM*, EU:C:2012:744; Joined Cases C-129 & 130/13, *Kamino International Logistics*, EU:C:2014:2041.

[33] Where the national court finds that its remedies or procedural rules are not compatible with the requirements of effective judicial protection under Union law, then it will be obliged to resolve conflict by disapplying the incompatible provisions pursuant to principle of primacy.

[34] E.g., in Case C-78/98, *Preston*, EU:C:2000:247 the Court postulated that the 'reasonableness' of a limitation period – as assessed against the standard of effectiveness - should be examined not merely in the abstract but within its specific legal and factual context, including by reference to particular circumstances of each dispute. See, also, Case C-63/08, *Pontin*, EU:C:2009:666.

[35] Case C-188/95, *Fantask*, EU:C:1997:580, Case C-261/95, *Palmisani*, EU:C:1997:351.

This line of case law also offers an illustration of the 'procedural' routes favoured by the Court for ensuring that a balance is reached between potentially competing interests in the context of the enforcement of Union law. For example, when it comes to national remedies and procedures, it is typical for the Court to first assess whether the tensions between the requirements of legal certainty and the enforcement obligations can be resolved on the basis of the duty of consistent interpretation. Thus, it is left to the national court to make the final assessment between the competing claims.[36] The Court tends to rely on the principle of loyal co-operation in this regard, so as to avoid the need to make a determination over whether the relevant national rules are incompatible with EU law. It is arguable that the Court employs such an approach since it avoids the need to dictate a substantive outcome about the reconciliation between competing interests. Particularly in the area of procedures and remedies, in accordance with Article 4(3) TEU and Article 19 TEU, it is for the *Member States* to ensure the legal protection which individuals derive from the direct effect of Union law. The Court at most offers a set of structural guidelines, including the relevant legal principles, so the national court has the task of conducting the assessment and striking the balance between the various interests.[37]

Overall, it is usual for the Court when it is faced with a national procedural rule that has been found to be in conflict with an EU law obligation to limit its inquiry to an assessment of whether that rule complies with the effectiveness and equivalence of EU law. This is confirmed by a series of recent cases, through which the Court relies on the format of national procedural competence subject only to the modifications that might stem from effectiveness and equivalence.[38] Only where these rules present unreasonable restrictions to the effective enforcement of EU law should they be set aside by the national court by virtue of the principle of primacy. The way the Court deals with the tensions between the enforcement of Union law and legal certainty is framed as a matter of balancing, on the one hand, the principles of respect for national procedural autonomy (and legal certainty), and on the other hand the need for the

[36] See Case C-505/14 *Klausner Holz*, EU:C:2015:742 concerning national rules on *res judicata*. The Court explained that the national rules may be interpreted consistently with EU law to avoid such rules obstructing the enforcement of the EU law as regards State aid matters. See, also, Case C-282/10, *Dominguez*, EU:C:2012:33 where the Court explained that even though a Directive may not produce direct effect in the national legal order, any conflict between the domestic provisions and the Directive must be resolved on the basis of consistent interpretation.

[37] E.g. Case C-120/97, *Upjohn*, EU:C:1999:14.

[38] See Case C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini* EU:C:2010:146, at [67]; and Case C-69/10 *Samba Diouf* EU:C:2011: 524 at [70]; Case C‑213/13, *Impresa Pizzarotti*, EU:C:2014:2067; Case C‑69/14 *Târşia*, EU:C:2015:662; Case C-505/14 *Klausner Holz*, EU:C:2015:742.

effective protection of EU rights. Thus, the Court sets out the general principles that ought to be respected, whilst the task of reaching a balance between them is left to the national courts. It is important to note that legal certainty is not depicted as a competing primary law interest under this approach: it is rather situated in the context of national procedural autonomy as an interest that may be (justifiably) protected at the national level.[39]

2.1.2) What governing assumptions underpin the 'Union-national' model?

It is possible to note two key consequences of this paradigm 'Union-national' approach. First, it follows a largely consistent formula for addressing the potential 'obstructions' stemming from national law to the enforcement obligations under EU law. The path followed is to establish whether the national rule is capable of constituting a restriction of an otherwise binding Union obligation. The national rules or practices which have been classified as restrictions in this context may be open to justification and/or acceptance under Union law, given that they may safeguard legal certainty.[40] Moreover, it is usually left to the national court to determine whether the national rules – and the choices they embody - comply with effectiveness and equivalence as general principles of Union law. It is important here that the principle of legal certainty forms part of the effectiveness assessment. Indeed, counter-veiling interests, such as legal certainty, are 'triggered' (or made relevant) by the national rules and practices, and they appear to have no autonomous significance of their own on an abstract level. The role of the general principles of Union law, most notably effectiveness, is to mediate between the requirements of national and EU law, and to help to determine whether and when the national interest (in safeguarding legal certainty) outweighs the general EU interest (in the enforcement of Union law.) This methodology seems at most 'structural,' as it sets out guidelines for the national court, rather than any general rules that have been determined at the Union level by the Court.

[39] See also the interactions between the free movement provisions and fundamental rights. The Court in Case C-36/02, *Omega*, EU:C:2004:614 found that fundamental rights may provide a justification for a restriction to the free movement obligations. Like with the principle of effectiveness, for the assessment of whether the national rules are proportionate in view of their restrictive effects it would not be 'indispensable… for the restrictive measure to correspond to a conception shared by all Member State' as regards the precise way in which the fundamental right is to be protected.' So although fundamental rights protection under national law may fall under the scrutiny of the Court, the contents and standard of protection is to be determined by the Member States.

[40] The issue of 'acceptance' is important in relation to national procedural autonomy, as particular rules are generally allowed to apply on the basis of the national legal order's discretion. The Court has leaned further towards a 'justification' approach in some case law, in the context of making its assessment of the effectiveness of the national procedural rules. The objective proportionality approach first emerged in Case C-312/93, *Peterbroeck*, EU:C:1995:437, and Joined cases C-430/93 and C-431/93, *van Schjindel*, EU:C:1995:441.

Second, a common theme of the situations dealt with using the 'Union-national' model is that they are conducted under the assumption that in the absence of legislation, Member States can set their own rules, and determine how far they are willing to protect a certain interest, to the extent that the rules are compatible with Union law when mediated through a set of minimum requirements. That discretion exists to illustrate the continued importance of national standards in the absence of common rules. Thus, the Member States retain a degree of autonomy to adopt their own means to ensure EU rights and obligations are enforced and to protect relevant public interests. Nonetheless, these national choices - since they fall within the scope of EU law - are subject to compliance with the general principles of Union law. Whilst the Court is responsible for 'scrutinising' the national rules which fall within the scope of Union law, it does not 'mandate' positive standards of protection of the relevant (primary law) interest, beyond the *negative* obligation for national courts to 'disapply' any rules that do not adhere to the minimum requirements under Union law. Therefore, under the 'Union-national' model there are no distinct, uniform 'EU' standards and/or outcomes enunciated in the case law. This insinuates that, in the absence of Union legislation, the reconciliation of competing interests should not be pre-determined at the EU level, nor monopolised in the hands of the Court.

The broader debate relating to the 'Union-national' model and its possible rationale is whether the methodology is merely a pragmatic response to reconciling a Union rule and national values, or whether it is informed by a set of constitutional foundations.[41] There are indications of a more pragmatic understanding of this matter in the Advocate General's Opinion in *Rewe*. For the Advocate General, in the absence of common rules, there would be no other option but to leave it to the national legal order to set procedural and remedial rules, whose choices, even if they were to constrain the application of EU law, must be accepted on the basis of the current status of the Union law.[42] This suggests that there is not necessarily a strong constitutional imperative – such as the need to respect national sovereignty - to leave procedural and remedial rules to the discretion of the national legal order. In any case, it is important that the Court has not embraced an approach which places any sort of monopoly in its hands when it comes to determining when the enforcement of EU law can be limited, even

[41] Kakouris, 'Do the Member States Possess Judicial Procedural "autonomy"' (1997) 34 CMLRev 1389
[42] Opinion of AG Warner in Case 33/64, *Rewe*, EU:C:1976:167.

in the interests of the general principles of Union law. In so doing, it does not carve out any space to determine the appropriate hierarchical ordering between the relevant sources of Union primary law.

A final point is that although this model does reflect the traditional judicial formula which is reflected in the case law fairly regularly, there may be a few anomalies which may not lend themselves to convincing explanation.[43] This is especially true if it is assumed that the case law has evolved over time, and the alternative 'Union-Union' model is a relatively 'new' phenomenon. Therefore, the position ought to be more nuanced that one that would suggest that the Court has consistently adopted this formula until recently. It follows that other influencing factors warrant examination, even amongst these cases, so as to avoid the straightforward position that the analysis of the enforcement of Union law has altered over time.[44] As regards, for example, the modification of the temporal effects of Union law (in particular, the Court's interpretation), the case law has been informed by the need to protect the general principle of legal certainty, even though that might have the effect of maintaining the effects of a proven incompatibility with EU law at the national level.[45] This situation falls under the broad category of 'determining whether the law can be enforced,' yet it does not concern a national procedural provision that calls the possibility of enforcing EU law in the national legal order into question. In this context, the Court does not seek to balance a national interest or practice against the Union obligation, but it has developed its own set of conditions in an attempt to translate the national concerns into the general principle of legal certainty. Therefore, instead of employing a more deferential – or 'Union-national' – model and leaving the balancing process largely to the national court, in these circumstances the Court treats the issue as though it is to be resolved 'internally' at the Union level.

2.2) (More recent) examples of the 'Union-Union' frame

In the more recent case law, the judicial approach to dealing with the interactions between the foundational principles and legal certainty accords with an alternative

[43] E.g., the Court did not rely upon the principle of national procedural autonomy when it developed the right of redress for individuals, which is directly based on Community law in Case 6/90, *Francovich and Bonifaci v Italy*, EU:C:1991:428.
[44] See Section 3.2 on the possible influencing factors, in particular the lack of discretion left to Member States.
[45] For the first time in Case 43-75, *Defrenne*, EU:C:1976:56 the Court reserved the right (going beyond the wording of Article 234 EC) to limit the retroactive effect of judgments giving preliminary rulings on questions of interpretation, having regard to important considerations of legal certainty affecting all the interests involved, both public and private.

model. The result is that the Court seems to reserve for itself the responsibility of assessing and resolving any tensions between the Union's interests in enforcement and in ensuring legal certainty. In other words, the role of the Member State is to 'apply' the outcome arrived at by the Court, and the national rules and choices are for the most part firmly situated in the shadow of Union law. The cases which illustrate this (potentially) reformulated approach should be accompanied by a cogent rationale for the apparent change in the judicial approach.

2.2.1) Developments in the case law

The traditional approach of the Court to managing the interactions between the foundational principles – such as primacy and direct effect - and the general principle of legal certainty followed a fairly standard formula which has been categorised as the 'Union-national' model. Nevertheless, the judicial approach has developed subtly over time and the case law illustrates certain nuances in the Court's overall role in the process of reconciling tensions between Union primary norms as regards the enforcement of Union law.[46]

This chapter argues that the 'Union-Union' frame is generally a more recent development in the case law. However, there is some evidence to support at least something comparable to the 'Union-Union' model in earlier case law.[47] The idea emerged in the submissions of the parties in *Rewe* and *Comet.* For the parties, the dispute was framed as a clash between the primacy of EC law and national procedural rules which existed to ensure legal certainty. On that basis, they argued that the principle of primacy overrode a national procedural rule (on time limits) where it prevented a plaintiff from exercising a right under EU law. However, the Court (and

[46] See, also, the interactions between the fundamental freedoms and fundamental rights. The first evidence of an 'internal' balancing exercise arose in Case C-112/00, *Schmidberger*, EU:C:2003:333 where the Court's reasoning suggests there ought to be a 'fair balance' between the primary law interests of free movement and the protection of fundamental rights. The Court recognised the wide discretion of the Member States as regards the exercise of ascertaining whether a 'fair balance' had been struck between the competing interests involved. However, immediately after the recognition of the Member State's discretion, the Court explained that it would nevertheless be necessary to determine whether the restrictions placed upon intra-Community trade were proportionate in the light of the legitimate objective pursued. In effect, the Court 'centralised' the assessment of a possible clash between a fundamental right and a Treaty right.

[47] See, also, for an historical example Case C-208/90, *Emmott,* EU:C:1991:333. The Court seemed to establish a new rule governing the time from which national limitation periods can begin to run in cases concerning Union law: regardless of equivalence and effectiveness, they should be suspended in situations where the Member States had failed to comply with its obligations correctly to implement a Directive within the prescribed time limit. However, *Emmott* is now generally confined to its own facts. See, Case C- 452/09, *Iaia*, EU:C:2011:323: here the Court explained that the conduct of the national authorities in *Emmott* had prevented the applicant from claiming the benefit of the rights conferred by the directive at issue. Thus, EU law does not preclude a national authority from relying on the expiry of a reasonable limitation period unless, by its conduct, it was responsible for the delay in the application, thereby depriving the applicant of the opportunity to enforce his rights under an EU directive (see, Case C-327/00, *Santex*, EU:C:2003:109, paras 57 to 61, and Case C-542/08, *Barth*, EU:C:2010:193, paras 33 to 36).

the Advocate General in greater detail) rejected that argument in favour of what has been referred to as the 'Union-national' approach. In this way, the exercise was framed as involving a balance between on the one hand, national procedural autonomy (and legal certainty) and, on the other hand, the enforcement of Union law. It is through the application of the principles of effectiveness and equivalence that the Court ensures that EU law is protected and correctly enforced in the national legal order and in the process provides a structure for the national legal order to strike an appropriate balance between primacy and legal certainty.

The idea emerged again in the Advocate General's Opinion in *Verholen.*[48] He explained that it would be incompatible with the principle of primacy if national courts did not have a duty under EU law to raise points of Union law of their own motion. To reach that conclusion, the Advocate General explained that the primacy of EC law could not be left to the discretion of the national courts, without the risk of the uniform application of EC law being seriously compromised. This position was rejected by the Court in the judgment in *Verholen* and subsequently by Advocate General Jacobs in *Van Schjindel.*[49] In the latter case, Advocate General Jacobs took the opportunity to reject similar arguments put forward by Spain. The Spanish government suggested that a national court was required to consider, if necessary of its own motion, points of EU law notwithstanding any national procedural rules to the contrary. Such an argument was based on (a) the primacy of EU law, (b) the principle of effectiveness of EU law, and (c) the need to ensure its uniform application. Advocate General Jacobs however explained that it does not follow from primacy that a national court must in all circumstances set aside procedural rules which prevent a question of EU law being raised at a particular stage in the proceedings. Rather primacy requires that when a national court is confronted with a conflict between a substantive provision of national law and a substantive provision of EU law, the EU provision should prevail. But as regards procedural rules, primacy does not require that they should be overridden in all circumstances so as to allow EU law to prevail. It is sufficient that individuals are given an effective opportunity for enforcing their rights. He added that the assumption underlying the system established by the Treaties is that the need for effectiveness and

[48] Joined cases C-87/90, C-88/90 and C-89/90, *Verholen*, EU:C:1991:223.
[49] Opinion of AG Jacobs in Joined cases C-430/93 and C-431/93, *van Schjindel*, EU:C:1995:185.

proper judicial protection can normally be satisfied by national remedies enforced through the national courts in accordance with national procedural rules.[50]

The argument to support a 'Union-Union' understanding in the submissions and discussions in *Rewe* and *Verholen* is one that appears almost 'hierarchical:' EU law must always be enforced within the national legal order and primacy should always outweigh counter-veiling considerations reflected in the national legal system. Such a point of view is prevalent in French scholarship in this area where many obstacles to the application of EU law are perceived as a problem of primacy.[51] The most important point to note however is that this approach envisages the overall enforcement issue as one that is to be resolved at the EU level, but without the need for the Court to engage in any real balancing exercise as to whether EU law should be enforced within the national legal order, or whether the enforcement obligations may be offset by other interests reflected at the level of national, and indeed primary, law. It envisages general rules and obligations which have to be complied with in the national legal order, irrespective of the desire to protect certain interests through the adoption of procedural rules.

In response to this case law, academic commentators explained why such cases should not involve, or be viewed as involving, a clash between primacy and national procedural rules.[52] In particular, reference was made to the function of primacy and its place in legal proceedings, and the current state of Union law.[53] Cases concerning the determination of whether EU law can be enforced are about a breach of the principle of primacy by the national legal order; primacy operates as a guideline for choosing between rules which offer different legal consequences, once the choice is made to apply the incorrect law the decision is unlawful. As a result, there is no conflict between two substantive rules which would usually be solved by primacy. For the Court, the matter is a question of legality. The role of the Member States is to accept that illegality and take steps in accordance with its procedural rules to remedy it, with

[50] E.g. in *Rewe*, cited supra n.29., 'although the Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the ECJ, it was not intended to create new remedies in the national courts to ensure the observance of EU law other than those already laid down in national law.'
[51] E.g. Boutard-Labarde, 'Chronique droit communautaire,' La Semaine Juridique 1996 No. 24, at 245; Canivet and Huglo, 'L'obligation pour le juge judiciaire d'appliquer d'office le droit communautaire au regard des arrêts Jeroen van Schijndel et Peterbroeck' Editions du Jurisclasseur, Revue Europe, (1996), 1, at 4.
[52] See, for example, Hoskin, 'Tilting the Balance: Supremacy and National Procedural Rules' (1996) 21 ELRev 365 and Prechal, 'Community Law in National Courts: the Lessons from Van Schijndel' (1998) 35 CMLRev 681
[53] Primacy and effectiveness are both principles which operate to restrict the autonomy principle, but they do so at different stages of the decision-making process.

any decisions to be guided by the effectiveness principle. Effectiveness then serves as a benchmark for the decision of whether and under what conditions the effects of an incompatible decision must end. There is a *balancing process* under which legal certainty is to be weighed against the effective implementation of obligations deriving from EU law. Thus, even if as a result of this process a decision remains final - and contrary to EU law – it can be justified by the principle of legal certainty which explains the need not to continually revisit a decision.

The caution expressed in these circumstances is reasonable: the implications of the 'proposed' alternative approach could be that all national procedural rules have to be set aside.[54] The idea that the principle of primacy can be invoked to override all national rules which present a potential obstacle appears to be based on a belief that the 'correct' result should be reached as a matter of EU law in every case.[55] It also overlooks the role which procedural rules play in legal systems; an appreciation which would incline the view that a balance must be sought between the need to ensure the primacy of EU law and the procedural effectiveness of domestic legal systems. As explained by Advocate General Jacobs in *Van Schjindel* the 'proper application of the law does not necessarily mean that there cannot be any limits on its application.'[56] The interest in the full application of EU law needs to be balanced against other considerations such as legal certainty, sound administration and the orderly, proper conduct of proceedings by the courts. This highlights the key purpose of the principle of primacy: it requires that parties should have opportunity to rely on their EU rights in the national courts. Thus, although the idea of an 'internal' assessment of whether Union law should be enforced was evident in the earlier case law, it was generally looked upon unfavourably by the Court. It is important to note that the 'internal' assessment considered in these instances tends to situate primacy at the apex of the Union's 'hierarchy of norms' to the detriment of all other counter-veiling procedural values.

[54] As explained, if the view were taken that national procedural rules must always yield to EU law, it would unduly subvert established principles underlying the Member State's legal systems and would go further than necessary for effective judicial protection. Advocate General Jacobs in *van Schijndel* also noted that it could be regarded as infringing the principle of proportionality and, in a broad sense, the principle of subsidiarity which reflects the balance which the court has sought to attain in the area. Opinion of AG Jacobs in Joined cases C-430/93 and C-431/93, *van Schjindel*, EU:C:1995:185.
[55] See, Hoskins, cited supra n.52.
[56] At para 31.

However, despite the initial rejection of such an approach, in some of the more recent case law it seems as though the judicial methodology has actually moved towards something comparable to this 'internal' approach, but without necessarily prioritising the principle of primacy. Cases such as *ASDA stores* and *Skoma-Lux* illustrate this point.[57] These cases dealt with whether EU legislation should be enforced against individuals, even though they had not been made aware of its contents due to the failure of the EU institutions to correctly publish the relevant documents in the *Official Journal*. In *ASDA Stores,* an economic operator raised a defence to its sale of Parma ham as the detailed specification of the protected designation of origin (that it had not complied with) had not been published in English.[58] The Court held that certain conditions for using those designations could not be applied against the economic operators, since they had not been brought to their knowledge by adequate publicity of the legislation.[59] The Court therefore resolved the tensions between ensuring legal certainty for individuals in being able to acquaint themselves with the contents of legislation, and the need to ensure that valid EU law could be enforced within the national legal order, in favour of the general principle of legal certainty. Thus, the issue of 'whether EU law can be enforced' was considered an 'internal' matter of Union primary law, the outcome of which was determined by the Court. Moreover, in *Skoma-Lux*, the Court held it was evident from the wording of Article 297(1) TFEU that a Regulation cannot acquire legal effect unless it has been published in the *Official Journal*. The principle of legal certainty requires that EU rules enable those concerned to ascertain the extent of the obligations imposed on them.

These cases are, however, underpinned by a valid justification; they encompass a situation in which Union legislation cannot be enforced in the national legal order, essentially due to the EU's own faults in not ensuring its norms were correctly published.[60] In other words, the restriction to the enforcement of EU law does not have its origins in national law, as is the case when the Member State has infringed its

[57] Case C-108/01, *Consorzio del Prosciutto di Parma*, EU:C:2003:296 and Case 161/06, *Skoma-Lux*, EU:C:2007:773.
[58] All that was available in the Official Journal was a brief application for the protected designation of origin, stating the general characteristics of the product. However, a detailed and complete specification of the protected designation of origin, also containing a slicing and packaging requirement, was available only in the Italian national gazette, to which the Official Journal had made reference.
[59] However, see the opposing view of AG Alber in Case C-108/01, *Consorzio del Prosciutto di Parma*, EU:C:2002:267. He argued that there was no principle in EU law which would require all EU legal acts to be published in every official language. Thus, publication at the national level was sufficient. A major undertaking was able and expected to procure for itself a translation.
[60] See, the explanation offered by the Court in Case C-146/11, *Pimix*, EU:C:2012:450.

obligations under primary law.[61] The general principle of legal certainty is thus directly poised as a competing principle of EU law which may restrict primacy, as opposed to a primary law interest that is merely reflected in national law.

Nevertheless, a select few cases that came after *ASDA Stores* may be more problematic when it comes to identifying a persuasive justification for the 'internal' assessment undertaken by the Court about whether EU law should be enforced in the national legal order. This is especially true if the result is that the Court assumes for itself the responsibility of conducting its own assessment of the relations between Union primary law materials. It is possible to discuss three sets of circumstances which appear to reflect this changed approach: the interactions between final administrative decisions and the enforcement of Union law; the interactions between national procedural rules on *res judicata* and the enforcement of Union law, and the temporal suspension of the effects of Union law on the broad ground of legal certainty.

2.2.1.1) Final administrative decisions and the enforcement of Union law

A first set of cases concern administrative decisions which are incompatible with Union law but which have become final at the domestic level. In *Kühne & Heitz* the Court was confronted with a final administrative decision that breached EU law, but which was subsequently confirmed by a judgment having acquired the status of *res judicata.*[62] The question was whether the general position as regards the 'enforcement' of Union law - that a rule interpreted by the Court must be applied in the national legal order even to legal relationships which arose before the ruling - must be complied with, notwithstanding that the decision had become final. The Court concluded (in a largely abstract manner) that the general principle of legal certainty operates as a constraint on the full enforcement of Union law: a constraint that it would not usually be willing to set aside. The result is that, in principle, there is no obligation for administrative bodies under EU law to overturn an administrative decision which has become final upon the expiry of reasonable limitation periods or the exhaustion of legal remedies, even if its re-examination would allow the incompatibility with Union law to be remedied. In these circumstances, legal certainty is almost portrayed as a

[61] Primacy is relevant in these circumstances, given that it is not the national court that has made a choice between EU law and national law in favour of the latter. The Court is essentially qualifying the normal consequences of primacy, to suggest that the national legal order should continue to apply its own law in such circumstances. This is because it is not the Member States in breach of their obligations, but the Union institutions who are in breach of primary law.
[62] Case C-453/00, *Kühne & Heitz*, EU:C:2004:17

competing principle of Union primary law - giving rise to its own requirements - rather than being presented as a domestic choice made in the exercise of national procedural autonomy.

However, the 'non-enforcement' of Union law would not be acceptable in all circumstances. In *Kühne,* the Court explained that if a certain set of conditions are fulfilled, then since national authorities are bound by the principle of loyal co-operation (Article 4(3) TEU) there may be an obligation to review a final decision in order to take into account the correct interpretation of EU law. This obligation would exist when: national law confers on the administrative body competence to reopen the decision; the administrative decision became final as a result of a judgment of a national court ruling at last resort; the decision was based on a misinterpretation of EU law and was adopted without submitting a preliminary ruling under the conditions laid down by Article 267 TFEU, and finally that the individual concerned complained to the administrative body immediately after becoming aware of that judgment. Therefore, due to the requirements of effective judicial protection, the Court explained it was possible to modify the way that the national provisions pertaining to administrative decisions could be applied. Although national law did not contain an obligation to review a decision - but provided a possibility to that effect - the Court transformed the option into an obligation under Union law.[63] Therefore, the Court did not recognise any general suspension of primacy which would dictate that legal certainty prevails in an all-or-nothing fashion in cases of this kind. Rather, a more layered approach appears to emerge with a set of 'indications' about how the 'balancing' assessment should be structured in accordance with the relevant primary law obligations. Whilst such a circumstantial 'balancing' assessment is not necessarily problematic in itself, if the Court acquires a 'monopoly' over making the final assessment, then the factors which inform its assessment should be made clear.

The approach adopted in *Kühne* would become more significant if it was followed through to its logical conclusion. In particular, the Union's primary norms (legal certainty and the enforcement obligations) may be reconciled amongst themselves at the Union level, so as to determine what obligations – potentially of a positive nature - are incumbent upon the Member States. Therefore, the Court may also be able to

[63] Caranta, 'Case C-453/00, Kühne & Heinz NV v. Produktschap voor Pluimvee en Eieren, Judgment of the Full Court of 13 January 2004' (2005) 42 CMLRev 179

determine *when* EU law would favour enforcement, outside of the usual context of determining the effectiveness and equivalence of national procedural choices. This may afford the Court a significant amount of space to make its own assessment of the relations between the enforcement of Union law and legal certainty – flexibility with the potential to lead to very different outcomes in practice. By making the case about primacy against legal certainty - rather than national procedural autonomy against other interests - the Court has greater control over the boundaries of Union primary norms than it does over the national procedural autonomy framework.

A common theme of the thesis is that the judicial approach is not necessarily consistent and at times it is very difficult to decipher and to understand. Indeed, it is possible to identify a 'hybrid' analysis in the approach adopted by the Court in *Kühne*.[64] The first reading of the case is that the Court based the obligation to reopen a final decision on the principle of loyal co-operation under Article 4(3) TEU. The use of this principle has been associated with principle of primacy and with ensuring the full effectiveness of EU law.[65] It is possible to argue on this basis that the obligation to reopen a final decision could arise as an independent EU law requirement, and need not be grounded in national law. By contrast, the second interpretation draws upon the fact that the Court emphasised as one of its 'conditions' that the obligation to re-examine a decision ought to stem from domestic law. This can be interpreted as an attempt on the part of the Court to accommodate national procedural autonomy in its response.[66] With the initial reception of the judgment, the Court was criticised for making no reference to national procedural autonomy.[67] In subsequent cases, however, the Court has refined its outlook to bring the issue of when EU law should be correctly enforced in the national legal order - notwithstanding the finality of a decision - into alignment with the *Rewe* framework.[68]

Even though the Court has nuanced its approach to final administrative decisions, it is nevertheless true that the area remains shrouded in ambiguity over the correct approach to addressing the question of whether EU law can be enforced. For example,

[64] Groussot and Minssen, 'Res Judicata in the Court of Justice Case Law' (2007) 3 European Constitutional Law Review 385
[65] See, generally Klamert, *The Principle of Loyalty in EU Law*, (OUP, 2014)
[66] Indeed, the French government in its submissions in Case C-453/00, *Kühne & Heitz,* EU:C:2004:17, was concerned that the existence of an EU law obligation to reconsider a final administrative decision would amount to casting doubt on the principle of procedural autonomy.
[67] Caranta, 'Case C-453/00, Kühne & Heinz NV v. Produktschap voor Pluimvee en Eieren, Judgment of the Full Court of 13 January 2004' (2005) 42 CMLRev 179
[68] See, Joined Cases C-392 & 422/04, i-*21 Germany and Arcor*, EU:C:2006:586.

Advocate General Colomer in *Arcor* expressed a different view to the one adopted by the Court in the case as to whether the effects of an administrative decision that was incompatible with Union law should be maintained.[69] He took as a benchmark that it was necessary to strike a *balance* between the requirements of legal certainty and those of EU legality. In so doing, it would have to be determined whether the former always represent an insurmountable barrier or whether, on some occasions, it must yield to the latter.[70] The Advocate General explained that although the Court had shown itself to be sensitive to the rule of finality – as an arm of legal certainty – that principle may become an obstacle to the uniform application of EU law. Thus, it would have to be *reconciled* with other values that are worthy of protection.[71] In the discussion of the 'proper' extent of national procedural autonomy, he argued that where appropriate, the national courts *must* review administrative measures in accordance with the procedures contained in their respective systems. The Advocate General proposed a set of uniform circumstances under which EU law required *exceptions* to be made to principle of legal certainty and - as an expression of that principle - to the finality of administrative decisions. For instance, by virtue of loyalty in Article 4(3) TEU, he suggested that assessments which were contrary to EU law and which became final should be reviewed, if maintaining them in force would 'be at odds with the spirit of the provisions and would give rise to situations which are unfair and contrary to equity or to other principles underlying EU law.'[72] The solution proposed has its basis firmly in the EU legal framework, and accordingly the final balance of interests would be determined at the Union level.

Moreover, the case law still generates confusion about where *Kühne* stands in relation to the traditional 'Union-national' framework. Consider for example the judgment in *Byankov*. This case concerned a Bulgarian law under which it was not possible to obtain a review of the circumstances that gave rise to a territorial prohibition of an EU citizen, even though the prohibition was contrary to the requirements of EU law. Despite the fact that under national law it was no longer possible to reopen the final decision, the Court found it was necessary to reopen the decision in order to ensure

[69] Opinion of AG Colomer in Joined Cases C-392 & 422/04, i-*21 Germany and Arcor*, EU:C:2006:181.
[70] At para 70.
[71] In *SNUPAT*, cited supra n.2, the Court explained the principle of legal certainty is not absolute, since its application must be combined with the principle of legality. Moreover, the prevalence of one of the interests would depend on the circumstances of the case, at para 87.
[72] At para 121.

the effective enforcement of Union law. The method employed to reach that conclusion is not particularly clear, however. In terms of the reasoning, the Court did suggest that it was making use of the *Rewe* framework and its outcome was reached on the basis of assessing the effectiveness of the national rules, rather than the possibly more 'centralised' *Kühne* approach.[73] The referring Court asked about the relationship between the principle of legal certainty with regard to final administrative acts and the principle of effective judicial protection under EU law. It considered that *Kühne* appeared to provide evidence for the suggestion that the principle of effective judicial protection will reach its limits when it comes up against 'national rules which establish the principle of legal certainty with regard to administrative acts.'[74] However, the Court responded that the case was not directly relevant for determining whether an administrative body is under an obligation to reopen administrative procedure with a view to annulling the administrative measure. The Court nevertheless reached its outcome - that administrative procedure should be reopened in order to take full account of EU law - after *conducting a balancing exercise* between the principle of legal certainty and the requirement of legality under EU law, whilst referring to the principles of effectiveness and legal certainty.

An overall pattern emerges from the case law on the finality of administrative decisions. The Court has stated that EU law does not place administrative bodies under an obligation, in principle, to reopen an administrative decision that has become final. This stance is not explicitly related to the existence and/or exercise of national discretion, but seems to stem from the general principle of legal certainty itself. It makes this statement of principle *before* going on to allow exceptions to its general stance under certain conditions. There are two possible routes through which such exceptions may be recognised: through national procedural rules (*Arcor*), or on the basis of the EU framework (*Byankov*).[75] In order to establish an obligation to reconsider a final administrative measure, the Court conducts a balancing of values in the circumstances of each case. On one side of the scale is the primacy of Union law, which is underpinned by the principles of legality, equivalence, effectiveness and loyal cooperation. On the other side is the general principle of legal certainty.[76] Although

[73] Case C-249/11, *Byankov,* EU:C:2012:608 at paras 77-81, and 69, 72, 75
[74] At para 50.
[75] Case C-249/11, *Byankov,* EU:C:2012:608.
[76] Galetta, 'Autotutela decisoria e diritto comunitario', in *Rivista Italiana di Diritto Pubblico* (2005) pgs.35 to 59

there are no concrete rules in the sense that primacy or legal certainty are to take an absolute 'priority' when the two come into contact, there is a 'framework' of relevant interests, and at least some indication of the circumstances that might sway the balance one way or the other.[77] The important point is that under this latter approach the Court has much more flexibility and is able to exploit the malleability of the Union's primary law framework to impose obligations on the Member States and to interfere with national choices. The Court does so by framing the issue as a direct clash between the enforcement obligations under Union law and legal certainty, rather than involving the national procedural autonomy framework.

2.2.1.2) Res judicata and the enforcement of Union law

A similarly confused formula for the determination of whether Union law may be enforced is evident in the case law on the principle of *res judicata.* Here, the Court – at least initially - seems to have used the general principle of legal certainty almost as a stand-alone principle, outside of the usual application of the principle of national procedural autonomy. In some judgments it appears to have employed a fairly consistent 'internal' EU law-based approach when it explains that it is the general principle of legal certainty which dictates that national decisions that are protected by *res judicata* should not be reopened, even if that would enable an incompatibility with EU law to be corrected.[78] For example, it emerged from *Kapferer* that the general principle of legal certainty may act as a justification for the national court's refusal to reopen a national judgment that has become *res judicata* in order to correct a breach of Union law. Only after that statement of principle is made has the Court gone on to assess what, if anything, the foundational obligations underpinning the enforcement of Union law would require of the national legal order under particular circumstances; such as, the setting aside of the final judgment that was based on a misinterpretation of Union law, or the review of that judgment to correct the incompatibility. The focus of such an assessment, if followed through to its logical conclusion, is that Union primary norms are to be reconciled amongst themselves, so as to determine what

[77] For example, Article 4(3) TEU may produce effects, the nature and intensity of which can vary depending on the specific situation. E.g. Case C-453/00, *Kühne & Heitz*, EU:C:2004:17 provides a means of mitigating the negative effects of the lack of a reference for a preliminary ruling, by offering individuals who have exhausted the remedies available under domestic law an opportunity to assert the rights under EU law.

[78] In Case C-126/97, *EcoSwiss*, EU:C:1999:269, the Court underlined that rules conferring finality contribute to legal certainty, which is a fundamental principle of EU law, paragraph 46.

obligations are incumbent upon the Member States.[79] Again this takes place outside of the usual framework of determining the equivalence and effectiveness of the national rules.

The suggestion that the Court is inclined to conduct a 'centralised' assessment in order to find where the balance between Union primary interests lies is illustrated, at least on one possible reading, by *Lucchini.*[80] The reference question in that case encapsulated the central tension: whether in the light of the principle of primacy it would be compulsory for the national administrative authority to recover (unlawfully granted) aid from a private recipient, even though a final judgment had been delivered confirming the unconditional obligation to pay the aid. The Court reached the conclusion that the principle of primacy would preclude the application of the national provision laying down *res judicata* where its application would prevent the recovery of State aid granted in breach of EU law. Therefore, in these circumstances the enforcement obligations under EU law, in particular the principle of primacy, outweigh the need to ensure the protection of legal certainty. This supports the view that if on the one hand, legal certainty may preclude the enforcement of Union law; on the other hand, the Court also reserves for itself the capacity to suggest when the enforcement obligations would override legal certainty concerns.

Again, it is necessary to account for and acknowledge any potential reasons for the 'internal' approach employed in *Lucchini*. From one perspective, the judgment seems to be quite far-reaching, since no mention was made of national procedural autonomy and the primary reference point for the setting aside of the national rules on *res judicata* was the principle of primacy.[81] This is markedly different to the traditional 'Union-national' approach under which there is no clash between primacy and national procedural rules *per se*: what is involved is the interaction between national procedural rules (which might reflect legal certainty) and the effective enforcement of Union law. However, one reason for the rather different approach in *Lucchini* could be the specificity of State aid. The area has always benefitted from a more interventionist stance on the part of the Court, including in relation to national limitation periods.[82] Nevertheless, the more recent judgment in *Klausner Holz* – again

[79] See, the Opinion of the Advocate General in Case C-507/08, *Slovakia v Commission*, EU:C:2010:507.
[80] Case C-119/05, *Lucchini*, EU:C:2007:434
[81] At para 62.
[82] See, for example, Case 24/95, *Alcan*, EU:C:1997:163.

dealing with *res judicata* – demonstrates that even as regards State aid matters the 'usual' *Rewe* framework is to be applied in order to assess whether Union law should be enforced.[83] This means that a second rationale may be more plausible: that the Court was motivated by the conduct of the Italian authorities, rather than any strict constitutional imperative to develop general rules as to when EU law should be enforced over principles such as *res judicata*. Indeed, the Court has explicitly made reference to its judgment in *Lucchini* in other cases, only then to go on to qualify its effects and to limit the judgment to its facts.[84]

The most recent case law in this area is more consistent insofar as it reflects the traditional 'Union-national' approach. In *Târşia,* the Court did not mention the general principle of legal certainty, but relied on the national rules on *res judicata* as part of national procedural law which could apply due to national procedural autonomy.[85] More importantly, this case concerned the slightly different situation of the arrangement of the conditions for the review of final judgments under national law. The Court explained, in the context of the assessment of the effectiveness of the national rules, that there were *'no particular circumstances'* which would justify adopting a different approach to the one that had been accepted in the case law: that there is no general obligation to reopen judicial decisions that have become *res judicata* under Union law. Logically then some 'circumstances' do exist. There are two separate tracks which may, for the Court, justify a different approach. These tracks are distinguishable as the first concerns the assessment of exceptions to *res judicata* under national law and the second concerns the application of rules on *res judicata* more generally.

The first track accords with the 'Union-national' approach as regards the assessment of the possibilities afforded under national law which allow for exceptions to the principle of *res judicata*. If national law provides for exceptions to *res judicata,* the national courts may only be required to reassess their decision due to the limitations that EU law places on national procedural autonomy. In particular, the exception must apply to decisions concerning EU law that are analogous to domestic claims to which

[83] Case C-505/14, *Klausner Holz Niedersachsen,* EU:C:2015:742

[84] See e.g., Case C-213/13, *Impresa Pizzarotti*, EU:C:2014:2067 the Court held it is for the national court alone to determine the exact terms of a judicial decision which has become *res judicata*.

[85] Case C-69/14, *Târsia*, EU:C:2015:662. AG Jääskinen did however frame the case as a manifestation of the interplay between primacy and legal certainty, see Case C-69/14, *Târsia*, EU:C:2015:269.

the exception applies.[86] The second track arises on a more independent basis by virtue of EU law.[87] Thus, when the dispute does not concern a national exception to *res judicata* that is relied upon in order to enforce EU rights, but rather a plea for a broad interpretation of national rules to protect judgments that are inconsistent with EU law, the Court appears to favour primacy over *res judicata*.[88] In these latter cases, the Court seems to be balancing the interests protected by the general principle of legal certainty and the enforcement obligations under EU law (including primacy) on a broadly 'internal' Union level.

The cases on *res judicata* leave room for speculation about the theme characterising the (divergent) judicial approach. It is possible to draw out two dominant threads which shed light on the influences shaping the Court's more 'centralised' approach to this issue. A first factor concerns the gravity of the effects of *res judicata* on the application of Union law. The relevant cases seek to reconcile the consequences national rules on *res judicata* have on EU law, with how far those effects can be justified by the principle of legal certainty. Overall, the more serious the effect on EU law, the less likely the Court is to accept their application. For example, as regards State aid in *Lucchini* the Court sought to prevent a final judgment obstructing the exercise of the sole decision-making competence of the Commission on the compatibility of State aid with Union law. More often, the Court has dealt with situations where the maintenance in force of a final judgment makes it impossible to ensure the correct application of EU law on *a recurring* basis. Thus, the Court is perhaps prepared to alter its position to avoid a long-term, systemic problem. In *Fallimento* the broad scope of *res judicata* essentially had that effect; EU law could not be taken into account to correct the national court's interpretation, meaning that the rules would be misapplied for each new tax year.[89] On the contrary, *Târșia*

[86] If domestic rules of procedure provide the possibility for a national court to review a decision having the authority of *res judicata* in order to render the situation compatible with national law, that possibility must prevail in accordance with the principles of equivalence and effectiveness (e.g. Case C-213/13, *Impresa Pizzarotti*, EU:C:2014:2067 at para 62.)

[87] This could be understood in different ways: either as favouring primacy over legal certainty directly or within the context of national procedural autonomy and a different way of striking the balance between primacy and legal certainty. The latter category accords with the understanding of Case 106/77, *Simmenthal*, EU:C:1978:49 where it was considered that there was a stronger need to ensure that EU law was effectively enforced due to the circumstances of the case. See, further, Becker 'Application of Community Law by Member State's Public Authorities: Between Autonomy and Effectiveness' (2007) 44 CMLRev. 1035.

[88] E.g. Case C-213/13, *Impresa Pizzarotti*, EU:C:2014:2067 and Case C-2/08, *Fallimento Olimpiclub*, EU:C:2009:506.

[89] See also, Case C-505/14, *Klausner Holz Niedersachsen*, EU:C:2015:742.

concerned an incompatibility with EU law whose effects would not stem beyond the judgment, since the issue could be raised in other proceedings.

Here, a distinction could arise between *purely technical limitations* to the enforcement of Union law and *constitutional 'blocks'* to the application of Union law, and in particular an individuals' right to invoke EU law.[90] This shares similarities with the Court's self-constructed 'no horizontal direct effect of Directives rule' developed in the case law on the premise that the Member States should not be able to profit from their failure to implement Directives in a timely manner.[91] By contrast, a more technical limitation period merely acts to *reduce the opportunity for individuals* to bring a claim and the extent of the claim, but they *do not block the exercise of a right* or the application of Union law entirely.[92] Indeed, the national procedural autonomy formula aims to strike a balance between primacy and the need for procedural rules: every individual must have an opportunity to rely on EU rights in the national courts, but the exercise of those rights must be subject to reasonable procedural rules.[93]

The second factor concerns the 'stage' of the analysis. In *Târșia,* the enforcement of EU law was impeded by a *pre-existing* final decision whose incompatibility was only clarified by the *subsequent* judgment of the Court in *Tatu*.[94] By contrast, in *Lucchini*, the final decision was delivered *after* the Commission's decision, which it infringed. Thus, the national court effectively made a choice to apply national law, rather than

[90] A similar dynamic arises in relation to retrospective time-limits. Whilst the existence of a national time-limit does not in itself breach the principle of effectiveness, in Case C-62/00, *M&S*, EU:C:2002:435 a new time-limit was introduced after *M&S* had made the overpayments of VAT and after it had claimed repayment, which therefore made it impossible for *M&S* to rely on their directly effective rights before the national courts. The parties argued that was clear that once the Court has declared a charge illegal, the principle of effectiveness prevents a Member State from subsequently introducing a national time-limit which restricts refunds solely to those parties who submitted their claims before the judgment was delivered. Reference was made to Case C-37/02, *Dilexport*, EU:C:2004:443 in which Italy was permitted to introduce a new shorter time-limit following a Court judgment rendering charges illegal without infringing the principle of effectiveness, provided that the charges in question were not specifically targeted by the reduced time limit and that new provisions did not make it impossible in practice/excessively difficult to exercise the right to repayment. Thus, although the amendment reduced the opportunity for bringing claims for repayments of charges illegally levied, it took effect 90 days from entry into force of the new law. *M&S* argued that it was implicit in *Dilexport* that a national time limit which deprives, with immediate effect, those who have paid sums illegally levied the right to reclaim them, is contrary to EU law. Para 28 of the AG's Opinion in *Dilexport* stated that the principle of legal certainty prevents an application for repayment lodged before the entry into force of new time-limits from being defeated by the retrospective application of such time limits.

[91] For Advocate General Mischo in Case C-208/90, *Emmott*, EU:C:1991:164 as Directives were only binding upon the Member States and therefore could not give rise to obligations for individuals, a Directive could not supply a starting point for a limitation period which could be raised as a barrier to the enforcement of individual rights.

[92] The limitation rule in Case C-208/90, *Emmott*, EU:C:1991:333 appears to align with the category of constitutional 'blocks' to the application of Union law. Indeed, one of the justifications the Court offered in Case C-338/91, *Steenhorst-Neerings*, EU:C:1993:857 for not applying *Emmott* was that in *Emmott* the plaintiff was denied the right to invoke the Directive at all. In *Steenhorst*, it was possible for the plaintiff to invoke the Directive, although the extent of the claim for obtaining the relevant benefit would be limited.

[93] Hoskins, cited supra n.52

[94] Case C-402/09, *Tatu*, EU:C:2011:219, precluded Romania from levying pollution tax on motor vehicles on their first registration in Romania if the tax was arranged so as to discourage the circulation of second-hand motor vehicles purchased in other Member States, without discouraging the purchase of second-hand vehicles of the same age and condition on the domestic market.

the EU measure.[95] This case seems to be best understood in relation to the failure of the national court to take into account the decision of the Commission on compatibility of State aid with the common market, so that it essentially had no jurisdiction over the specific issue. It is possible that if the relevant EU law is clear before a national judgment is delivered, any inconsistency would usually entail a blatant disregard of EU law.[96] Thus, the usual approach in *Târșia* may prevail where the incompatibility is revealed *a posterior*. An analogy could be drawn with cases where the Court mediates the retroactive effects of a judgment – so as to restrict the ability of individuals to rely on it - in the interests of legal certainty.[97]

In most cases these twin factors lead to the conclusion that there is a 'Union level' problem that is within the EU's control to resolve. For example, it was the circumstances of *Lucchini* that justified the exception to the cases where respect owed to the principle of *res judicata* had been assumed to constitute a legal principle, in particular due to the apparent disregard of the Commission's decision by the national court. First, the Court was confronted with an encroachment by a final judgment – which the national court had no jurisdiction to make - on the exercise of the sole decision-making competence of the Commission. Secondly, the Commission had *already* delivered its decision. The *subsequent* national decision ordering the disbursal of aid therefore disregarded EU law entirely. In such circumstances, it is important that the Court views itself as competent to address how EU law is to be enforced within the national legal order and to determine the outcome of the interaction between the foundational principles and legal certainty.

Thus, as a summary of the case law concerning the enforcement of Union law and the principle of *res judicata*, the general principle of legal certainty seems to underpin the Court's position that there is no EU law obligation for a national court to disapply domestic rules of procedure conferring finality on a decision (even if disapplication would enable the national court to remedy an infringement of EU law.)[98] In other

[95] Contrast Case C-507/08, *Slovakia v Commission*, EU:C:2010:802: as the decision became final before the subject-matter was categorised as aid, the Court rejected a strict duty to annul on the basis of primacy. It therefore applied the 'orthodox' approach.
[96] In Case C-249/11, *Byankov*, EU:C:2012:608 the measure was regarded as incompatible with the CRD from the time of its adoption.
[97] In Case C-231/96, *Edis*, EU:C:1998:134 AG Colomer, at para 20 pointed out that judgments are not endowed with a kind of 'supra-temporal effect'. Their effects must apply to those legal situations which, under domestic law, are still *open* to challenge or review, and which accordingly may be subject of a decision of a judicial authority.
[98] E.g. Case C-234/04, *Kapferer*, EU:C:2006:178, at para 21. This rule is closely linked to the obligation on applicants seeking to enforce EU law rights to comply with reasonable time limits for bringing proceedings set by national law. This obligation

words, EU law does not require a judicial body automatically to reconsider a judgment having the authority of *res judicata* in order to take into account the interpretation of EU law adopted by the Court after the delivery of that judgment. That is usually the case unless it is possible under national law to reopen a final judgment, as those exceptions fall under the scrutiny of Union law, in particular the general principles of equivalence and effectiveness. However, in certain instances the Court has gone beyond the options that are available under national law for revisiting a final decision, so as to identify (potentially) more autonomous EU obligations on the basis of its understanding of the general principle of legal certainty. In this way, the case law demonstrates that the Court may sometimes adopt an approach that reflects a 'Union-Union' framing exercise, albeit not always in a consistent or convincing manner.

2.2.1.3) Temporal suspension of the effects of Union law: legal vacuums

Another set of cases concern the interplay between the obligations underpinning the enforcement of EU law and the general principle of legal certainty in circumstances where the enforcement of Union law could lead to legal vacuums arising in national legal orders.[99] In *Winner Wetten* the key issue was whether national legislation that was incompatible with a fundamental freedom could be left in place for a transitional period in order to bring it into conformity with EU law.[100] The resulting tension arose as allowing such legislation to be left in place as a matter of EU law would involve the suspension of the effects of primary law for a temporal period. This case captures quite clearly the difference in the choice between the two possible framing models for the Court.[101] In its reasoning, the Court demonstrated its keenness to avoid a direct conflict with EU law arising from a national constitutional provision, which gave expression to the national concerns on legal certainty.[102] Thus, the Court rejected the first ground for maintaining the effects of the judgment based on the existence of a German Constitutional Court decision. Interestingly, however, the Court did not rule

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can only be attenuated when the wrongdoer has discouraged the applicant from bringing proceedings in good time. See C-452/09 *Iaia*, paras 17-22.

[99] Case C-409/06, *Winner Wetten*, EU:C:2010:503

[100] See, also, Case C-41/11, *Inter-environment Wallonie*, EU:C:2012, where the Court was faced with a tension between two different 'requirements' stemming from EU law. In view of the existence of overriding considerations relating to the protection of the environment, the referring Court was *exceptionally* authorised to make use of its *national provisions* empowering it to maintain certain effects of an annulled national measure, until the measure was redrafted (insofar as certain conditions were met.)

[101] For AG Bot, a derogation from the immediate enforcement of EU law would not be permissible under any circumstances. He took issue with the ability of a general principle of Union law, such as legal certainty, to qualify the foundational principles. See Case C-409/06, *Winner Wetten*, EU:C:2010:38.

[102] The is not necessarily surprising, given the usual approach to the application of national law over EU law which is mandated by the principle of primacy, outside of the context of national procedural autonomy.

out a possible analogy with how it treats EU law and the ability to justify a temporary limitation of the effects of annulled legislation in the interests of legal certainty. As a result, it did not reject the possibility, in principle, of a decentralised power to suspend the application of EU law in order to prevent a legal vacuum arising under national law, which would undermine the protection afforded to legal certainty as a general principle of Union law. Essentially, the judgment reveals another circumstance where the 'Union-Union' model prevails. This appears to have been motivated by the desire on the part of the Court to retain control over the circumstances where a derogation from the foundational principles is permissible.

Similarly, in *Association France* the referring court asked whether it was possible to limit in time certain effects of the annulment of a domestic provision which contravened obligations provided for under EU law.[103] The argument was based on the point that annulment would give rise to a gap in environmental protection at the national level which would be contrary to both Union primary and secondary law.[104] The problem was that upholding the national measure would allow the breach of EU law to persist and afford national courts an opportunity to derogate, for a period of time, from their duty to disapply a national measure that is contrary to Union law. The Court's response suggests it is possible to modify the full effects of the principle of primacy in the national legal order, by the application of other interests protected under primary law such as legal certainty and environmental protection.[105] This reflects a desire to avoid a legal vacuum emerging in relation to the achievement of the main aims of the Union. In terms of the methodology which the Court employs, it focuses on reconciling the interplay between two distinct Union value choices under primary law: the principles of primacy (and legality), and the protection of the environment.[106] It is important to acknowledge that as a consequence, it is the Court, firmly at the EU level, that authorizes the national court to exercise this exceptional power. Thus, in principle there is no general (presumptive) authority for the national legal order to determine whether to remedy an incompatibility, a choice which would only then be subject to the principles of equivalence and effectiveness.

[103] Case C-379/15, *Association France Nature Environnement*, EU:C:2016:603.
[104] See in both primary law, Art. 3(3) TEU, and Art. 191(1) and (2) TFEU, and secondary legislation, including Directive 2001/42/EC.
[105] This differs from affording precedence to national law *per se*, as opposed to an EU interest.
[106] Case C-379/15, *Association France Nature Environnement*, para 36.

With this in mind, it is important to explore the implications of framing the issue as a clash between two values enshrined in Union primary law. First, it is the Court which has the task of weighing the respective strengths of these competing interests. In *Winner Wetten*, the Court did not provide any indication of how the balancing exercise ought to be conducted. However, it is possible to speculate that it may have reserved for itself the task (in future cases) of determining when primacy can be outweighed by legal certainty concerns, and vice versa. This point emerges with greater clarity in *Association France* as it seems that the Court assumes a monopoly over determining which EU interests may play a role in suspending the enforcement of EU law for a temporary period - so far, this includes environmental protection and legal certainty. Second, the Court is also able to determine the content and extent of these interests. For example, it is clear that it is solely for the Court to decide on the conditions of the 'suspension.' As a result, it is not the national conception of legal certainty or environmental protection, but the Union version – as interpreted by the Court – that is decisive in these circumstances. Finally, this decentralized power for national courts is established on a case-by-case basis.[107] Although this may raise problems of consistency and predictability, such concerns can be attenuated to an extent by the conditions set out in the judgment as to when the national courts may exercise such a power.[108] These conditions almost have the colour of a legislative stipulation insofar as they structure the judicial inquiry.

A final example which demonstrates some of the key issues is *Dansk Industri.*[109] In this case again the Court is inclined to place control over defining the boundaries of the 'enforcement' obligations - in light of the general principle of legal certainty - in the hands of the Union court, rather than the national courts. This is because one of the reference questions touched upon the issue of who could define exceptions to the foundational obligations. In response, the Court seemed reluctant to accept that the general principle of legal certainty could qualify the direct effect afforded to a general

[107] Case C-409/06, *Winner Wetten v Bürgermeisterin der Stadt Bergheim*, EU:C:2010:503, paras. 39, 40, 42.
[108] First, the national measure must correctly transpose the Nitrates Directive. Second, the adoption and entry into force of the new national measure containing the programme would not enable adverse effects on the environment resulting from the annulment of the contested measure to be avoided. Third, annulment of the measure would result in a legal vacuum as regards the transposition of the Nitrates Directive which would be more harmful to the environment, as it would result in a lower level of protection of waters against pollution caused by nitrates and would therefore run contrary to the fundamental objective of that Directive. Fourth, the effects of the measure may be exceptionally maintained only for a period which is strictly necessary to adopt the measures which remedy the irregularity. See, Case C-41/11, *Inter-Environnement Wallonie and Terre wallonne*, EU:C:2012:103.
[109] Case C-441/14 *Dansk Industri*, EU:C:2016:278.

principle of Union law. The reason for this reluctance might be attributable to the fact that the national court asked if it was possible to conduct its own determination of the effects of Union primary norms. However, as the Advocate General explained in his Opinion the boundaries of and qualifications to primary norms - particularly those of an unwritten nature - are to be determined by the Court.[110] That the Court is not generally reluctant to allow the foundational obligations to be qualified on its own terms – and where it retains its control over the balancing assessment - is demonstrated by cases like *Winner Wetten* and *Association France*.

Based on these cases, it is fair to say that the presentation of the issue through the 'Union-Union' model appears to be a relatively recent development in the case law. For the most part, it is also arguable that the Court has embarked upon a process of amplifying the consequences of the recognition of a national concern at the EU level, and genuinely 'internalised' that concern to make it one of EU primary law falling (almost) exclusively within the interpretive capacity of the Court. In some cases, this enables legal certainty to be elevated to the position of distinct and largely independent EU principle. That presupposes that there is some form of 'common' standard of this value across the Member States, which is protected at the EU level. It is open to debate whether that is in fact true.

2.3) Reasons to be cautious of the 'Union-Union' approach

On the basis of the available evidence, it is seems that two assumptions are made in the case law which reflects the 'Union-Union' model. The first is that the relevant enforcement issue is within the EU's 'direct' control, so that it ought to be resolved through an 'internal' balance of interests protected at the level of Union primary law. It follows that there is sufficient 'EU' content of the primary norms involved in an interaction in order to reconcile their different consequences at the Union level. Consequently, reference to an external standard - for example one stemming from national law – in order to inform the Court's appraisal appears unnecessary. National law here becomes somewhat incidental, as its standards do not seem to be a matter of the Member States' own discretion, but rather a question of whether they comply with the 'prescribed' EU standard. The result, in some cases, is that the Court may also retain control over the circumstances and/or the conditions for any derogation from

[110] AG Bot in Case C-441/14 *Dansk Industri*, EU:C:2015:776.

the Union's foundational principles, on the basis of its own understanding of the requirements of the interests should they interact. The nature and scale of this point is illustrated by *Winner Wetten* where it seems that the Court attempts to accommodate values that are recognised at the national level within its own Union primary principles. It does so in a way that does not rely on a specific national conception of legal certainty.[111] It is the Court that maintains control over the interpretation of primary law; it is not at the discretion of the national legal order to decide when to suspend its operation. Thus, these values essentially become a matter of primary law, which the Court itself is competent to define.[112] This has the effect of reinforcing a need to give full effect to the EU's 'internal' values: an approach which leaves little to no room for national diversity.

For example, in *Fallimento,* the Court emphasised that the way the limits of *res judicata* were construed under Italian law prevented not only a final administrative decision from being called into question, but also prevented judicial scrutiny in the context of a different tax year of any finding on a fundamental issue contained in a final judicial decision.[113] The result would be recurring violations of EU law without it also being possible to remedy them. The Court was able to conclude that such *extensive* obstacles to the effective application of EU rules on VAT could not *reasonably be regarded as justified in the interests of legal certainty* and therefore were contrary to the principle of effectiveness. In effect, the Court made a determination of the appropriateness of the national rules; it assumed the ability to determine the extent to which the national legal order can permissibly protect *res judicata* and legal certainty on the basis of its own understanding of what those principles require under Union law. There is a perceptible difference in the way the Court assesses procedural rules through the application of the general principle of legal certainty, which in these circumstances is almost employed as an independent review standard.

The second main assumption corresponds with a common theme of the case law which reflects with the 'Union-Union' model. The methodology inclines towards a

[111] See, similar, Besselink, 'Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010, nyr.' (2012) 52 CMLRev 671
[112] At least in a context where no EU legislation has been adopted which would serve to operationalise the relevant primary norms. See, similarly, Chapter 1.
[113] Case C-2/08, *Fallimento Olimpiclub*, EU:C:2009:506

'centralised' assessment on the part of the Court to managing the relationship between the Union's primary norms. In some cases, the dispute is framed as a conflict between two distinct Union law norms - which the Court itself is competent to examine and to define in the exercise of its interpretive function.[114] National law in these circumstances effectively operates in the shadow of Union law, as its standards do not seem to be a matter of the Member State's own (fettered) discretion, but rather a question of whether they comply with a positive EU standard, which would appear to permit of little, if any, diversity. This essentially presents the assessment as 'internal:' the Court assumes a monopoly over finding the relevant balance, far beyond its usual supervisory role of the national standards for their compliance with the general principles of Union law as outlined in *Rewe* and *Comet*. As a consequence, the discretionary assessment left to the national court as regards the effectiveness of any of the national measures is significantly curtailed.

By contrast, the 'Union-national' method presents the assessment of an enforcement issue between national law and Union law as an interaction between EU law and a national interest and/or value. This takes the issue away from determining what primary law is *per se*.[115] In order to assess an EU law obligation as to its relationship with the general principles when it comes to national procedural rules which give expression to and/or contribute to legal certainty, the Court uses the general principles of effectiveness and equivalence as minimum standards that the national rules must comply with. The fact that the national rules safeguard legal certainty is usually relevant when the Court assesses the effectiveness of the national rules. The assessment is to determine how far the national measures can be reconciled with the effects that they exert on the Union primary obligation. This is in keeping with, and respectful of, the Union's current constitutional and legislative environment. Indeed, in the absence of legislation, as expressed in *Rewe* it is the task of the Member States to regulate a matter (i.e. procedural rules), provided that any rules adopted and the standards of protection afforded comply with the 'minimum' requirements under EU law.

[114] That is not to justify its approach, but offers a possible explanation of the process.
[115] See similarly in Case C-112/00, *Schmidberger*, EU:C:2003:333 the Advocate General explained that the Court assesses whether the interest protected by the national constitutional provision is generally compatible with EU law so that the Court retains control and makes sure that national constitutions do not become instruments for the Member States to avoid their obligations.

It is arguable that presenting the interplay as involving two Union primary norms may essentially justify (and perhaps also legitimise) a move towards a 'Union-Union' approach for the Court. What is relevant from a constitutional perspective is that, as a result of the Court's tendency to 'centralise' the assessment of the interplay between Union primary norms, the national courts are in effect pre-empted in carrying out their own assessment of the balance between the relevant interests. This is despite the fact in cases like *Rewe* the Court recognised the level of national discretion to select their own procedural rules in the absence of common Union-level standards.

There are still some cases where this model appears to be used without any clear rationale, or it being possible to infer a rationale from the patterns that arise from the case law. This is true even despite the central issues being the same or at least similar to those which have traditionally reflected a 'Union-national' frame. As there are clear differences not only in the substantive outcomes of cases, but also as regards the allocation of powers within and across the Union in these contexts, all of which depend upon the model that is employed, the Court should remain aware of the rationale behind the use of different methods in different circumstances. The question that arises against this background is whether these cases constitute *ad hoc* exceptions to the usual 'Union-national' approach or whether they reflect a new constitutional understanding of how to approach compatibility disputes about the enforcement of Union law which involve interactions between Union primary norms. It is worth noting that the Court has gone back and refined its case law, but has not overturned the decisions which could be considered as exceptions to the general 'Union-national' approach. However, confining certain rulings to their facts is prone to creating messy case law.[116]

3) **To what extent does the judicial choice between the models follow a consistent methodology?**

The Court tends to adopt two distinct methodologies through which to assess the compatibility of national law with EU law in the context of the enforcement of Union law. Nevertheless, is it not entirely clear why these two methods exist and why apparently similar categories of cases are treated differently. Although the Court does

[116] Rather than overturning certain decisions, the Court distinguishes other cases in order to minimise the impact of the general principles enunciated in the case law. .See e.g. ,AG Jacobs' Opinion in Case C-170/05, *Denkavit*, EU:C:2006:266.

lean towards a pragmatic balancing approach which accounts for the circumstances of each case, this does not rule out the possibility that it may have provided some structural guidance to assist in other cases. In particular, if any factors have informed its reasoning, they might provide us with a basis upon which to identify connections across the case law. Some of the possible factors informing the judicial choice between these two approaches are drawn together here for the purposes of determining whether there are any common patterns. The possible 'factors' are only discussed briefly however, as each suffers from its own anomalies and therefore cannot offer a complete explanation of the case law.

3.1) The significance of the nature of the proceedings

A first factor is the nature of the proceedings and the influence on the methodology employed by the Court. With preliminary references under Article 267 TFEU for example, the Court is traditionally not able to express its opinion over the legal issue that has been referred to it, but it may provide guidance to the national court: for example about whether certain types of national rules could ever be considered to be compatible with EU law, and about the standards against which such rules should be assessed against.[117] Due to this, it may be suggested that cases of this kind would be more likely to fall under the 'Union-national' frame. By contrast, with Commission enforcement proceedings under Article 258 TFEU, the Court has to decide whether a Member State has breached their obligations under Union law in the specific context of the case. In such circumstances, therefore, there is a more direct answer to the question. As a consequence, it is possible to assume that these cases are more likely to fall under the 'Union-Union' frame.

However, on the whole, the context of the proceedings is purely incidental to the exploration of these legal issues. In other words, it does not determine or have a (significant) bearing on the judicial approach. In particular, the Court does not necessarily change the substantive test that it uses in these situations depending on the nature of the proceedings. So, for example, it still makes use of the formula of examining the effectiveness and equivalence of national rules in the context of determining whether EU law may be enforced in the national legal order. Indeed,

[117] The review operated by the Court in a preliminary reference procedure is of an abstract nature. Advocate General Cosmas observed in Case C-261/95, *Palmisani*, EU:C:1997:351 that as far as compatibility of a national procedural rule with the system of EU remedies is concerned, 'specific review lies with the national court' whilst review 'in abstract is for the ECJ' at para 20.

Slovakia v Commission took place in the context of Commission enforcement proceedings against Slovakia in circumstances within which illegally granted State aid was not recovered, due to the initial decision granting the aid having become *res judicata*.[118] The Court adopted the same approach to assess the legal issue as it did in *Klausner*, a preliminary reference concerning whether national rules on *res judicata* – which protected a judgment that was incompatible with EU law on State aid – would be compatible with EU law. In both cases, following the established line of case law, the Court proceeded to examine the equivalence and effectiveness of the national rules which is common to the 'Union-national' frame.

3.2) The level of discretion enjoyed by the Member State

A second possible driver behind the existence and (implicit) use of the two models is the level of discretion left to the national legal order. In other words, an issue that is within the EU's 'direct control' seems to align with a 'Union-Union' frame, whereas the need to make reference to an external (national) standard - in the absence of a concrete standard at the Union level - seems to accord with a 'Union-national' model. This raises questions about when the EU has (or should have) control over a specific issue.

The traditional 'Union-national' approach is underpinned by the general assumption that in the absence of Union legislation – on the procedural measures for the enforcement of EU law – it is for the Member States to regulate a matter according to their own standards. This stance is informed (even if not explicitly) by the fact that the Member States have a recognised discretion to protect certain legitimate interests. Indeed, Member States retain the competence to adopt their own procedural rules to enforce EU law, in the absence of any relevant legislation. For the Court, the objective of securing uniformity in the application of Union law throughout the Member States cannot be ensured in the absence of EU legislation on procedural matters.[119] Still, these assertions - and the Member States' resulting discretion - are qualified to an extent by the application of the general principles of Union law which are used to review the

[118] Case C-507/08, *Slovakia v Commission*, EU:C:2010:802.

[119] E.g., as regards preliminary references the Court explained in Case 43/75, *Defrenne v SABENA*, EU:C:1976:56, that 'a rule interpreted must be applied by the courts even to legal relationships arising and established before the judgment ruling on request for interpretation, *provided that in other respects* the conditions enabling an action relating to the application of the rule to be brought before the courts having jurisdiction are satisfied.' That proviso refers to the national procedural rules which continue to govern the conditions in which a dispute may be brought before the Courts.

national standards. The underpinning assumption nevertheless remains the same: the adoption of the 'Union-national' model conforms to the level of discretion afforded to the Member States. This discretion exists to illustrate the continued influence of national standards as regards rules of procedure, in the absence of Union legislation setting out harmonised standards.[120]

The corollary of this point is that in circumstances where limited (or no) discretion is retained by the national legal order, it is more plausible that the situation falls within the EU's direct control and ought to be resolved through an 'internal' balancing exercise. To clarify this more general point, an analogy can be drawn with *Melloni* which dealt with the principle of mutual recognition in the Area of Freedom Security and Justice and how that interacts with the protection of fundamental rights.[121] The basic tenet of the judicial approach is that in situations where common legislation is adopted at the Union level, it is presumed that the Union's political institutions have struck the balance between the relevant interests - in ensuring mutual trust and of protecting fundamental rights - provided that their appraisal complies with Union primary law, and here in particular the CFR.[122] In such circumstances, the national legal order loses its discretion to protect an interest (or a fundamental right) according to its own standards.[123] On this basis, it is possible to argue that when EU legislation is adopted, a 'Union-Union' appraisal is appropriate, as the matter becomes 'internal' to the Union legal order. Indeed, there may be a common definition in EU legislation of the level of protection which must be afforded to a fundamental right,[124] meaning that the use of diverse standards across the Member States would essentially obstruct that balance. The fact that the Union institutions have decided to balance Union primary norms in a certain way may mean that the Court should legitimately conduct its analysis of the compatibility of Union legislation on an 'internal' basis at the EU level.[125]

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[120] Indeed, in the case that the Court explicitly acknowledged the interplay between the judicial and political roles in the internal market, it also broadened the grounds under which a Member State could justify the continued protection of their standards. See, Case C-120/78, *Rewe v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon),* EU:C:1979:42.

[121] Case C-399/11, *Melloni,* EU:C:2013:107.

[122] See, further, Case C-617/10, *Fransson,* EU:C:2013:105 for the distinction between exhaustive and minimum harmonisation, and the effect that has on the degree of Union control over a subject-matter.

[123] However, there can be derogations in exceptional circumstances from the procedural obligations laid down in legislation due to the infringement of substantive fundamental rights. See, for example, Case C-404/15, *Aranyosi,* EU:C:2016:198 and Case C-659/15, *Caldararu,* EU:C:2016:140.

[124] See, also, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland,* EU:C:2014:238 where the institutions did not strike the correct balance, as understood by the Court.

[125] See, similarly, Case C-574/14, *Phillip Morris Brands,* EU:C:2016.

This is further supported by the situations where the Court has indicated that legal certainty exerts less extensive (if any) effects on the application of the foundational principles and the imperative of the effective enforcement of EU law. On the available evidence, these situations relate to the lack of discretion afforded to the Member States. It is arguable that a more 'direct' clash between a Union primary obligation and a Union primary principle arises. Equally, and as expected, these situations generally adhere to the 'Union-Union' framing methodology. In other words, it is the Court which conducts the overall assessment of the relations between the primary sources and reaches a specific conclusion that is to be 'implemented' at the national level. For example, as regards the principle of State liability, the Court explained in *Köbler, Traghetti* and *da Silva,* that the existence of the doctrine and the conditions for its exercise within the national legal order cannot be entirely constrained by considerations of legal certainty.[126] Thus, the Court has defined where the balance of interests under the mechanism lies, on the basis that legal certainty is adequately protected at the Union level.

A similar approach is evident in the case law on State aid. The Court held in *Lucchini* that the principle of primacy would preclude the application of national rules on *res judicata,* in a situation where they prevented recovery of State aid which was found to be incompatible with the common market in a Commission decision. Both examples imply that the approach of the Court is less flexible when it is confronted with a distinct Union principle and/or a rule which applies in the national legal order as a result of primacy.[127] Thus, the Court appears keen to state (at least implicitly) that the application of legal certainty cannot provide a loophole through which it is possible for individuals, or for the Member States, to circumvent and/or to avoid clear obligations imposed under EU law.[128] Indeed, as regards State aid, the Member State's standstill obligation becomes final when the Commission delivers a negative decision. If legal certainty were able to operate as a constraint on the application of primacy in

[126] Case C-224/01, *Köbler*, EU:C:2003:513, Case C-173/03, *Traghetti del Mediterraneo*, EU:C:2006:391 and Case C-160/14, *da Silva e Brito*, EU:C:2015:565.

[127] State liability is recognised as an autonomous Union remedy which is 'inherent in the system of the Treaty' see Case 6/90, *Francovich and Bonifaci v Italy*, EU:C:1991:428. At the same time, the Commission's competence to determine the compatibility of State aid with the internal market is expressly guaranteed by the Treaty (Article 108(2) TFEU.)

[128] Where there is no possibility of the 'direct' circumvention of an EU measure – i.e. through conducting a 'different' legal assessment to the one conducted by the Commission in its decision on State aid as in Case C-119/05, *Lucchini*, EU:C:2007:434 – the Court adopts a more balanced appraisal. See, Case C-505/14, *Klausner Holz Niedersachsen*, EU:C:2015:742 and Case C-507/08, *Slovakia v Commission,* EU:C:2010:802. In *both* cases the issue concerned State aid and res judicata, but the Court took into account the interest in protecting legal certainty as far as possible. It did not recognise a 'general' duty in the area of State aid to disapply rules on res judicata.

such circumstances, it would perpetuate the situation in *Lucchini* in which the national court made its own decision about the enforcement of EU law and subsequently substituted its own assessment for the Commission's decision. Such a result would interfere with the exercise of the sole decision-making competence of the Commission conferred under the Treaty (Article 108(2) TFEU.) The lack of discretion can therefore be justified by the specific relationship between the national authorities and the Commission in the area of State aid.[129] Overall, State liability and State aid are fields within which the national courts have specific obligations that are enshrined at the level of primary law (either written or unwritten). Thus, national procedural autonomy is not (or perhaps rendered less) relevant in those circumstances, and the national legal order is consequently accorded less, if any, discretion to set its own rules in the interests of legal certainty.[130]

This understanding could also help to explain why the case law on the maintenance of the temporal effects of a judgment was an 'outlier' to the earlier case law which reflected the 'Union-national' model.[131] Although non-compliance with direct Treaty obligations may arise from national measures or practices, it is usually only possible to suspend the enforcement of Union law on the basis of the pre-determined 'conditions' set out by the Court and its assessment as to whether they have been fulfilled.[132] Thus, it is solely on the basis of the general principle of legal certainty, and its concurrent requirement to ensure the stability of legal relations, that the enforcement obligations can be suspended. In the majority of cases, the Court's analysis tends to be informed by whether the Member State has been led to believe that its practices comply with Union law, on the basis of the actions of the Union institutions.[133] Indeed, the limitation of the temporal effects of the Court's rulings on the interpretation of Union law has often been informed by the actions of the Union

[129] The application of the State aid regime has traditionally been characterized by the strict division of competence between the Commission and national authorities: a domestic court cannot make its own autonomous assessment of whether State aid is compatible with the common market.

[130] State aid matters have consistently attracted a different approach on the part of the Court to national procedural autonomy (Case 24/95, *Alcan*, EU:C:1997:163). Although, see Case C-505/14, *Klausner Holz Niedersachsen*, EU:C:2015:742, following the accepted approach to national procedural autonomy and res judicata, whilst translating the 'importance' of State aid matters into the 'effectiveness' assessment.

[131] See, for a fuller discussion, pg.104.

[132] Two (cumulative) conditions must be satisfied for legal certainty concerns to outweigh the interest in ensuring the enforcement of EU law. First, those concerned should have acted in good faith: any unlawful practices must have been adopted as a result of the existence of objective, significant uncertainty concerning the scope and interpretation of EU law provisions. Second, there should be a risk of serious repercussions if the previous legal situation was called into question by the application of EU law. See Case C-40/13 and C-432/13 *Balazs*, EU:C:2015:26.

[133] See, Case C-437/97, *EK & Wein*, EU:C:2000:110, and the distinction made in Case C-82/12, *Transportes Jordi Besora SL*, EU:C:2014:108.

institutions and the legitimate expectations created on that basis.[134] Moreover, the Court is able to maintain the effects of unlawful EU legislation due to overriding reasons of legal certainty.[135] And, in cases where EU legislation has not been adequately published, the Court has held that its provisions cannot be enforced against individuals.[136] In these circumstances, the general principle of legal certainty almost appears to have autonomous effects, as is it not enshrined in any specific provision (such as a national provision which gives expression to legal certainty.) The general principle of legal certainty operates as a constraint on the application of the principle of primacy, in order to protect individuals from the imposition of obligations that they were not made aware of due *to the EU institutions' faults*. As a result, legal certainty appears to be able of itself to furnish the Member States with a reason not to enforce clear (and in many cases valid) provisions of EU law.

The differences as regards the granting of interim relief between, on the one hand national rules in breach of the Treaty and, on the other hand, Union rules which infringe a Treaty norm follow a similar logic of situations falling outside of the EU's direct control – 'Union-national' - or within the EU's direct control – 'Union-Union.' Indeed, the approach seems to vary depending on the level of discretion that is left to the national legal order. As regards national rules in breach of the Treaty, the Court held in *Factortame,* that interim relief was a Union right in principle.[137] But in *Unibet* the Court subsequently clarified that the substantive conditions under which such interim relief is to be granted by the national courts is to be determined within the standard national procedural autonomy framework.[138] The more 'centralised' approach for the category of Union rules which infringe a Treaty norm can be justified on the grounds of protecting the uniform application of legislation from being distorted by national courts reaching different assessments about the appropriateness of granting interim relief. Consider, for example, *Zuckerfabrick* in which the Court specified the conditions under which a national court may order the suspension of a national

[134] In Case 43/75, *Defrenne*, EU:C:1976:56 the direct effect of provisions forbidding the imposition of CEEs could not be relied upon until the charges in question had been identified as falling within the prohibition either by the Commission's directive or judgment. Thus, the reason why the Court limited the retrospective effect of the judgment was that numerous people (and private employers) had been misled as to their obligations by the behaviour of the EU institutions and the Member State's governments. Note that the long-standing perceived or actual complicity of an EU institution in approving a practice will automatically lead to such a conclusion; Case C-577/08 *Brouwer,* EU:C:2010:449 at para 39.
[135] Case C-577/08, *Brouwer*, EU:C:2010:449
[136] Case C-108/01, *Consorzio del Prosciutto di Parma*, EU:C:2003:296 and Case 161/06, *Skoma-Lux,* EU:C:2007:773.
[137] Case C-213/89, *Factortame,* EU:C:1990:257.
[138] Case C-432/05, *Unibet,* EU:C:2007:163.

measure based on an EU Regulation.[139] In so doing, it disregarded the possible existence of national rules. Consider, also, *Atlanta,* where the Court acknowledged the power of national courts to order interim measures to settle or regulate contested legal positions or relationships with reference to a national administrative measure based on an EU Regulation which is subject to the reference for a preliminary reference on its validity. The Court laid down the conditions which EU law requires to be fulfilled in order for interim relief to be granted.[140] But since the Court employs a centralised framework, it does not undertake a comparative analysis of different national systems, which may reveal principles common to the legal orders of the Member States.[141] According to that view, the only way in which any uniformisation of methods for the grant of interim protection can be brought about is by means of legislation.[142]

In these situations where assessing how to enforce Union law is a 'Union' issue, it is possible to suggest that they involve 'common rules' adopted by the Union's political institutions. Indeed, it is the absence of such rules which informs the case law that accords with the 'Union-national' balancing framework. Thus, the inclination on the part of the Court to conduct an 'internal' balancing exercise in these circumstances seems entirely legitimate. After all, national standards can no longer be decisive when the Union has introduced harmonised rules in a particular area. If a common standard is reflected in the secondary rules – as opposed to mere minimum standards – then it can be assumed that the institutions have defined where the balance between the relevant interests should lie, and at the same time determined the 'Union level' contents of the Union primary norms.[143]

At this stage, it is important to note that certain situations may not correspond with the assumption that the level of discretion left to the Member States influences the judicial approach. Thus, this explanation cannot be conclusive of itself. For example, there are cases which appear to bypass the usual 'Union-national' framework that one may expect to be followed in the absence of Union legislation. This includes, but is not limited to, at least some of the case law on national rules on *res judicata* and the finality

[139] Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen AG*, EU:C:1991:65
[140] Case C-465/93, *Atlanta*, EU:C:1995:369
[141] Danzer-Vanotti, commenting on the judgment in *Zuckerfabrik* 'Der GErichshofder Europai-Schen' Germeinschaft beschranht vorlaufigen Recthsschutz,' (1991) Der Betriebsberater, 1015
[142] See also, Dougan, *National remedies before the Court of Justice: issues of harmonisation and differentiation* (Hart Publishing, 2004).
[143] Drawing an analogy with Case C-399/11, *Melloni*, EU:C:2013:107.

of administrative decisions discussed in Section 2.2.1.1. The question arises about what if anything inclines the Court, if it has at all, to call into question its established position as reflected in the 'Union-national' model. If it were to materialise that there are no particularly persuasive factors to explain the apparent shift in the judicial approach, then the concerns regarding the incursion into the realm of national procedural autonomy in cases such as *Kühne* are entirely legitimate.[144] By moving the dispute onto a level entirely concerned with managing higher Union primary interests, largely without reference to the standards and/or choices adopted under national law, the Court moves into the realm of dictating a level of conduct (potentially favouring one interest over another), even in the absence of Union legislation.

For instance, it is not clear why the relationship between EU law and national rules on *res judicata* should be framed, in some cases, as a 'Union-Union' balancing exercise, especially since there is no EU legislation on the principle of *res judicata* and any of its exceptions. In terms of the way in which the Union legal order is structured around the allocation of competence - particularly for procedural matters and by virtue of the Court's own self-understanding expressed of the matter in *Rewe* - it may be assumed that it is preferable to create binding obligations for the Member States on judicial protection for actions based on EU law through legislative measures.[145] Furthermore, it is difficult to overlook the fact that the Court is using the general principle of legal certainty in its more recent case law to assess national rules on *res judicata* in order to determine whether they accord with its 'EU-based' conception.[146] This is so despite the fact that it has traditionally been used within the legal order as a principle of interpretation in relation to concrete rules (either at the national or the Union level). In these more recent cases, it is almost presented as a free-standing obligation – with its own legal consequences – which can be used to review national rules for their compliance with Union law.[147] It should be asked whether that is acceptable, especially as those cases seem to lean towards a common EU conception of *res*

[144] See, Kornezov, 'Res judicata of national judgments incompatible with EU law: Time for a major rethink?' (2014) 51 CMLRev 809.
[145] This particular situation is determined by practical considerations, given that without systemic harmonization through secondary legislation, there is no alternative to utilizing the existing domestic systems for decentralized enforcement of Treaty norms. See Kakouris, 'Do the Member States Possess Judicial Procedural "autonomy"' (1997) 34 CMLRev 1389.
[146] Kornezov, '*Res judicata* of national judgments incompatible with EU law: Time for a major rethink?' (2014) 51 CMLRev 809.
[147] This analysis is generally slotted (however tenuously) into the effectiveness assessment.

judicata. After all, some broad conceptions under national law must be set aside in order to comply with the (more narrow) EU conception.

3.3) Constitutional developments

A third possible reason behind the (generally) more recent change in the use of the models is the influence of Union-level constitutional developments. As the second finding of the theiss reveals, the fact that Union law now protects more diverse values and objectives as primary law means that it is far more likely that there will be interactions between norms which envisage competing legal outcomes.[148] Indeed, the interactions between the foundational obligations of the Union and other of the Union's principles now occur more frequently. For example, the Union's enforcement obligations come into contact, and potential conflict, with the Union's own objectives evidenced in the Treaty, such as environmental protection, or as unwritten sources such as the need to secure legal certainty. So, whilst the traditional elaboration of primacy by the Court suggests that it is an 'absolute' principle straightforwardly to be applied so as to set aside conflicting national law,[149] the expansion of the scope of what constitutes Union primary law affords no easy answers to a clash between two Union primary norms pointing in different directions: to give effect to primacy over conflicting national law on the one hand, or for example to tolerate breaches of primacy to avoid detrimentally affecting legal certainty, on the other hand.[150]

Overall, the tensions between Union primary sources in the context of the enforcement of Union law are informed by the expanding scope of Union primary law. The focus on the interplay between the Union's foundational obligations and general principles of Union law sees the Court battling with the Union's (or its own conception) of environmental protection and legal certainty. Indeed, the case law suggests that the Court struggles to identify the appropriate role of the foundational obligations in a denser Union framework, which traditionally would lean toward the enforcement of Union law, whatever the resulting consequences. The expansion of Union primary law makes the question of enforcement much more difficult to answer.

[148] See similarly the interactions between the fundamental freedoms and fundamental rights and a newer 'centralised' Union level assessment which seems to be motivated by the reinforced primary law nature of fundamental rights in the Charter. See, Opinion of AG Trstenjak, Case C-271/08, *Commission v Germany*, EU:C:2010:183 and the judgment of the Court EU:C:2010:426; Opinion of AG Cruz Villalón, Case C-515/08, *Santos Palhota a.o*., EU:C:2010:245

[149] See, Case 106/770, *Simmenthal*, ECLI:EU:C:1978:49 and Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr*, EU:C:1970:114.

[150] See, Case C-409/06, *Winner Wetten*, EU:C:2010:38.

3.4) Subjective or objective importance of the Union interest

The final factor stems from an understanding that the 'Union-Union' model is generally more relevant in circumstances where the EU's interest is (or at least is understood to be) more pronounced. The substantive area of Union law may therefore have a bearing on the more interventionist approach adopted by the Court to resolving the tensions between the foundational principles and the general principles of Union law.

For example, the judgments in the area of State aid, such as *Lucchini*, may be further examples of the generally more interventionist approach adopted by the Court to national procedural rules in this area.[151] Indeed, in this area the Court has recognised a general obligation to annul an illegal decision. Thus, all State aids breaching EU law have to be recovered by the Member States even if the underlying administrative decision is binding. This lack of discretion is justified by the specific relationship between the national authorities and the Commission in the area of State aid rules. Moreover, there seems to be a similar pattern in the context of competition law. By contrast to the approach in *Kühne* where the Court would not (usually) be willing to set aside the principle of legal certainty to ensure that Union law is correctly applied, in *Masterfoods* the Court explained that the Commission cannot be bound by decisions of a national court in competition proceedings. It emphasised that the Commission adopts formal decisions which are binding on the national court by virtue of the principle of primacy.[152] That is the case even if that would lead to a conflict with a national judgment with regard to the same agreement or practice. Taken together, the nature of the Union's competence may influence the judicial methodology. After all, competition is an exclusive competence of the Union (Article 3 TFEU), and the assessment of aid measures for their compatibility with the internal market under Article 107(3) TFEU falls within the Commission's competence, subject to review by the EU courts. [153]

Another way of looking at the 'importance' of the area of Union law may be where the 'importance' is determined on a more *ad hoc* basis. This includes when the Court

[151] See, Case 24/95, *Alcan Deutschland*, EU:C:1997:163.
[152] Case C-344/98, *Masterfoods*, EU:C:2000:689
[153] E.g., Case C-526/14, *Kotnik and Others*, EU:C:2016:767.

might not be prepared to accept a particular outcome under EU law.[154] Naturally, this depends upon the Court's perception of the importance of an interest, which may incline it to adopt a more interventionist approach. Thus *Lucchini* and *Kühne* suggest that what the Court is most concerned with is providing a remedy for the problematic conduct of the national authorities.[155] As a consequence, however, this means that the Court is potentially developing general rules and principles which are largely informed by the facts of particular cases. That makes it very difficult subsequently to apply the principles as they have been developed by the Court to other, potentially similar, cases.

Although many of these factors offer an explanation of at least some of the cases which reflect the different models employed by the Court, none of them are convincing in all circumstances. Indeed, there is a significant amount of confusion on the part of the Court about when and why the 'internal' or 'external' balancing technique is necessary. Therefore a strict separation line has not been drawn in the case law between the two methods. Thus the question of *how* the Court approaches the relationship between the Union's primary norms in the context of the enforcement of Union law cannot be answered with any great clarity. But what is clear is that there is no consistent 'hierarchy of norms' between the foundational obligations and the general principles with one always prioritised over the other. The models however do influence our understanding of the 'hierarchy of norms' questions within Union primary law. On the one hand, the 'Union-national' model suggests less of a hierarchical understanding within Union primary law, since the national procedural autonomy framework leaves it to the national court to make the overall assessment of the tensions between the enforcement of Union law and national procedural interests. On the other hand, the 'Union-Union' model enables the Court to enjoy a monopoly over managing Union primary norms to prioritise the principles it has definitional control over, which will vary in different circumstances. Thus, the Court has greater control over the 'hierarchical' orderings, if any, within Union primary law.

[154] E.g., Case C-208/90, *Emmott*, EU:C:1991:333 has been understood as involving a situation where the government deceives or misleads an individual.

[155] The 'nature' and 'intensity' of the national court's obligations may vary depending upon the circumstances and the effects on EU law. E.g. Case C-249/11, *Byankov*, EU:C:2012:608., may have been informed by the 'fundamental nature' of the directly effective citizenship provisions.

4) <u>What are the constitutional implications of how the Court structures the relations between the foundational obligations and the general principles of legal certainty?</u>

The judicial methodology and choice between the two prevailing models has a number of important consequences, both in practice and at the level of principle.

4.1) Practical implications

It is possible to make two assertions in terms of the practical consequences that accompany the Court's ambivalence over its methodological approach. First, it is significant that the use of either model may lead to different substantive outcomes, due to the type of assessment conducted and the standards of review used under both templates. For example, under the 'Union-national' model, the Member States essentially have an obligation to comply with the minimum 'negative' standards under EU law, in particular those stemming from the general principles of Union law (equivalence and effectiveness.) However, this standard of review alters when it comes to the use of the 'Union-Union' model. What the Court essentially recognises in these latter circumstances is a 'positive' obligation or duty on the part of the Member States to achieve a certain result. The national legal order is then left with the task of 'implementing' the outcome reached at the level of Union primary law.

Thus, there are essential qualitative differences in the standards required of the Member State, which feed into the broader constitutional implications discussed below. For example, the 'Union-national' model only extends so far as to assess the existing national choices for their compliance with Union law. In other words, there is no positive or autonomous EU standard that the Member States ought to comply with.[156] At most, the Member States have a *negative* obligation to assess the legality of their own standards and choices against the general principles of Union law. Thus, it may be possible that Member States are able to retain their national standards even if they differ from those of other Member States. By contrast, the shift to a 'Union-Union' model could, for instance, result in a situation where the national court must reopen their final decisions if they are incompatible with EU law, even if that

[156] This is the case with the principle of equivalence, whereby the EU only requires that existing domestic standards be extended to comparable claims under EU law. This is usually the same as regards the principle of effectiveness: it generally imposes negative standards.

possibility had not been afforded under national law.[157] Indeed, in *Byankov,* the existence of an obligation to review a final administrative decision – despite the general non-enforcement principle on the basis of the general principle of legal certainty - did not depend on the existence of a national procedural rule to that effect.

Second, a troubling unpredictability emerges from the two methodologies. After all, the same 'type' of situation is treated differently by the Court, making it difficult to predict the process through which the Court reaches its decisions.[158] So, for example, as regards final administrative decisions under national law and their relationship with the foundational principles of EU law, the Court has adopted two different routes to assess whether a final decision which leads to a result that is incompatible with EU law must be set aside. It is not clear whether an individual will be able to enforce their EU rights before national courts or have a remaining remedy under EU law, and indeed whether the national court would be relieved of its obligation to ensure the correct application of Union law. In *Kühne,* the Court invoked the general principle of legal certainty to explain that there is no obligation under EU law for national authorities to open final administrative decisions. However, the Court also indicated that, under certain circumstances, those decisions would have to be reopened, laying down a series of conditions on the basis of Article 4(3) TEU which insinuates that an 'internal' assessment between Union primary law follows.[159] By contrast, in *i-21 Germany and Arcor*, the judicial approach more closely reflects the 'Union-national' framework for assessing the finality of a decision at the national level which was incompatible with EU law.[160] The Court applied its standard formula that, in the absence of EU legislation, the presumption of national procedural autonomy governs the matter, subject to the national rules complying with the requirements of equivalence and effectiveness.[161] Thus, the need to revise a final administrative decision which

[157] This is one possible interpretation of the approach in Case C-453/00, *Kühne & Heitz.* It also can help to explain the Court's outcome in Case C-249/11, *Byankov* as the situation of the claimant did not fall within one of the 'exhaustive grounds' under national law requiring a final decision to be reopened. As a result, the administrative bodies would no longer be able to exercise their power to have the case reviewed in the light of the ECJ's case law; despite the fact they would be subject to the obligation to respect the primacy of EU law. However, due to the gravity of the effects on primary law interests, particularly the free movement rights of citizens, the decision not to reopen a final decision would maintain in force a situation which was the antithesis of the free movement rights guaranteed under the Treaty.

[158] Even when the Court does lay down a set of conditions, it is not always made clear how they will apply outside of the context of the immediate case. See, Case C-453/00, *Kühne & Heitz*

[159] See pg.110.

[160] Joined Cases C-392/04 and C-422/04, *i-21 Germany, Arcor,* EU:C:2006:586. The case was distinguished on the basis that the undertaking in *Kühne* had exhausted all legal remedies available to it, whereas *i-21* did not avail themselves of their right to appeal.

[161] The different assessments made by the Court and the Advocate General are interesting. Advocate General Colomer considered that the Member State was required under article.4(3) TEU to repay the sum that had been unlawfully charged. By

breached EU law in this instance was recognised through equivalence.[162] More recently in *Byankov* the Court's analysis is illustrative of the confusion generated by the case law since the Court seems to make reference to the national procedural autonomy framework whilst simultaneously suggesting that a balance must be struck between two distinct Union primary interests.[163] There thus appears to be some problems, even for the Court, when it comes to navigating the boundaries between both models in making decisions about the enforcement of Union law.

In summary, the case law does not seem to be guided by any rational underpinning so as to make it possible to predict when an 'internal' assessment will be favoured over the usual 'external' assessment of the tensions relating to the enforcement of Union law. This is important as the different models could also influence the practical outcome as regards the (non-)enjoyment of individual rights. Indeed, the extent to which legal certainty can moderate the usual effects of the foundational obligations may determine whether the Member States and/or private parties can be relieved of their obligations under EU law. Consider, for example, *Dansk Industri*. The referring court asked whether the general principle of legal certainty could work to prevent the enforcement (in the form of direct effect) of an otherwise binding obligation under Union law. If the Court had answered in the affirmative, then the employer would have been relieved of its obligation to pay a severance allowance to its employee.[164] In yet other circumstances, individuals could potentially escape a sanction for their conduct which is mandated by EU law, if the relevant rules setting out such a sanction are not correctly communicated to them.[165]

4.2) Constitutional implications

Another set of consequences are more reflective in nature, in so far as they concern the constitutional implications of the differences between these two methodologies.

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contrast, the Court grounded its conclusions in the principle of national procedural autonomy, without any reference being made to the principle of supremacy.

[162] According to German administrative law, the administration was under an obligation to withdraw an administrative act if maintaining that act would be 'outright intolerable in respect of public policy or manifest unlawfulness.' The Court ultimately left it to the national court to make that assessment. However, in doing so, the Court explained that the national court would have to take into account that imposing the fee would create a serious limitation on competition and would preclude the fulfilment of the Directive's objectives. See, further, Taborowski, 'Joined cases C-392/04 & C-422/04, i-21 Germany GmbH (C-392/04), Arcor AG & Co. KG (C-422/04), formerly ISIS Multimedia Net GmbH & Co. KG v. Bundesrepublik Deutschland, Judgment of the Court (Grand Chamber) of 19 September 2006, nyr' (2007) 44 CMLRev 1463.

[163] Case 249/11, *Byankov*, EU:C:2012:608.

[164] Case C-441/14, *Dansk Industri (DI)*, EU:C:2016:278

[165] See, for example, Case C-108/01, *Consorzio del Prosciutto di Parma*, EU:C:2003:296.

The first thread is the relations between the EU and the Member States on the vertical plane. Of particular significance in that regard is the possible 'centralisation' of the assessment of enforcement issues through the use of the 'Union-Union' template by the Court. The second main theme relates to the question of what courts (of any nature) can do within the limits of their jurisdictional powers. The specific focus here is the horizontal relationship between the Court and the Union's political institutions. These inter-related issues are underpinned by a common question: does, and if so how does, the Court display its appreciation of the Union's institutional dynamics in the context of the enforcement of Union law? They thus speak directly to the third finding of the thesis about the role of the Court vis-à-vis other constitutional actors.

4.2.1) Vertical implications: the relations between the Member States and the Union

This chapter suggests that the 'Union-Union' model reflects a shift toward a centralised assessment of the respective strengths of competing Union primary law interests in the hands of the Court. For example, under the traditional 'Union-national' model the Court's role is to supervise the relevant national choices that may restrict Union primary law obligations. Thus, the level of discretion left to the Member States is in keeping with the prevailing legislative environment: the Member States are generally free to set their own rules, and to determine the extent to which they safeguard legal certainty, provided such choices comply with the general principles of Union law. By contrast, under the 'Union-Union' model, the Court conducts a centralised assessment when it comes to balancing Union primary norms in order to reach its outcome, which is to be complied with at the national level. A centralised process locates responsibility for striking the balance between primary norms at the EU level, but, more importantly, that responsibility in the absence of Union legislation falls to (or is more accurately assumed by) the Court. This is problematic since questions about the enforcement of Union law are generally left to the Member States in the Treaties, under Article 19 TEU.

One consequence is that this has the effect of reducing the Member State's ability to pursue their own (possibly diverse) policy goals, even in areas where they are supposed to retain competence.[166] After all, EU primary law almost operates as the sole reference point for the balancing of interests under the 'Union-Union' appraisal:

[166] See, similarly, Chapter 1 on the relationship between the directly effective provisions and Union competences.

two EU values are to be reconciled as regards their substantive outcomes. Yet under the traditional 'Union-national' formula, if the Court were to lay down uniform rules and to make (and assess competing) policy choices about appropriate level of intervention, this would amount to a usurpation of the roles of the national (and Union) legislative organs.[167] It is only by treating the matter as defining what primary law is or requires that the Court is able to move its assessment away from specifying what national law should say, to elaborating upon what Union primary law requires.

To some degree, the scrutiny of national rules which are potentially incompatible with EU law is, in many cases, also centralised at the Union level by the Court.[168] However, many of these situations benefit from their own constitutional rationale. The Court is, at least under the 'Union-national' model, attuned to the limits of its role: it generally occupies a supervisory position, leaving it to the national court to resolve any tensions between the competing interests, provided their conception complies with the minimum standards required under Union law. However, this makes it more difficult to understand why the Court adopts a different methodology over the same issues in similar contexts. In such circumstances the insinuation is that it is necessary to balance two competing interests of equal force at the EU level, an exercise which the Court reserves for itself. The Court therefore runs the risk of being accused of using the mechanism of the balancing of primary law interests to centralise its assessment, and to justify the ends that it reaches on the basis.[169]

4.2.2) Horizontal implications: the role of the Court and the Union's political institutions

A second set of implications of the methodological choices concern the role of the Court and its relationship with the Union's political institutions. The issue here is whether the Court the correct institution – in a constitutional sense - to assume the responsibility to make value choices between competing Union primary norms.

In the earlier case law the Union's political institutions were understood as the actors with responsibility for making such value choices. Indeed, very similar to chapter one,

[167] Craufurd-Smith, 'Remedies for Breaches of EU Law in National Courts' in Craig, de Búrca, *The Evolution of EU Law* (OUP, 1999), p.296.
[168] E.g. the Court can at times be prescriptive as to the compatibility of national measures with Union law.
[169] This is a concern of any balancing exercise. For example, it can lead to too much judicial discretion, in the absence of a pre-determined framework, which may therefore render the resolution susceptible to subjective, value judgments. Zucca, *Constitutional Dilemmas: Conflict of Fundamental Legal Rights in Europe and the USA* (OUP, 2007) and 'Conflicts of Rights as Constitutional Dilemmas' in Brems (ed), *Conflicts between fundamental rights* (Intersentia, 2008) 19.

the traditional approach from *Rewe* was to leave the prevailing situation as it was in the absence of Union legislation: the divergent protection of interests at the national level, and the maintenance of obstacles to the enforcement of Union law. If the Union institutions were unhappy with the situation they had the competence to intervene.[170] For example, in *Rewe*, the Advocate General explained that although its approach may have the effect of limiting the substantive rights of individuals by allowing obstacles to the enforcement of EU law to arise under national law, the only satisfactory remedy was the adoption of legislation to harmonise limitation rules and ensure judicial protection for actions based on EU law.[171] After all, the extent to which provision is made in procedural rules for limitation periods, amongst other things, is a matter for the legislature to decide: making a choice between requirements of legality and requirements of legal certainty on the basis of the historical and social circumstances at a given time.[172] The Court's role serves to compensate (but not to replace and/or act as a substitute) for the lack of legislation, by introducing the minimum standards of equivalence and effectiveness in order to balance the need at the EU level for the effective enforcement of Union law with the discretion reserved by the Member States.[173]

The 'Union-Union' model in some cases reflects a move towards more uniform outcomes for the Member States, even in areas where the Union's political institutions have not introduced legislation, or where they cannot introduce legislation due to their limited competence. If the use of this model is taken further, it could have far-reaching consequences. The Court may essentially indicate the 'EU-mandated balance' between Union primary interests, when that touches upon national values or standards that find their reflection at the level of EU primary law, such as legal certainty. In this way, the assessment may become purely a means of ensuring the enforcement of the 'EU' value choice as to the standard of protection to be afforded to a particular interest, which in the majority of cases will be the one determined by the Court.[174] However, as has been acknowledged a degree of disparity in the application of EU law is

[170] At para 4 of its judgments the Court was explicit that the then Articles 100 to 102 and 235 of the Treaty enabled measures to be taken to remedy the differences between the provisions in Member States.
[171] Opinion of AG Warner in Case 33/64, *Rewe*, EU:C:1976:167.
[172] See Case T-22/02, *Sumitomo Chemical*, EU:T:2005:349.
[173] Adinolfi, 'The Procedural Autonomy of Member States and the Constraints Stemming from the ECJ's case law' in Micklitz and De Witte (Eds.), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012)
[174] For example, it is possible to argue to the reconciliation of a direct clash between fundamental freedoms and fundamental rights is a key political decision. Furthermore, in the absence of intervention the prevailing approach would be consistent with the maintenance of disparities between national labour law systems, which have not been co-ordinated to any significant degree.

inevitable in the absence of harmonised rules on remedies and procedures. Therefore, the interests of uniformity cannot justify any requirement that all time limits for claims arising from EU law are set aside. As regards the enforcement of Union law, in the absence of harmonised rules, the sole requirement should be that national remedies and procedural rules provide adequate legal protection as envisaged by the *Rewe* formula.

There are also problems with a 'pre-determined' balance between interests being enunciated in the case law, without the guidance of general legislative rules. In particular, the outcome may not be transposable to different contexts due to the fact that the initial balance was informed by the facts of a case on an *ad hoc* basis. The cases which have proven very difficult to explain are usually those which see the greatest influence of the particular factual circumstances of each dispute upon the general legal principles articulated by the Court. Consider, for example *Kühne* and *Lucchini*. These examples seem to have been motivated by the desire to do justice on the particular facts of the case, but in so doing also established exceptions to the more traditional line of case law they would normally form part of.[175] Such a case-by-case approach to dealing with these legal issues is prone to lead to confusion in subsequent cases. Amongst other things, this explains why the task of making 'pre-determined' choices between Union primary norms should lie with deliberative institutions, which may not be as (easily) susceptible to factual influences. It is due to such problems with the judicial development of legal principles, that some believe such a process should be entrusted to political institutions who are able to set more general, abstract rules.[176]

Overall, these 'constitutional' implications share in common the fact that they relate to the level of control the Court reserves for itself in order to tackle the tensions between Union primary norms when it comes to the enforcement of Union law. This therefore sheds light on the third key theme of the thesis: the *centrality* of the Court vis-à-vis the Union's political institutions and the Member States. It also feeds into

[175] For example, despite the formal reverence to the principle of legal certainty in Case C-326/96, *Levez*, EU:C:1998:577 the Court seems to affirm that time limits or other procedural rules can be set aside if the circumstances of the case dictate. It has been noted that such a 'specific circumstances' derogation seems to introduce an element of uncertainty, both at the EU and at the national level. See, Curtin and O'Keefe, *Constitutional Adjudication in European Community and National Law* (Butterworths, 1992)

[176] See, Himsworth, 'Things fall apart: the harmonisation of Community judicial procedural protection revisited' (1997) 22 ELRev 291.

our normative critique of the Court operating contrary to the Treaties as regards the enforcement of Union law and the responsibility of the Member States under Article 19 TEU and the Union's political institutions under the Treaty framework of competence.

4.2.3) The dual use of the general principles of Union law

The methodological choices are also revealing as to the role of general principles of Union law. Under the 'Union-national' model legal certainty is recognised as a legitimate interest that may be reflected in national rules and which can be used to delimit the enforcement obligations under EU law. But, there seems to be quite a substantial shift from the use of the general principle essentially as a defence against a restriction of Union law - whereby primary law is relevant in so far as it reflects the aim pursued under national law - to its ability to give rise to a set of independent obligations which are to be balanced against the Union's foundational obligations. Under the 'Union-Union' model the general principles acquire a substantive significance and lead toward a judicial choice between the different conceptions of legal certainty across the Member States in the formulation of an 'EU'-standard.

After all, as a general principle of Union law, the Court is able to manage the *boundaries* of legal certainty. Thus, not all national conceptions will be accommodated under the auspices of its review in the event that they do not adhere to the 'EU' conception. Rather than allowing qualifications of EU law to stem from an external source (national law), as a matter of judicial practice, it appears to be preferable in some of these cases to ensure that the balancing assessment is 'internal' to the EU legal order. In this way, the relevant 'interests' are recognised within the framework of EU law as general principles. A crucial question is to what extent such an approach is motivated by the fact that it enables the Court to obtain greater control over the boundaries of restrictive national rules. Take for example the cases on national rules on *res judicata*, as regards when the definition of *res judicata* – which protects judgments which have become final – will be considered to be too broad by the Court owing to its effects on Union law.[177] The Court specified in *Târsia* that, in

[177] Recall Case C-2/08, *Fallimento Olimpiclub*, EU:C:2009:506, where the Court pointed out that the way the limits of *res judicata* were construed under Italian law meant that there would be recurring violations of EU law without it also being possible to remedy them. Moreover, in Case C-505/14, *Klausner Holz Niedersachsen*, EU:C:2015:742 the national rules on res judicata precluded questions being raised which could have been raised in an earlier action. The Court held that this interpretation could have the consequence of attributing effects to a decision which would frustrate the application of EU law.

the context of its assessment of the principle of effectiveness, under 'particular circumstance[s]' national rules on *res judicata* can be side-lined in order to ensure that EU law is enforced.[178] The rationale behind these cases seems to be that certain obstacles to the enforcement of EU law cannot be justified by the broad interpretation given to *res judicata* under national law, irrespective of the desire to protect legal certainty that may be reflected in that interpretation.

As a result, there is evidence of a 'dual usage' of the principle of legal certainty in the case law. In its more 'traditional' use under the 'Union-national' model the principle of legal certainty at most operates as a justification for a restriction of a Union law obligation stemming from national law. However, when the case law reflects the 'Union-Union' framing exercise, the general principle of legal certainty becomes a more central part of the overall assessment. In other words, legal certainty seems to produce stronger and arguably more independent preclusive effects: it is not merely a 'justification' for a restriction which stems from national law. This is interesting in itself as legal certainty is generally recognised as an ambiguous concept with little, if any, normative potency of itself.[179] Yet, it is being used to achieve two different results in the case law, the nature and intensity of which can vary depending on the situation.

It is important to note that legal certainty has generally been used in such a manner where the problem arises due to the nature of EU law. In other words, there is usually no enforcement issue with EU law arising from national law *per se*. The Court seems to take into account legal certainty when it comes to (suspending) the imposition of obligations on individuals. For example, the Court has explained that Directives must be implemented in the national legal order to create the necessary legal certainty for individuals, before they can be relied upon to impose obligations in the context of horizontal disputes.[180] Equally, Regulations must be adequately published in order for any obligations to become enforceable against individuals.[181] The Court also has

'A rule with such extensive effects for the application of EU law - especially a principle as 'fundamental' as control of State aid – would be incompatible with the *principle of effectiveness*.' At para 45.

[178] These cases concern the 'interpretation' of res judicata in *Lucchini*, *Fallimento* and *Klausner*. This ensures that, from the perspective of EU law, it is not understood too broadly.

[179] Bobek, 'The Binding Force of Babel: the Enforcement of EC Law Unpublished in the Languages of the New Member States' (2007) 9 CYELS 43.

[180] The limitation of the horizontal direct effect of Directives in Case C-201/02, *Wells*, EU:C:2004:12 was attributed to the principle of legal certainty, due to the consequences that stem from the nature of Directives as a source of EU law.

[181] In Case C-161/06, *Skoma-Lux*, EU:C:2007:773 the Court held that an act adopted by an institution cannot be enforced against individuals before they have the opportunity to acquaint themselves with its publication*:* the principle of legal certainty *would require* that EU rules enable those concerned to ascertain unequivocally the extent of the obligations imposed on them, at para 33.

discretion for the annulment of EU acts. Even though an act may be unlawful, the Court can - under an express provision of the Treaty - decide that some of its legal consequences shall nevertheless lawfully take effect.[182] Taken together, the enforcement of EU law in all three of these situations is essentially made *conditional* on ensuring that legal certainty is protected. But, all of these limits acquire a degree of textual support from the Treaty. Indeed, it is evident from the wording of Article 297(2) TFEU that a Regulation cannot take effect in law unless it has been published in the *Official Journal*. Moreover, Article 288 TFEU specifies that a Directive shall be binding, as to the result to be achieved, *upon each Member State to which it is addressed*. Therefore, it is arguable that as the 'balancing' exercise between legality and legal certainty could be said to have been pre-determined by the Treaty text, the Court is not willing to introduce (at least explicitly) any exceptions in the individual circumstances of a case.

However, it is not entirely clear what the rationale is for extrapolating this particular use of the general principle of legal certainty, to the context we are concerned with in this chapter: limitations to the Union's foundational obligations arising from a national law or practice. As the 'usual' 'Union-national' approach exhibits, in the majority of cases the principle of legal certainty is protected due to the 'choice' of the particular Member State, and not by virtue of it being recognised as a general obligation under EU law as such. Legal certainty is essentially used to reinforce the 'reasonableness' of national rules that may constitute a restriction to the enforcement of EU law.[183] The role of the Court seems to be to 'vet' *when* legal certainty can be invoked as a justification in order to suspend the obligation to ensure the application of EU law. This type of effect is typically accorded to legal certainty where the concerns originate from national law. In such circumstances, an attempt is made by the Court to accommodate these national concerns within an EU obligation. The source of the obligation cannot be said to be the general principle *per se,* as it does not of itself dictate that EU law should not be enforced in an abstract set of circumstances. Equally, any exceptions to the need to ensure legal certainty within the national legal order over the principle of legality generally arise on the basis of national law.

[182] Thus, where it is justified by overriding considerations of legal certainty, the second paragraph of Article 264 TFEU confers on the Court a discretion to decide which specific effects of the measure must be regarded as definitive; Case C-228/99, *Silos e Mangimi Martini SpA*, EU:C:2001:599, at para 35.
[183] E.g. see the case law on national time limits, including Case C-78/98, *Preston*, EU:C:2000:247.

The Court should remain attuned to these distinct possibilities as regards the 'enforcement' issue when it comes to the interplay between the foundational obligations and legal certainty. The Opinion of the Advocate General in *Norvatis* offers an explanation for the possible 'limits' to the enforcement of Union law within different contexts: on the one hand, national procedural autonomy and, on the other hand, the general principle of legal certainty *per se*.[184] This insinuates that the general principle of legal certainty can only assume a more potent and essentially independent function in situations where national procedural autonomy itself has no bearing on the dispute. If national procedural autonomy is relevant, then the principle of legal certainty forms part of the national legal order, rather than being a direct obligation stemming from the Union legal order. On the available evidence, the Court seems to confuse even its own understanding of the role of legal certainty as expressed in cases like *Rewe.*

4.2.4) Implications for the relations between the Union and national legal orders

Taken together, the implications discussed above contribute to a more fundamental observation. Indeed, the methodological choices of the Court might shed light upon the way in which the structural relationship between the national legal systems and the Union legal order is understood at the Union level. Moreover, the general principles of Union law may play a role, as either driving or at least as reflecting a possible change in how those relations are understood. In this sense, their (potentially different) role under each model may align with different conceptions of the relations between the legal orders.

This reflection is situated within the context of a broader debate in EU law. Some commentators believe that there a unitary - or essentially hierarchical - conception of the legal order embracing both the Union and national legal orders. This appears to be the Court's own view of the matter as expressed in cases such as *Simmenthal.*[185] To others, however, the legal orders are to be understood as retaining their separate characters, with their specific identity to be defined according to their own rules and processes.[186] It is interesting to consider whether, and if so how, either of the two

[184] Case C-442/11, *Norvatis AG,* EU:C:2012:66.
[185] Case 106/77, *Simmenthal,* EU:C:1978:49.
[186] See, for example, the debate between Schilling, 'The autonomy of the Community legal order' (1996) Harvard International Law Journal 389–409 and Weiler and Haltern, 'The autonomy of the Community legal order: Through the looking glass' (1996) Harvard International Law Journal 411. See, also, Dougan, 'When Worlds Collide! Competing Visions of the

framing models in this context may accord with these fundamentally different understandings.

As regards the 'Union-national' model, although the compatibility disputes may involve Union primary interests, legal certainty is not necessarily presented as a distinct norm of Union primary law. Rather, legal certainty is an interest protected in the first instance by national law, which is to be weighed against the Union's foundational obligations. The role of the general principles (such as effectiveness) seems to be to mediate between the apparently contradictory requirements of the Union and national legal orders, so as to make them work together. In this sense, they provide a sort of 'bridge' between the requirements under national law and the requirements under EU law. This process of separation and interaction that plays out through the balancing exercise aims to translate the requirements and interests of the legal orders into one another. As a result, it is possible to argue that this appraisal presupposes that the national legal order is entirely separate from the Union legal order. Indeed, the very existence of limiting principles (equivalence and effectiveness) on the applicability of their national procedural rules only serves to support this appraisal.

With the 'Union-Union' model however, the compatibility dispute is framed as though it involves two distinct Union primary norms. In these cases, the Court assumes for itself the role of reconciling any tensions between the foundational obligations and the general principles, firmly as a matter of EU law. There is no need to accommodate diverse national choices as regards, for example, the standards and contents of legal certainty, as a dispute may be resolved internally on the basis of the balance of primary law interests. The question that arises here is whether the general principles of Union law assume a more autonomous function in the sense that they do not merely play a role in mediating between national and Union requirements, but rather may project their own free-standing requirements? This may mean that the 'Union-Union' model supports a different relationship between the legal orders than the 'Union-national' model. For example, that conception could be one which is more integrated and

Relationship between Direct Effect and Supremacy' (2007) 44 CMLRev 931, as to how this relates to the roles of the principle of direct effect and the principle of primacy in the Union legal order.

hierarchical, with the national legal order merely 'implementing' the balance of interests struck at the Union level.

4.2.5) A 'hierarchy of norms?'

A final point of interest concerns what impact these two models have on the 'hierarchy of norms' within Union primary law. The 'Union-Union' model tends to present the relevant Union primary norms on an equal basis. In other words, there is not necessarily a structural hierarchy which would place one of the primary law materials above the other. The implication is that a 'balancing' exercise ought to follow. But, there is still no real guidance as to how the issues (that lead to quite significant outcomes) should be or are approached. What we thus see is a greater role for the Court in managing the different outcomes, which can lead to variable results.

By contrast, the 'Union-national' model captures an approach whereby a Union primary law interest (legal certainty) is (usually) portrayed as being less likely to have the effect of qualifying the 'governing' Union primary obligation. For example, when the dispute is conducted under the 'Union-national' framework legal certainty - recognised at the national level - is qualified as a *prima facie* restriction to the foundational obligations, which must be justified through equivalence and effectiveness.[187] Thus, these norms are, at least in practice, not viewed as though they are of equal nature and thus are not deserving of equal consideration. On one possible reading this may be a necessary result of how the legal system is currently organised: given that values/interests usually need to be operationalised before they can impose independent obligations under EU law.[188]

5) Conclusion

This chapter explored the interactions between the foundational principles of Union law and the general principle of legal certainty. It should be clear that the Court has a choice over *how* it might approach the enforcement of Union law and thus *how* it may arrange the Union's primary law materials. The Court employs two techniques to

[187] See, in the context of fundamental rights and the fundamental freedoms, Reynolds, 'Explaining the Constitutional Drivers Behind a Perceived Judicial Preference for Free Movement over Fundamental Rights' (2016) 53 CMLRev 643.
[188] E.g. as the Court seems to understand in its statements in Case 33/76, *Rewe,* EU:C:1976:188, Case 45/76, *Comet,* EU:C:1976:191.

frame the assessment, which lead to different conclusions and also give rise to their own set of consequences.

The usual judicial approach to addressing compatibility issues as regards the enforcement of Union law is well-established. The standard 'Union-national' formula benefits from a certain degree of predictability: at least as to the locus of power, the procedural route envisaged for the scrutiny of national rules and the standards of review to which those rules must adhere. Moreover, under that model, attached to the assessment of 'whether EU law can be enforced' is a convincing rationale: as the situations fall within the scope of EU law, the Court is able to adopt a supervisory role, but the standards of protection stem from the national legal order (in the absence of legislation at the Union level). However, there are a series of cases which concern broadly the same issues that were originally dealt with under the standard model for which the Court employs a different model. Even though the 'Union-Union' framing model may offer an explanation of the judicial practice in those cases, it cannot of itself provide a justification for the underlying rationale for the modified approach, without further acknowledgement of what the process is being used to achieve, and the circumstances and/or criteria for its application. After all, the existence of these two different paths is prone to lead to confusing results. Even in the cases which employ this altered 'Union-Union' methodology, there appears to be confusion on the part of the Court as to why it feels it necessary to adopt this model. This is especially pertinent given that the 'drivers' of this change fail to demonstrate any consistency in the overall approach.

Thus we are left with evidence to suggest that the 'Union-Union' and 'Union-national' models help to explain the judicial approach to managing the interactions between the foundational principles and legal certainty. The very fact that there are at least two different paths through which the Court assesses the relations between the foundational principles and the general principle of legal certainty, and that there is no clear acknowledgment on the part of the Court as to why they are used or any consistency in the exercise of its choice, presents constitutional issues in and of itself. In terms of *what* the constitutional implications of this chapter are, it seems that even the Court is unsure of the acceptable approach, despite the significant implications which accompany each of the models. One possible reading of the case law is that much of the confusion that is reflected in the judicial practice essentially depends on

the Court's ambivalent understanding of the vertical relations between the national legal orders and the Union legal order. Each of the models seems to articulate fundamentally different conceptions of this relationship and between the relevant principles of EU primary law.

Overall, the findings of the chapter clearly reinforce the three key findings of the thesis. First, it is not possible to identify clear hierarchical orderings between the foundational principles and legal certainty in the context of the enforcement of Union law. The chapter identified circumstances where legal certainty moderates the effects of the Union's foundational obligations, as well as circumstances where the foundational obligations take precedence over legal certainty. The Court does however employ different approaches to reach its outcomes: the 'Union-national' and the 'Union-Union' model. The latter model inclines toward a more 'centralised' assessment on the part of the Union. It is important that the centralised assessment under the 'Union-Union' model affords space for the Court to make its own assessment of possible 'hierarchical' relationships between Union primary norms.

Second, the development of Union primary law has increased the possibility for interactions in this context and accentuated potential problems with the management of such interactions. Indeed, the Court has developed its own conception of the general principle of legal certainty which – as a value of Union primary law – comes into contact with the Court's conception of the foundational obligations of Union law.

In turn, it is clear that a 'Union-Union' approach affords the Court much more control over the interactions between Union primary norms in the context of the enforcement of Union law in line with the third key finding of the thesis. As this chapter serves to reveal, this is to the detriment of the powers of the Member States and also of the Union's political institutions recognised under the Treaties. In the same vein as chapter one, it is also largely true that the central role of the Court in elaborating and expanding upon Union primary law has *caused* greater difficulties for questions about the enforcement of Union law, rather than merely being a *consequence* of the expanding scope of Union primary law and the absence of a clear 'hierarchy of norms.' The Court has the monopoly in this context to arrange the Union's primary norms, and it demonstrates a growing tendency to 'centralise' its assessment of the interactions to

resolve any tensions as regards the enforcement of Union law on an ‘internal’ Union level.

Chapter three: the relations between the Union's primary legal sources in the context of the amendment of Union law

The central theme of the following two chapters is the legal parameters of the Union's primary law-making powers under Article 48 TEU. In contrast to the processes of the operationalization and enforcement of primary law discussed in the previous chapters, the present chapters focus on the construction of Union primary law, and which actor(s) enjoy(s) the prerogative to that effect. The importance of this theme lies in the possible challenge to the assumption that prevails in many domestic legal systems, and sometimes within the Union legal system, that the Member States remain the 'masters of the Treaties,' in the sense that they enjoy the ultimate prerogative over the procedural routes for amendment, and also for determining the substantive content of amendments to Union primary law.[1] The remaining two chapters therefore explore the nature and scope of the primary-law making powers and the meaning of 'mastery' in the context of the amendment of Union primary law.[2] The central question is to what extent does *Union primary law* function as a limit to the Treaties' reservation of amendment powers to the Member States.[3]

A common pattern of the previous chapters is the supposedly 'equal' value of Union primary law in the absence of a clear 'hierarchy of norms.'[4] The logical corollary of this is that there ought to be a 'balancing' exercise between these different sources in order to reconcile their potentially competing legal consequences in practice – an exercise which tends to afford the Court a significant amount of discretion. The clearest way in which a 'less equal' value amongst Union primary law may emerge is if Union primary law functions as a limit to amendment. This chapter and chapter four

[1] The idea that the Member States are 'masters' finds it basis in domestic understandings of the EU legal order, see, the case law of the German Constitutional Court, e.g. Cases 2 BvR 2134/92 & 2159/92 Manfred Brunner and Others v The European Union Treaty, judgment of 12 October 1993 and Cases 2 BvE 2/08 et al. Ratification of the Treaty of Lisbon, judgment of 30 June 2009. It is also the case at least implicitly from the Treaty, given their central (and apparently decisive) role in the amendment procedures. See Article 48 TEU.

[2] The use of the notion 'primary law-making' suggests some form of 'constitutionalisation' of the process of amendment/higher law-making in the Union context, by contrast to the traditional rules for amendment in international law. In other words, the nature of the Union framework allows for its own 'internal' rules of higher law-making.

[3] This thesis does not focus on the domestic limits or the general limits from public international law that may admittedly constrain the Member States in this context.

[4] That assumption is strengthened in this context as the same amendment procedures are required for all primary norms. This is the case contrary to the usual approach in domestic constitutional systems and in certain proposals in the Convention for the Future of Europe leading up to the (defunct) Constitutional Treaty, see the Introductory Chapter pgs.15-16. For example, one way in which a constitution can balance stability and flexibility is by designing different amendment processes for different provisions; some provisions may require a simple amendment procedure, whilst others may necessitate a more difficult procedure. Eisgruber, *Constitutional Self-government* (HUP, 2001), pg.14

thus explore *how* Union primary norms relate to one another in the context of the amendment through two separate inquiries: procedural limits and substantive limits.

In this chapter, the 'higher' value of Union primary norms may become clear if the existing sources lay down 'mandatory' procedural conditions for amendment. In terms of the enforcement of these procedural conditions, the logical outcome is that purported amendments that do not follow the prescribed procedures cannot be recognised as constituting primary law. This chapter is interesting since it tells us something about the *reactive* role of the Court in the Union's 'hierarchy of norms.' Indeed, in this chapter it is the Union's political actors who take the lead on the 'hierarchy of norms' issues, with the Court taking a less active role than it has done in the previous chapters.

In chapter four, there may be limits to the formulation of primary law, in the sense that the contents of 'new' primary law ought to comply with the existing materials, which, by implication, would enjoy an elevated legal value. Indeed, there is much discussion about the substantive limits of the Member States' role in the amendment of Union primary law.[5] If any limits exist, the question is whether the Court is prepared to enforce such limits essentially *against* the Member States in their attempts to amend the Union's primary framework.[6] If so, the Court may in some circumstances essentially 'sit above' the Member States in the process of amendment.

In order to explore these two issues use is made of the Court's self-imposed benchmarks. On the face of it, it appears as though the judicial understanding of both the procedural mechanisms used to amend the Treaty and the substantive content of such amendments is, at least implicitly, informed by the centrality of the position of the Member States under Article 48 TEU. On the one hand, the Court in *Defrenne* attributes great significance to the *exclusive* procedures for amendment under the Treaty.[7] On the other hand, the Court in *UPA* seems to draw clear lines between its *interpretation* of primary law and the *amendment* of the substance of primary law, the latter strictly the responsibility of the Member States under Article 48 TEU.[8] This

[5] Nuno Piçarra, 'Are there substantive limits to the amendment of the Treaties' in, José Luís da Cruz Vilaça *EU Law and Integration: Twenty Years of Judicial Application of EU law* (Hart, 2014)
[6] Questions about enforcement are not explored in detail in this chapter – but they have been explored extensively elsewhere. See, Hillion, 'Negotiating Turkey's Membership of the European Union: Can the Member States do as they please?' (2007) 3 European Constitutional Law Review 269.
[7] Case 43-75, *Defrenne*, ECLI:EU:C:1976:56, para 58.
[8] Case C-50/00, P *Unión de Pequeños Agricultores*, EU:C:2002:462, para 45.

implies that the Court values Article 48 TEU as occupying a high place in the Union's 'hierarchy of norms.' It remains to be seen whether these benchmarks are reflected in the case law in practice. This chapter and chapter four thus attempt to review the case law, and identify *how* the Court approaches the interactions between different primary sources in the context of amendment.

The chapters also explore *what* the possible implications of the organisation of the Union's primary legal sources in the context of amendment are from a constitutional perspective. Indeed, the legal issues give rise to an interesting set of questions about the nature and the scope of the Union's primary law-making power contained in the Treaty. More specifically, the findings have clear implications for the vertical relationship between the Member States and the EU. In this way, the chapters reinforce the central findings of the thesis. First, in formal terms, the Court seems to place great weight on Article 48 TEU as one of the 'highest hierarchical provisions' within the Union. But, in practice, the situation is significantly more fluid, such that the Court does not always respect the Member States' powers in practice. In absence of a clear hierarchy, the Court assumes discretion to make decisions about the role of Union primary norms and their amendment. Second, due to the expansion of Union primary law the Court has greater leverage to control the Member States – through the general principles of Union law and the case law. Moreover, the constitutional framework is now much more value-laden including Article 2 TEU which sets out the Union's founding values. This has inevitably prompted inquiries about the existence of 'unamendable' provisions. Third, it is clear the Court has a strong role compared to the Member States to influence to formulation and amendment of Union primary law. This is problematic given the Treaties' reservation of amendment powers to the Member States.

Section 1 provides some background to the inquiry in this chapter and chapter four, and identifies the key themes discussed in the literature in relation to limits to the amendment of Union law. Section 2 offers a brief outline of the constitutional importance of the issues. Section 3 explores the procedural limits to the amendment of Union law in more detail, and draws out the key implications of the findings. Chapter four will then do the same regarding substantive limits to amendment.

1) The background to the inquiry

1.1) The amendment procedures

A logical place to begin the analysis is the amendment procedures as they are set out in the Treaty. It is Article 48 TEU that lays down the formal amendment procedures, namely the ordinary and the simplified amendment procedures. The ordinary amendment procedure is the default procedure for when an envisaged amendment falls outside of the scope of either of the two simplified procedures provided for in Article 48(6) and 48(7) respectively.

Under the ordinary revision procedure, any Member State government, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. The Council then submits such proposals to the European Council and notifies the national Parliaments. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission.[9] The Convention is to examine the proposals and may adopt by consensus a recommendation to a conference of representatives of the governments of the Member States (IGC.)[10] An IGC shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

The simplified revision procedures are available within a narrowly defined set of circumstances. The first procedure is for when a Member State government, the European Parliament or the Commission submits to the European Council proposals for revising all or part of the provisions of Part Three TFEU relating to the internal policies and action of the Union. The European Council may adopt a decision amending the provisions of Part Three TFEU, acting by unanimity after consulting the

[9] An interesting question relates to the possible implications if, in using Article 48 TEU, the European Parliament is not consulted. Is it possible that a decision to open an IGC for revision of the Treaties adopted by the Council without regard to the consultation procedure provided for could be declared void? Indeed, in Case 138/79, *Roquette Frères*, EU:C:1980:249, the Court declared void an act of the Council adopted in ordinary legislative process without the prior consultation of the European Parliament.

[10] The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the Member State governments.

European Parliament and the Commission, and the ECB in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements. One caveat is that the decision may not increase the competences conferred on the Union in the Treaties.[11]

The second simplified amendment procedure is again confined to specific circumstances. Where the TFEU or Title V TEU provides for the Council to act by unanimity in a given area, the European Council may adopt a decision authorising the Council to act by a qualified majority. Where the TFEU provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure. Any initiative taken by the European Council on this basis is to be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of such notification, the decision shall not be adopted. For the adoption of such decisions, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.

1.2) The existing literature

The existence of procedural constraints is generally understood as a prerequisite for the existence of substantive constraints.[12] Hence, this chapter explores the issue of procedural constraints, before chapter four explores substantive limits.

Some commentators take the view that there can be no limits to amendment even of the sort apparently contained under Article 48 TEU itself: the three procedures through which it is possible to revise primary law. It has been argued that as Member States are the 'masters of the Treaties,' they cannot be constrained, under international law, from amending Union law outside of the formal procedures.[13] To others, however, Article 48 TEU naturally enjoys a mandatory character as regards envisaged amendments to Union primary law.[14] Accordingly, 'amendments' which do not follow

[11] See, Case C-370/12, *Pringle*, EU:C:2012:756 for analysis of this condition.
[12] Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP, 2017)
[13] See, in particular, Hartley, 'The Constitutional Foundations of the EU' (2001) 117 LQR 236.
[14] Bernhardt, 'The Sources of Community Law: The 'Constitution' of the Community' in EC Commission, (ed.) *Thirty Years of Community Law* (Luxemburg, 1983), pg. 75 'any amendment is possible provided that the prescribed procedures have been followed.'

the prescribed procedure may not alter primary law, since they themselves do not constitute Union primary law.[15]

There is a greater body of literature on substantive limits to the amendment of Union primary law. In particular, a set of accounts suggest that there may be limits to the formulation of primary law arising from either 'supra-constitutional' or 'higher' primary principles.[16] On this view, questions arise about the legality of the adoption of Union primary norms which attempt to abrogate existing primary norms. Therefore, the literature engages in a discussion which deals with '*harder' limits to amendment*; that is, certain amendments may be 'unconstitutional' or 'unlawful.'[17]

On the one hand, substantive limits to the modification of primary law may be of a general nature. For example, as in many constitutional contexts, fundamental rights are understood by some as 'universal' values (or natural law), which in theory should lie beyond any attempt to circumvent them through positive law-making.[18] On the other hand, certain limits may be specific to the EU legal order. In this respect, two topical issues come to mind. The first is whether the Member States are able to amend primary law so as to permanently exclude Turkish nationals from becoming citizens of the Union, if Turkey became a member of the Union.[19] This example is capable of creating tensions between the fundamental nature of the Treaty provisions on free movement (and non-discrimination on the grounds of nationality) and their attempted abrogation by another, restrictive, provision in an Accession Treaty. The second is whether the Member States are able to respond to Opinion 2/13 on Accession to the ECHR so as to maintain the restrictions in primary law of the CJEU's jurisdiction in CFSP matters, but nevertheless to still wish to accede to the ECHR and thus confer jurisdiction upon the ECtHR over CFSP matters.[20] This could create tensions between the (unwritten) principle of the autonomy of the Union legal order and its attempted abrogation by the Member States in the amendment of Union primary law.

[15] The Court's position in Case 43-75, *Defrenne*, ECLI:EU:C:1976:56., is often used as the authority for this point.
[16] Pescatore, 'Aspects judiciaires de l'"acquis communautaire' (1981) 21 Revue trimestrielle de droit européen 61.
[17] The use of the term 'supra-constitutional' limits is not necessarily neutral, but it neatly captures the main thrust of the contentions that certain norms cannot be altered by any institutional actor.
[18] The non-amendability of fundamental rights to some reflects the idea that 'unlike ordinary legislation which is governed by the majoritarian principle, human rights alone are not subject to the will of the majority.' Beck, 'The Idea of Human Rights Between Value Pluralism and Conceptual Vagueness' (2006) 25 Pennsylvania State International Law Review 615.
[19] Such limits have been envisaged in the 'Negotiating Framework for Turkey' para 12, 4th Indent: long transitional periods, derogations, specific arrangements or permanent safeguard clauses… may be considered. Council of Ministers, *Accession Negotiation with Turkey: General EU Position,* 12823/1/05 REV 1, Brussels, 12 October 2005, at p.11
[20] See Opinion 2/13, on Draft ECHR Accession Agreement, EU:C:2014:2454.

This chapter and chapter four argue that a sole focus on binary perspectives of limits/no limits to amendment is to overlook a set of more intricate questions as regards the revision of Union primary law. For example, there is room to consider how possible amendments are accommodated within the Union's constitutional framework in more *subtle* ways than through questioning the legality of primary law *ex post*. Moreover, it is possible to explore what classifies as an amendment of primary law, which necessitates a discussion of the uncertain boundary between the adaption, alteration and amendment of primary law. There are therefore more refined areas of analysis to explore together under the general theme of procedural and substantive limits to the amendment of primary law.

In the first sense, there may be more subtle procedural vehicles - as opposed to formal Treaty provisions - through which it is possible to elaborate upon, supplement and perhaps also to amend the Treaty. Section 3 focuses on the political understandings and agreements – that *prima facie* have no primary law status - which may have the effect of altering how Union primary law is understood, and could be said, at least in some circumstances, effectively to rewrite and amend primary law. These political understandings may emerge from the Union's political institutions or a different configuration of Member States than is otherwise anticipated by the Article 48 TEU procedures, which require unanimous agreement. The resulting question is whether political choices of this nature can (impliedly) amend parts of Union primary law.

In the second sense, in terms of the substance of primary law, as opposed to a focus on a direct confrontation between the Member States and the Court (with 'hard' limits to amendment,) a more refined avenue to explore is the extent to which the Court can nuance the written Union primary law trajectory. Indeed, chapter 4 demonstrates that it does not always treat the Member States' statements expressed in the Treaty as definitive. So, although amendments may be 'lawful,' the extent of their envisaged effects may be reduced (or even perhaps expanded) through the case law. This makes it more difficult for the Member States to enjoy *full* control over amendment, at least in practical (rather than strictly legal) terms.

It is against this background that the remaining chapters explore the possible procedural and substantive constraints on the power to amend Union primary law in more detail. These separate legal inquiries form a basis for the exploration of the first

framing question of the thesis: *how does the Court* manage the interactions between primary legal sources in the context of the amendment of Union law? The findings help to structure the analysis of the second framing question of the thesis: *what* are the implications of these findings for the balance of powers between the Union and its Member States? In particular, the chapters explore whether the Member States enjoy the ultimate prerogative to amend primary law.

1.3) Why are these questions of constitutional importance?

There is very little literature which explores both procedural and substantive constraints to Union amendment together, or procedural constraints alone, in any sustained way. Most of the literature explores substantive (or 'supraconstitutional') limits to the amendment of primary law. The existence of limits of this nature is based on numerous (and to some extent unchallenged) assumptions about the Union legal order.

The first assumption is not only that the Union legal order has a constitutional nature, but that there is a legal, rather than political, understanding of the constitution.[21] In other words, there are higher values that stand above and restrain the exercise of political authority, in this context the Member States' assumed primary law-making prerogative. The second assumption is that there are procedural limits to amendment. Indeed, it would make little sense if the procedural limits - as they seem to arise from Article 48 TEU - are ineffective, but that substantive limits exist and are enforceable. Although, the literature recognises that procedural limits are a pre-requisite for substantive limits, it does not explore the practice of the Court and whether procedural limits restrain the political actors in practice.[22] The chapter therefore seeks to dismantle the underlying assumptions by considering what light the judicial practice as regards revision of Union primary law sheds upon them.

It is possible to outline a few of the theoretical benchmarks that will be kept in mind throughout the chapter which provide some indicators about the constitutional importance of the inquiry.

[21] It is important to note that the two are not mutually exclusive – the point is that one element may, at times, be prioritised over another. See, further, Loughlin, 'The Political Constitution Revisited' (2017) LSE Law, Society and Economy Working Papers 18/2017, 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3077947>

[22] Passchier and Stremler, 'Unconstitutional Constitutional Amendments in EU Law: Considering the Existence of Substantive Constraints on Treaty Revision' (2016) 5 Cambridge Journal of International and Comparative Law 337

1.3.1) The relations between the Member States and the Court

The analysis of potential constraints to the amendment of Union primary law necessarily raises a set of constitutional questions. For example, questions arise about the extent of the Member States' assumed control as 'masters of the Treaties' in the formulation of primary law: which receives support not least from their central role under the Treaty amendment procedures.[23] Therefore the question that underpins the entire discussion is who holds the prerogative as the 'ultimate' primary law-maker within the EU. As a result, it is necessary to explore the relations between the Member States and the Court in the context of the amendment of Union law.

There are at least three theoretical perspectives through which to assess the relationship between the different constitutional actors. The chapter explores which offers the best illustration of the current practice within the Union legal order. The first is based on the assumption that since the Member States are the 'masters' of the Treaties, it is a necessary consequence that there can be no internal restraints (either of a procedural or substantive nature) that operate on their otherwise autonomous decision-making powers. This perspective has a democratic character; amendment of the legal order is a paradigmatic exercise of (in this context derived) public authority. On this basis – and even if it were to emerge that there are nuanced orderings within the primary law architecture itself – when it comes to amendment, essentially all primary norms are viewed as equally susceptible to amendment as the other in terms of substance.[24] In other words, there are no 'entrenched' Union primary norms. Moreover, Article 48 TEU cannot bind the Member States to the procedures for amendment.

The second theory is based on the understanding that the Union legal order comprises of not only primary and secondary law, but also hierarchical orderings within Union primary law itself. On this view, certain norms perhaps acquire a 'supra-constitutional' status.[25] This theory seeks to preserve the special status of 'entrenched' primary

[23] Member States have the ability to amend/alter provisions or introduce new ones under Article 48 TEU.
[24] This perspective shares similarities with the position under UK constitutional law, specifically in relation to the doctrine of implied repeal. Thus, the latest expression of parliaments' (or in this case the Member States') intention takes priority over previous statements. See, also, l*ex posteriori derogate priori principle:* latter norm should prevail over a conflicting earlier norm of the same legal/normative status.
[25] This view suggests that some norms are recognised as 'constitutional fundamentals' and lay down hard *legal* limits with the necessary implication being that they are immune to revision. If this were true, the Court would effectively be able to tell the Member States what action they are precluded from taking as regards the development of primary law. This would be similar to the approach followed by the US Supreme Court. See, e.g. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP, 2000), especially chapter 5.

norms, beyond any institutional stipulations to the contrary expressed in the process of amendment. The rationale for the existence of 'supra-constitutional' limits is that all institutional actors are taken to have *deferred* to such norms.[26] In terms of substance, this means that there are limits to what the Treaty authors can do regarding amendments of the contents of primary law.

The final theoretical perspective captures a more complementary role of the Court and the Member States in the assessment of the relations between Union primary norms. As regards substantive limits, it may be that there is a role for an implied intention on the part of the Member States and/or a positive presumption of their compliance with 'higher' primary norms in the formulation of primary law. Certain norms may therefore be 'semi-entrenched' in the legal order, and require express derogation by the Member States in the exercise of the power under Article 48 TEU. This facilitates interactions between the Court and the Member States, rather than the Court affording a priority status to primary norms contrary to the Member States' own intentions, or conceiving of the Member States as enjoying an unlimited primary law-making prerogative. In contrast to 'entrenched' limits, therefore, this approach *subtly* limits the *capability* of the Member States to amend primary law to an extent; it does not deny them the *capacity* to amend primary law entirely.[27] In terms of procedure, the Member States themselves have set limits on what they can do *procedurally* under Article 48 TEU. Such procedural conditions may thus be 'semi-entrenched' unless and until they are amended by the Member States, through the correct procedures.[28] This final view adheres to the logic of Article 48 TEU, as the issue is handed back to the Member States who remain collectively competent to express a different understanding of an issue to the one reached by other constitutional actors, particularly the Court.

Each perspective affects the relations between the Member States and the Court in very different ways. For example, the first perspective sees the Court's role as 'rubberstamping' the substantive parameters agreed upon by the Member States, regardless of the procedural mechanisms through which an amendment is realised. By

[26] See, e.g., 'constitutional statutes' which may enjoy a higher status rendering them less amenable to repeal in the UK: *R (on the application of HS2 Action Alliance Limited) v The Secretary of State for Transport and another* [2014] UKSC 3.
[27] See, Gordon, *Parliamentary Sovereignty in the UK Constitution* (Hart, 2015).
[28] This shares similarities with the 'manner and form' theory of parliamentary sovereignty under UK constitutional law. See, generally, Ibid.

contrast, the second perspective essentially confers the ultimate authority on the Court to enforce its view of what is possible under the auspices of Article 48 TEU on the basis of 'supra-constitutional' principles. And finally, whilst the third perspective situates the Court and the Member States on a more equal footing than do the other perspectives, an 'implied intention' on the part of the Member States regarding their compliance with Union primary law would essentially be a case-law construction.[29] After all, the fact that the Court may enjoy a complementary role alongside the Member States is problematic since the exercise of public authority is understood as a political task in general and from the express text of Article 48 TEU in particular.[30]

1.3.2) Are 'limits' to amendment desirable in the Union legal order?

A logically prior issue to the identification of procedural or substantive limits to the amendment of Union primary law is whether such limits are constitutionally desirable in the first place. It is possible to explore the factors which favour the recognition of such limits and the factors that lean against the need for limits.

First, there are strong arguments to the effect that the Member States are legitimately bound by the procedures for amendment. In particular, the procedures set out under Article 48 TEU account for a range of interests, and ultimately require common accord amongst the Member States. Furthermore, the procedural limits are the product of the Member States' own expressed intentions in the Treaty. Indeed, as the Member States in formal terms enjoy the ultimate prerogative to revise Union primary law, they can – if they so desire – amend the amendment procedures in a way which would perhaps relax the existing requirements. For example, in the discussions preceding the now defunct Constitutional Treaty and eventually the Lisbon Treaty, the Member States agreed on the incorporation of two simplified amendment procedures and also altered the ordinary revision procedure so as to include, *inter alia*, the need for a Convention.[31] In this way, the ultimate authority for revising primary law still resides with the Member States.

[29] This is the case with the common law in the UK, as regards the principle of legality e.g. *R v Secretary of State for the Home Department ex p. Simms and another* [1999] 3 All ER 400; a judicially cultivated requirement rather than one imposed by written law.
[30] E.g. 'constitution-conform' interpretation poses a number of problems. First, it makes it very difficult for the political actors to amend. Second, it intrudes into the political realm, by essentially providing guidelines for amendment. See, for example, de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart, 2014).
[31] See, further, pgs.16-17 of the thesis.

To others, a Treaty revision that takes place outside of the boundaries laid down in Article 48 TEU is not problematic.[32] A first supporting argument is that procedural constraints eventually collapse into substantive constraints.[33] It may be one thing to accept that the authority to amend primary law is bound by procedural conditions, but quite another thing to accept that procedural conditions could have the effect of limiting the substantive parameters of action.[34] A second point relates to the international law view of Union law.[35] The general principle of international law governing the amendment of Treaties finds its expression in the Vienna Convention on the Law of the Treaties.[36] State parties to any international agreement may at any time amend or revoke a Treaty, whether formally or not, in principle by unanimity; Articles 39, 54, 57. Moreover, even when an international treaty lays down provisions establishing a specific procedure for its amendment, contracting parties may, by common accord, disregard such provisions. If this view holds true for Union law, the Member States - through the application of international law principles - may amend the Treaty without regard to the formal procedural conditions under Article 48 TEU.

Second, in terms of substantive constraints, the arguments on either side of the spectrum are quite polarised. On the one hand, if there are no limits to amendment at all, it is arguable that this could negate the value of 'higher' principles entirely. As a result, Union primary law may only be safeguarded to the extent that it does not conflict with the intentions of the 'masters of the Treaties' as expressed in written primary law.[37] Indeed, the Member States may be competent to adopt any amendment to the Treaty that they wish, even if that undermines certain principles that one may consider (or wish) to enjoy an 'entrenched' status within the legal order. So, one reason why the existence of limits to amendment garners support relates to the protection of

[32] Deliege Squaris, 'Révision des traités européens en dehors des procédures prévues' (1980) Cahiers dr eur 550; Gaja, 'Fonti Comunitarie' VI, Digesto delle Disciplina Pubblicistiche, (Milan, UTET Giuridica, 1990) 437; Steinberger, 'Der Verfassungsstaat als Glied einer Europäischen Gemeinschaft', Steinberger, Klein, Thürer (eds) *Veröffentlichung der Vereinigung der Deutschen Staatsrechtslehrer* (Berlin, De Gruyter, 1991) 16–17.

[33] See, for example, the Advocate General's discussion in Case C-370/12, *Pringle*, EU:C:2012:675 of the procedural conditions of the simplified amendment procedure which require an assessment of the substance of an amendment.

[34] See, Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP, 2010)

[35] See, Hartley, *The Foundations of EU Law* (OUP, 2014).

[36] Vienna Convention on the Law of the Treaties

[37] See Hartley, 'The European Court and the EEA' (1992) ICLQ 846 and Bernhardt, The Sources of Community Law: The Constitution of the Community' in *Thirty years of Community law* (Brussels-Luxembourg, 1981), at pg.71: 'the Treaties do not impose any express limitation on constitutional amendments; they do not, for example, contain anything which could make sacrosanct the basic rules set out in Articles 2 and 3 EEC or would prohibit substantial amendments of the institutional provisions. An amendment could, conceivably, conflict with the spirit and general principles of the Treaties and, in consequence, be open to challenge. However, it is virtually impossible to give any convincing examples of a legal restriction on the amendment of the Treaties… any amendment is possible provided that the prescribed procedures have been followed.'

fundamental values, and how it may be desirable to safeguard them from abrogation by political actors.[38]

Yet, this line of argument raises delicate issues not only in relation to the inherently contestable contents of values and principles – for which there is no universal agreement – but also regarding the question of 'who' is responsible for identifying and upholding values that purportedly enjoy an elevated status. Indeed, the identification of the values which deserve protection may take place outside of a negotiated Treaty context by the Member States, and potentially through case law. This poses a challenge to many of the assumptions that have traditionally characterised the Union legal order. The possibility of absolute substantive limits to amendment necessarily implies that the Member States' authority is not equally absolute in legal terms. Instead, the reach of their substantive authority may be determined (and qualified) by reference to the extent and nature of the fundamentality which is ascribed to the EU's 'central' norms and arrangements. The Court's task when negotiating its approach to amendment might be to interpret the Member State's authority by reference to the content of the constitutional framework.[39] The legal dimension of the EU's constitutional framework would in this way form a backdrop against which to interpret all primary law, and ultimately even against which to assess its validity. In this context, the question arises whether the articulation (and enforcement) of such constraints is a legitimate judicial task, in the absence of a written provision conferring such a power on the Court.[40]

It is these constitutional issues that support the argument that the Member States are, or at least should be, capable of amending Union primary law on any substantive matter, in any way that they desire. In particular, arguments to the effect that they should enjoy legally unlimited primary law-making power project a message about the centrality of democratic decision-making. By allocating ultimate primary law-making power to the Member States, it is the actors who at the domestic level are democratically elected which have the final authority to determine the trajectory of

[38] Constitutionalisation is usually evident as a response to failures of democracy, generally so as to avoid similar atrocities eventualising in the future. For example, this materialised in post-war Germany with the introduction of certain immutable principles, see Brecht, *Federalism and Regionalism in Germany – The Division of Prussia* (OUP, 1945), pg.138.

[39] 'The use of principles by the Court enables an autonomous legal discourse, strengthens the autonomy of courts vis-à-vis politics and could allow for an internal development of the law which circumvents Article 48 TEU.' Von Bogdandy, 'Founding Principles of EU Law: A Doctrinal Sketch' (2010) 16 ELJ 95

[40] Even in national constitutional law judicial control over the 'constitutionality' of Treaty change is quite rare and is usually because the text of the constitution sets out to protect some core content of the constitution against later amendments. E.g. Article 79(3) of the German Basic Law incorporates an 'eternity-clause.' This precludes amendments that would affect the *core principles* of the German constitution.

primary law.[41] In the specific context of the Union this also resonates with questions about sovereignty and the division of competence between the Union and its Member States.[42] Yet, this is not to say that the Member States' power is (or should be) completely unlimited in practice: practical and political limits still condition its exercise. These political boundaries indicate what is possible within the confines of a power which is not constrained by law.[43]

1.3.3) A hierarchy of Union primary norms?

This chapter and chapter four focus on the tensions between existing and newly formulated (or revised) Union primary sources with a particular focus on the Treaties' reservation of amendment powers to the Member States. These chapters consider whether such tensions are resolved by reference to the 'fundamentality' which Union primary sources may have been invested with. This depends on whether the 'special' status of certain primary norms thereafter operates so as to constrain – be it temporarily or permanently - the ability of the Member States to amend EU law. If this is the case, we will be left with a very clear 'hierarchy of primary norms' which essentially guides the process of amendment.

1.3.4) The nature of the EU legal order

A final point is that the different views on the 'limits' to amendment of Union primary law depend for a large part upon how the nature of the EU legal architecture is understood. They ultimately reflect different conceptions of the nature of the amendment power. On the one hand, a view of the system as constitutional in nature makes the possibility of limits to amendment more palatable.[44] It is often considered that the development of EU primary law forms the basis of the Union's constitutional law.[45] Thus, accepting the idea of substantive requirements of Treaty revision may be a (further) step in the process of the 'constitutionalisation' of the EU.[46] On the other

[41] See, Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007, CUP).
[42] See, David Cameron's plans for the amendment of the Treaties as a result of the UK's renegotiated settlement with the EU. See, the analysis available at: http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/577983/EPRS_IDA(2016)577983_EN.pdf (last accessed 27th February 2018.)
[43] See, Gordon, *Parliamentary Sovereignty in the UK Constitution* (Hart, 2015).
[44] See, for an extensive overview, see Tezcan, *Legal Constraints on EU Member States as primary law makers* (Meijers Research Institute, 2015)
[45] Möllers, 'Pouvoir Constituant – Constitution – Constitutionalisation' in von Bogdandy & Bast (eds), *Principles of European Constitutional Law* (Hart, 2009), pgs.183, 195
[46] Passchier and Stremler, 'Unconstitutional Constitutional Amendments in EU Law: Considering the Existence of Substantive Constraints on Treaty Revision' (2016) 5 Cambridge Journal of International and Comparative Law 337.

hand, a strictly international law view of the Union legal order leans against limits to amendment, or any constraints on what the Member States are able to do in the revision of the Treaty. On this view, the EU formally does not have a constitution, but it is governed by a set of Treaties. And according to the Vienna Convention, treaties may be amended by any form of agreement between the parties.[47] With this in mind, the chapter may tell us something about how the Union's legal architecture is conceived at the Union level, particularly by the Court.

2) **Procedural constraints on Union primary law-making**

This chapter focuses on procedural limits to Union primary law-making. It explores whether it is possible to amend Union primary law, or introduce new primary law, without engaging with the framework envisaged under the Treaty. In so doing, the chapter identifies the mechanisms through which Union primary law can be implicitly or explicitly amended.

The analysis here does not concern the substance of amendments, which will be explored in chapter four. The focus is rather the possibility (and legitimacy) of revising Union primary law through alternative procedural avenues other than those envisaged under Article 48 TEU, with a particular emphasis on the actors involved in these processes. It explores the way(s) in which EU primary law is developing *under or independent* of the authority of the Member States. The analysis explores the extent to which it is feasible (and ultimately acceptable) for political events and understandings to bypass the formal legal procedures and produce similar effects to Union primary law adopted through the correct procedures.

It is possible to outline three main strands of the overarching inquiry. The first issue is whether Article 48 TEU enjoys an exclusive character within the Union legal order. The different views as regards this issue are set out, as well their underlying rationales. Indeed, if Article 48 TEU does not have a mandatory character in principle or in practice, a logical question arises as to whether this implies that the Member States do not enjoy the ultimate prerogative for primary law-making. The second issue follows from this point, since the focus is *who, or what actors,* may share this prerogative. This might include for example the Court, the Union's political institutions, or

[47] See further Section 2.1. on 'procedural exclusivity' in this chapter.

configurations of the Member States other than that envisaged under the Treaty. The final issue concerns the implications of *shared Union primary law-making powers*.

2.1) Procedural exclusivity of Article 48 TEU

It is open to question whether Article 48 TEU constitutes the exclusive means through which it is possible to amend Union primary law.[48] Such procedural exclusivity may only arise by implication, as the Treaty does not explicitly state that the procedures are exclusive.[49] There are two different perspectives on this issue.

First, on numerous occasions, the Court has been keen to stress the binding nature of the procedures contained in Article 48 TEU as being the only way through which it is possible to amend the Treaty. The Court has thus affirmed that there are procedural conditions which the Member States must respect when amending the Treaties. For example, in *Defrenne v Sabena* the Court excluded the possibility that the Member States could modify the Treaty by means of an informal agreement. It explained that apart from any specific provision, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236 (now Article 48 TEU.) And for the Court, administrative practices cannot over a period of time operate to modify or override substantive law.[50] Thus, at least in some circumstances, the Court seems to have the competence (and indeed exercises its competence) to assess whether the procedure through which primary law is amended accords with the limits contained in the Treaty.[51] In this first sense then, Article 48 seems to enjoy a mandatory character; primary law cannot be amended outside of its boundaries.[52]

[48] A similar view has been taken by the Court concerning accession arrangements, which also have the status of primary law. For example, in Case 93/78, *Mattheus* v *Doego*, EU:C:1978:206 the Court explained that 'Article 49 establishes: [a] precise procedure encompassed within well-defined limits for the admission of new Member States, during which the conditions of accession are to be drawn up by the authorities indicated in the article itself. Thus the legal conditions for such accession remain to be defined in the context of that procedure without it being possible to determine the content judicially in advance.'
[49] Parallels can be drawn here with the questions over the 'exclusivity' of Article 50 TEU on withdrawal from the Union. See, Peers, 'What next after the UK vote to leave the EU?' 24/06/2016. Available at: http://eulawanalysis.blogspot.co.uk/2016_06_01_archive.html.
[50] Case C-327/91, *France v Commission*, EU:C:1994:305, at para 36.
[51] In Case C-370/12, *Pringle*, EU:C:2012:756, the intervening Member States argued that review of a new Treaty provision as a matter of principle is beyond the Court's powers and would as a consequence allow the Court to review the substantive compatibility of an agreed Treaty amendment with existing Treaty provisions, which would possibly preclude amendments to the Treaties. The Court disagreed as it observed that it was simply assessing the validity of an act of the institutions, within the terms of article 267 TFEU.
[52] de Witte, 'International Agreement or European Constitution' in Winter et al. (eds.), *Reforming the Treaty on European Union – The Legal Debate* (Kluwer Law International, 1996) at p. 15.

It is important to understand the factors informing the position that Article 48 TEU enjoys procedural exclusivity. To start with, Article 48 TEU reflects an important message about the constitutional equality of the Member States: an amendment is to be unanimously supported by all Member States. The envisaged procedures also work to protect the prerogatives of the institutions who, along with the Member States, are involved, in one form of another, in the process of amendment. For example, the establishment of a Convention in the ordinary revision procedure includes national parliaments and the EU institutions, although it is ultimately the Member States who are responsible for primary law-making. As regards the first simplified revision procedure, whilst the European Council generally holds the prerogative, there are important consultation requirements extending to the Commission, the European Parliament and in some cases the ECB. As regards the second simplified amendment procedure, there are notification requirements in relation to national parliaments, and the opposition of national parliaments can effectively amount to a veto of a Decision amending the Treaties. Overall, these procedural conditions specify the threshold of support that a successful amendment must attract.

This chapter reveals that the idea Article 48 TEU is a procedural constraint for future Union primary law-making does not necessarily hold true in practice. Indeed, primary law is, at least implicitly, developing outside of the procedures provided for under the Treaties, and implicates a different range of constitutional actors than those which are anticipated under Article 48 TEU. It is therefore helpful to explore other perspectives over the (potentially optional) nature of the Treaty procedures. Hartley has made the observation that 'Article 48 cannot deprive the Member States, *acting unanimously*, of the power to amend the Treaties without complying with its requirements (emphasis added).'[53] To a certain extent, this may suggest that the idea of procedural constraints has little bearing on the Member State's power as the 'masters of the Treaties,' acting in the exercise of their Treaty-making powers under international law. But this is only the case if the Member State act unanimously. This perspective thus overlooks a set of more subtle vehicles through which Union primary law is being revised (or at least substantially modified.)

[53] Hartley, 'The Constitutional Foundations of the EU' (2001) 117 LQR 236

The broader theoretical underpinnings of this second perspective may be better understood by reference to the literature on the rigidity and flexibility typically inherent in constitutional revision procedures.[54] On this basis, it is logical to consider whether any flexibility within Union primary law is in any way reconcilable with the Treaty, and its fairly rigid amendment procedures, requiring as they do unanimous consent of the Member States and ratification in each of the domestic legal orders. This raises questions over whether the law as it is set out in the Treaty is capable of evolving (outside of the formal amendment process) to account for contextual changes and political events. At least on one view, informal changes to Union primary law of this nature are necessary in a constitutional system characterised by rigid revision procedures.[55] Even if this account is plausible, in the context of the present inquiry the most interesting questions relate to who (in terms of the political and judicial actors) has a permissible role in the context of informal developments?

2.2) How does Article 48 TEU relate to other sources of Union primary law?

There are many examples of effective amendments to the Treaty which have been constructed outside of the formal Treaty structure and Article 48 TEU. This includes, for instance, the process of judicial interpretation which may at times result in an effective amendment or rewriting of the Treaty.[56] An example which best illustrates this point is the *'principle-oriented'* interpretation of primary law. In such circumstances, the interpretation of 'higher sources' of primary law by the Court may alter and shape how the Treaty text is understood and essentially 'refine' existing primary law.[57] For instance, the commitment to democracy under Union law has been used as a way of (implicitly) rewriting the Treaty provisions on CFSP matters, particularly in relation to the European Parliament's involvement in the negotiation of international agreements.[58] In *Parliament v Council* the Court held that the application to international agreements in CFSP matters of a general procedural obligation was not expressly precluded by Article 218(10) TFEU. As the provision did not introduce

[54] See, the classic reference on this issue, Bryce, 'Flexible and Rigid Constitutions' in *Studies on History and Jurisprudence*, (OUP, 1901.)
[55] de Witte, 'Treaty revision procedures After Lisbon' In Biondi, Eeckhout, Ripley, *EU Law After Lisbon* (OUP, 2012)
[56] See Hartley, 'The Constitutional Foundations of the EU' (2001) 117 LQR 236
[57] See also Case 249/83, *Les Verts*, EU:C:1986:166. The Court held that annulment proceedings could be brought against the European Parliament, notwithstanding the fact that Article 173 EEC (current Article 263 TFEU) specified that proceedings could only be brought against acts of the Council and the Commission.
[58] Case C-658/11, *Parliament v Council*, EU:C:2014:2025.

distinctions as to the nature of the area, all policy areas were to be placed on equal footing for the purposes of the general obligation.

There are more explicit examples of the judicial 'creation' of Union primary law, as opposed to the judicial elaboration (or (re)-formulation) of certain Treaty provisions in light of other values situated at the level of primary law. An example of this is the doctrine of implied external competence.[59] At the time of its 'creation,' there was an emerging discussion about how the existence of this competence, recognised in the case law, could be reconciled with the text of the Treaty which already contained specific competences in external relations.[60] Indeed, this phenomenon raises its own set of questions about where the line is to be drawn between the *judicial interpretation of primary law and altering the substantive content of written Union primary law*. As has been mentioned, the Court in *UPA* seems to demarcate a clear line between law and politics as regards the responsibility for Treaty revision.[61] Yet, these examples of judicial conduct suggest that the Member States do not enjoy an exclusive prerogative over amendments to primary law in practice. Furthermore, the procedural requirements under Article 48 TEU may not be the exclusive means through which it is possible to amend primary law, at least formally.

It is also possible to consider the procedural mechanisms through which the Member States amend primary law. Under usual circumstances, the Member States may directly influence the process of amendment, in the introduction of binding norms into both the Treaty and Protocols.[62] As a result, these written norms are able to govern the Treaty framework. Nevertheless, aside from this form of 'direct' influence, the Member States may be able indirectly to influence the formulation of primary law. The idea of a more malleable primary law framework emerges, for example, from some of the arguments of the Member States in the submissions to proceedings before the Court. This includes the manner in which the general principles of Union law were introduced in the case law, given that some Member States supported their

[59] Case 22/70, *Commission v Council* (*ERTA)*, EU:C:1971:32.
[60] According to AG Dutheillet de Lamothe: 'in the text there are several instances in the provisions of the Treaty on commercial policy where there are stipulations as general as those in Article 75(1)(c). It is certain that the authors of the Treaty did not consider that such provisions were sufficient to provide a basis for a Community authority in external affairs, since it considered it necessary, in order to confer that authority, to write into the Treaty six articles specifically devoted to this point. '[I]t appears clear from the general scheme of the Treaty of Rome that its authors intended strictly to limit the Community's authority in external matters to the cases which they expressly laid down.' See Case 22/70, *Commission v Council,* EU:C:1971:32.
[61] Case C-50/00 P, *Unión de Pequeños Agricultores*, EU:C:2002:462
[62] See, Article 51 TEU the Protocols and Annexes to the Treaties shall form an integral part thereof.

introduction in the first instance.[63] This could be understood as a form of 'political rewriting' of, and bottom-up influence over, Union primary law through different procedural channels to those envisaged under the Treaty. For instance, in *Spain v Italy* two Member States argued that the system of competence in the Treaties was not exclusive, and in that sense only provided an indicative list of the 'exclusive' category of competences.[64] The Court however rejected this argument. Two points can be made in this regard. The first is that submissions in case law obviously do not satisfy the requirements of Article 48 TEU, particularly as regards the constitutional equality of the Member States. It is highly unlikely that the Member States will share the same view on an issue in submissions before the Court, if they make submissions at all. The second point relates to the judicial role in 'sanctioning' these changes, which is worth acknowledging in terms of the 'legitimisation' of informal modes of primary law change.

Although these examples provide evidence that Union primary law can develop through alternative procedural means to those set out under the Treaty - specifically through the case law - they are not the main focus of the analysis. The central theme for exploring limits to the revision of primary law of a procedural nature is the 'political understandings and agreements' on the part of both the Member States and the Union's political institutions which have a bearing on the development of Union primary law. It should be noted at the outset that the boundary between the mere adaption and a 'stronger' amendment of primary law is not necessarily clear.[65] But the examples chosen for discussion exert some form of change on the Union's primary law structure in practice, regardless of whether they are recognised as amendments in formal terms.

2.3) How far may political understandings and agreements alter Union primary law?

This section explores the 'alternative' avenues for revising Union primary law, which have developed independently of the formal amendment procedures under Article 48 TEU. The focus is the political understandings and agreements that permit changes to

[63] See, for example, the development of fundamental rights as general principles of Union law in *International Handellsgesellschaft*, cited supra n. See, also, the introduction of the protection of legal certainty as a general principle of Union law in Joined Cases 7/56, 3/57 to 7/57, *Alegra and Ors*, EU:C:1957:7.
[64] Case C-274/11, *Spain v Italy*, EU:C:2013:240.
[65] See, Ioannidis, 'Europe's new transformations' (2016) 53 CMLRev 1237.

primary law, but which involve a different configuration of actors than ought to be involved in amendment pursuant to Article 48 TEU. The findings in this respect raise a set of questions. For example, how far can the Member States and the Union political institutions go without amending the Treaties? And may these modifications enjoy 'legally binding' effects, perhaps being 'ratified' by the Court or by future Treaty amendments? The findings may also tell us something about the value of Article 48 TEU in the Union's primary law framework.

The analysis focuses on a number of concrete examples to help illustrate *how* the Court has responded, in practice, to attempts of the political actors to revise or at least to alter Union primary law. It also addresses questions of a more speculative nature, where the Court is yet to respond to the political developments. The sections that follow are of a largely descriptive nature, and are thus not designed to discuss the merits of alternative procedural avenues. The final section draws the analysis together to consider *what* constitutional implications are common to these examples. In particular, the section focuses on the location of constitutional authority within the Union.

2.3.1) Institutional and regulatory responses to the Euro-crisis

The responses at the Union level to the sovereign debt crisis are an obvious example of informal political alterations to the Treaties which will be familiar to almost all EU lawyers. After all, they shed light on the circumstances where the Union's political institutions and the Member States have come close to what looks like an amendment of Union primary law, without engaging with the specified procedures to achieve that purpose. In some circumstances, the Court has been asked to review the legitimacy of changes to the constitutional underpinnings of the EMU, which are not the result of the political process envisaged under the Treaty. The Court has, in certain instances, 'ratified' these changes, despite the fact that they were formulated outside of Article 48 TEU.

First, the Court had to consider the legality of the European Stability Mechanism (ESM) Treaty - an instrument adopted amongst Eurozone Member States as an international organisation outside of the Treaty framework - in *Pringle.*[66] The Court

[66] Case C-370/12, *Pringle,* EU:C:2012:756

had the task of reconciling the existence of the permanent stability mechanism available to the euro Member States and the 'no bail-out' clause under Article 125 TFEU. A ruling that Article 125 TFEU had been modified would have meant that the conclusion and ratification of the ESM Treaty would have been possible only after the entry into force of Decision 2011/199 (that was adopted through the simplified revision procedure and aimed to introduce a new provision, Article 136(3) TFEU, to allow the Member States to adopt a stability mechanism.)[67] However, the Court managed to avoid the conclusion that there had been an implicit modification of Article 125 TFEU by explaining that a requirement of safeguarding the financial stability of the euro area was the 'higher objective' of the Article.[68] In particular, it ensued from the preparatory work relating to the Treaty of Maastricht that Article 125 TFEU was never 'intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State.'[69] Even though this does not necessarily follow from the text of the Treaty, it has been argued that it was necessary for the Court to read the requirement into Article 125 TFEU. The Court explained that the aim of the no bail-out clause is to secure budgetary discipline which would in turn contribute to the higher aim of financial stability.[70] By turning financial stability into the ultimate aim of Article 125 TFEU the conclusion that the Member States had always been able to grant assistance via a mechanism, such as the ESM, was possible.[71] It followed that Article 136(3) TFEU had a declaratory value, so the ratification of the ESM Treaty was not dependent on its entry into force.[72]

It is interesting that, in its judgment, the Court elaborated upon the conditions under which the activation of financial assistance by means of a stability mechanism would be compatible with Article 125 TFEU: assistance must be 1) indispensable for the safeguarding of the financial stability of the euro area as a whole, and 2) subject to strict conditionality; and 3) the Member State remains responsible for its commitments to its creditors. This interpretation largely reproduces two conditions forming the

[67] Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (OJ 2011 L 91, p. 1)
[68] Judgment, at para 135.
[69] Judgment, at para 130.
[70] To some, it was only the crisis itself that made it evident that financial stability was necessary for the stability of the currency union, and which exposed the inadequacies of the original legal framework of the single currency for the protection of financial stability. See Borger, 'Outright Monetary Transactions and the stability mandate of the ECB: *Gauweiler*' (2016) 53 CMLRev 139.
[71] See, judgment in *Pringle*, paragraphs 184-185.
[72] Borger, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) 9 European Constitutional Law Review 7

guiding thread of the ESM: first, safeguarding the financial stability of the euro area, and second granting of ESM aid subject only to strict conditionality.[73] In this way, it is clear that the results envisaged by the Member States had a substantial influence on the overall stance of the Court.

The judgment in *Pringle* raises two questions about the procedural routes for modifying primary law. First, in these circumstances use was made of the simplified amendment procedure (in Article 48(6) TEU)) which is limited to specific fields.[74] If the Court had found that the conditions for its use were not satisfied, the ordinary revision procedure would have been necessary to effect the envisaged changes. Second, the Member States adopted an international agreement on the ESM. The overarching question concerns the extent to which such mechanisms can impliedly amend other aspects of Union primary law, both in practical and ultimately legal terms.[75] For example, the European Council's decision was only envisaged to allow for the Member States to adopt a stability mechanism, but not to alter any other part of the Treaty. However this particular example reveals, at least to some, that the existing Treaty framework seems to be of limited importance in these circumstances, largely due to the desire to 'rescue' the euro.[76] It is noteworthy that the Court has essentially assumed a role which consists of defending developments created in the intergovernmental process and preserving a political compromise. This is demonstrated most clearly by the evident reluctance of the Court to interfere with the transition from a rules-based Treaty framework for the EMU to a more policy-oriented outlook led by the political actors. The fact the Court's response in some ways codifies a policy choice provides room for (and perhaps also legitimises) further discretionary policy-making on the part of the Union's political institutions and the Member States.[77]

[73] Adams and Parras, 'The European Stability Mechanism through the Legal Meanderings of the Union's Constitutionalism: Comment on Pringle' (2014) 38 ELRev 848

[74] The Court found that the revision conferred no new competence and it was already possible to grant the assistance of the sort envisaged under the ESM, so that even the SRP was not entirely necessary.

[75] The AG explained that as the proposed insertion was made using simplified revision procedure, the limits of that procedure must be expressly reflected in the wording of provision. At para 59: 'The limits which are imposed on a Treaty amendment in the procedure of Article 48(6) TEU also determine the limits of the normative content of the amended Treaty provision.' View of AG Kokott in Case C-370/12, *Pringle*, EU:C:2012:675.

[76] Ruffert, 'The European Debt Crisis and EU Law' (2011) 48 CMLRev 1777: 'French minister of finance, Christine Lagarde quite openly admitted the unimportance of the Treaties for the policy options taken. In a European Union based on constitutional foundations, this is not a reassuring perspective.'

[77] Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (OUP, 2015).

The second key case is *Gauweiler*.[78] Here, the question was whether primary law would allow the ECB to adopt a bond-buying programme: the Outright Monetary Transactions (OMT). Thus, the Court had to address the conflict between different conceptions of the competence of the ECB and the scope of the OMT regime. The reference came from the German Constitutional Court, and its objections to the OMT scheme could be taken as a defence of the original, rules-based conception of the EMU, in particular with its emphasis on the limited and apolitical role of the ECB.[79] Indeed, the ECB's role has evolved along with the transition to a policy-oriented vision of the EMU. As a result of the Court's decision to uphold the OMT scheme it continues the path set in *Pringle* of 'ratifying' changes made to Union primary law, and further embraces a move away from a rules-based EMU.

It is important to note that these cases naturally attract diverging views. On the one hand, many would agree that this evolution is unavoidable and necessary if the EMU is to adapt and survive.[80] On the other hand, questions arise as to whether this change should, if it all, take place through different means.[81] Overall, the area attracts considerable disagreement about the limits of Treaty competence, and how much can be achieved without a formal amendment.[82] At present, many changes to the constitutional framework of the EMU have taken place incrementally and largely through informal means agreed upon through inter-governmental channels or by the Union's political institutions. This ultimately bypasses the full range of actors and requirements written into Article 48 TEU.

2.3.2) Constitutional conventions

There are possible constitutional conventions developing within Union law which guide the operation of written primary law. The constitutional issues concern their recognition by the Union's institutions and as a consequence their potentially binding nature. First, in relation to the existence of constitutional conventions an important issue is the extent to which institutional practices that are conducted around the formal Treaty provisions may translate into constitutional conventions that fill gaps within

[78] Case C-62/14, *Gauweiler*, EU:C:2015:400.
[79] See Dahan, Fuchs, Layus, '*Whatever It Takes*? Regarding the *OMT* Ruling of the German Federal Constitutional Court' (2015) 18 Journal of International Economic Law, 137.
[80] See, Adams and Parras, cited supra n.73.
[81] Hinarejos, 'Gauweiler and the OMT Programme: The Mandate of the ECB and the Changing Nature of EMU' (2015) 11 European Constitutional Law Review 563-572.
[82] Consider also the discussion on the legal basis for a banking Union, discussed by Hinarejos cited supra n.77.

the Treaty provisions.[83] This may change the nature of Treaty provisions, which as a result could create tensions between the integrity of the Treaty, on the one hand, and institutional behaviour, on the other hand. In the EU legal order, this might affect the pre-determined allocation of power – or institutional balance - under the written texts. Moreover, whilst technically constitutional conventions are non-binding, they could acquire the status of 'rules' and significantly impact upon the functioning of the political system.[84] The second question is therefore whether conventions and practices could have binding effects, as opposed to binding the Union's institutions in their interactions in practical terms.

It is possible to discuss two examples of this phenomenon.[85] The first relates to the process of accession of a new Member State to the Union. In terms of the formal Treaty provisions, Article 49 TEU provides a vague framework for accession to the EU.[86] Originally, the procedure under Article 237 EEC centred on the interactions between the Member States and the applicant, and the conditions for admission and the adjustments to the Treaties were subject to an agreement reached by those parties. Article 237 EEC read:

> *'Any European State may apply to become a member of the Community. It shall address its application to the Council which, after obtaining the opinion of the Commission, shall act by means of a unanimous vote. The conditions of admission and the amendments to this Treaty necessitated thereby shall be the subject of an agreement between the Member States and the applicant State. Such agreement shall be submitted to all the contracting States for ratification in accordance with their respective constitutional rules.'*

[83] Editorial, 'A New Commission Takes Office: On the Relevance of Union law and the Emergence of Constitutional Conventions' (2014) 51 CMLRev 1571

[84] An understanding derived from the UK constitutional system as outlined by AV Dicey, *Introduction to the Study of the Law of the Constitution*, (Macmillan, 1915).

[85] See also the medium through which sincere cooperation was established and applied to the Union institutions: Article 10 EC only concerned the bottom-up, 'vertical' relationship between the Union institutions and the duties owed by the Member States. Nevertheless, Article 4(3) TEU was employed by the Court to prescribe mutual duties of cooperation between the Union institutions and the Member States, and between the Union and Member State institutions; Joined cases 358/85 and 51/86, *France v European Parliament*, EU:C:1988:431, paras 34–35; Case C-275/00, *Franex NV*, EU:C:2002:711, para 49; Case C-344/01, *Germany v Commission*, EU:C:2004:121, para 79. Consider, also, the recognition of fundamental rights protection under the CFR, before its legally binding status was formally recognised through non-binding commitments in legislation. See, Case C-113/04 P, *Technische Unie* v *Commission*, EU:C:2006:593.

[86] Article 49 TEU (post-Lisbon) largely follows the procedure set out in the TEU, but it adds the requirements to notify national parliaments of a membership application and provides that conditions for membership agreed by the European Council must be taken into account.

Over time, this Treaty procedure has been subject to adjustment, and supplemented by practice on the part of the Union's political actors.[87] For example, the Copenhagen criteria establish substantive and institutional elements that supplement the Treaty rules. The Member States were able to elaborate upon the general Treaty procedure governing 'eligibility'[88] for accession, since they established additional substantive conditions to which accession are subject in terms of the 'admissibility'[89] of candidates.[90] Moreover, in practice, despite the formal stipulation that the conditions for accession shall be subject to an agreement between the Member States and the applicant, the institutions were directly involved in the conduct of negotiations. For example, the Council does not automatically transmit a candidate's application to the Commission. It first decides whether to implement the Article 49 TEU procedure, with the result that each Member State acquires the power to assess the admissibility of the applicant, before the Commission or European Parliament are able to give their views and have the opportunity to vote. This sits uncomfortably with the procedural requirements under Article 49(1) TEU, as the Council's formal decision on the applicant is to be taken after the Commission is presented with an opinion. The multiplication of procedural steps on the part of the Member States and the Union's political institutions thus redefines the substance of Article 49 TEU, outwith a formal Treaty amendment.

Many of these *ad hoc* developments surrounding the Union's accession process are now codified in primary law. For example, the Copenhagen criteria were gradually 'constitutionalised' under Union law.[91] As a result of the recognition of their legally binding effects, the obligations enshrined in the Copenhagen criteria are now applied more strictly.[92] For instance, the European Council has confirmed that the political criteria, although they have been partly inserted into the Treaty, will determine the 'admissibility' of a candidate rather than its 'eligibility,' suggesting some form of

[87] Hillion, 'Evolution of EU Enlargement Policy' in Craig and de Burca, *The Evolution of EU Law* (2011, OUP)
[88] This is based on the fulfilment of the requirement of 'European-ness,' which does not envisage any additional substantive requirements.
[89] This is based on the fulfilment of political and economic conditions, so an admissible candidate can commence accession negotiations.
[90] European Council in Copenhagen, Conclusions of the Presidency, (21-22 June 1993, SN 180/1/93) 12.
[91] Article 49(1) TEU explicitly states that the conditions of eligibility agreed upon by the European Council shall be taken into account (for the purposes of accession). See also the Commission Regular Report of 2002; COM(2002)700, '[s]ince the entry into force of the Treaty of Amsterdam, these [political] requirements have been enshrined as constitutional principles in the TEU…'
[92] Hillion, 'The Copenhagen criteria and their progeny', in Hillion, *EU Enlargement: a legal approach* (Oxford, 2004), pgs. 1-23

priority between the two conditions of Article 49(1) TEU.[93] Arguably, the incorporation of these developments into the Treaty should entail greater predictability in the process of accession. But, in practice, codification has increased the malleability of the procedure. The raises the question of whether constitutional developments of this informal kind confer an unfettered discretion to the political actors involved in the relevant procedures to (re)shape the contents of Union primary law. For example, the European Council has the power to adjust the 'eligibility' conditions contained in Article 49 TEU. It thus enjoys the power to amend the procedure, and hence a primary law-making power outside of the specified revision procedures.

Another example which helps to explain the phenomenon of constitutional conventions is the European Parliament's role in the procedure for election of the Commission President. Although admittedly there is very limited evidence at present, its emerging role has the potential to stretch beyond that which is envisaged by the text of the Treaty under Article 17(7) TFEU. In formal terms, the European Council shall propose to the European Parliament a candidate for the President of the Commission, after taking into account the elections to the European Parliament and after having held the appropriate consultations. In terms of practice, it is arguable that the operation of the procedure may give rise to a constitutional practice which may (re)-define the nature of the European Council's obligations to 'take into account' the elections to the European Parliament.[94] It is possible that respect owed to the Union's foundation of representative democracy (Article 10(1) TEU) may inform obligations of this kind, when the European Council comes to propose a candidate on the basis of a majority in Parliament.[95] It is yet to be seen whether this will develop into a practice which enjoys legally binding effects. If it does, it may have an impact on Union primary law and the institutional balance that it envisages. For example, a greater role for the European Parliament in the election of the Commission President may: undermine the prerogatives that lie with the European Council under the Treaty; and

[93] When Croatia submitted its formal request for membership in February 2003, the Commission recalled that 'all European countries have the right to ask to join'; *Agence Europe* No 8406, 22 February 2003, 7. See also, For example, Turkey was made an 'official' candidate in the sense that it was eligible for accession. But additionally, the European Council in December 2004, on the basis of a report and a recommendation from the Commission, had to decide that Turkey fulfilled the Copenhagen political criteria, in order to open accession negotiations. Copenhagen European Council, Presidency Conclusions, 12–13 December 2002, pt 19.

[94] Editorial Comments, 'After the European elections: Parliamentary games and gambles' (2014) 51 CMLRev 104.

[95] For some, the European Council's endorsement of European Parliament's 'Spitzenkandidat' together with process of European Parliament consent to or veto over individual nominees is justified by the express commitment to representative democracy in Art 10(1) TEU. See, ibid.

perhaps 'politicise' the independence of the Commission. As a consequence, this may distort a dimension of the inter-institutional balance as it is laid down in primary law.[96]

Overall, there are many instances where the Union's political institutions, and at times the Member States, have sought to elaborate upon gaps within the Treaty framework. This has had the effect of leading to a practical adjustment of the Treaty rules, outside of the formal processes of amendment. Moreover, constitutional conventions of this nature may effectively become the 'source of law' for practical purposes. Indeed in terms of their legally binding effects, in certain circumstances the Court has effectively 'sanctioned' such practices. In yet other circumstances, the Member States have codified such practices within the written text of the Treaty.

2.3.3) Informal initiatives developed outside of the Treaty by the Member States

Other examples include informal arrangements agreed upon by the Member States which have some bearing on how the Treaty structure operates. Initiatives of this kind may eventually be understood as binding and/or be introduced into the Treaties. These examples are different to say the *Spitzenkandidaten,* since it is the Member States, not the Union institutions, who are responsible for the creation of such initiatives. Furthermore, constitutional conventions can be understood as practices governing the exercise of an existing Treaty power. The present examples, however, find no clear basis in the Treaty at all.

The best example is the 'green card' procedure for national parliaments. This arrangement envisages that a group of national parliaments may send a contribution to the Commission calling for 'new legislative action, or the review, amendment or repeal of existing legislation.' This is problematic from the perspective of the formal Treaty structure, which only envisages 'yellow and orange' card procedures under Protocol no. 2 attached to the Treaties.[97] A further increase in the power of national parliaments outside of existing primary law arrangements could impact upon the Commission's right of legislative monopoly, and the European Parliament's 'indirect legislative initiative' to put forward legislative proposals.[98] To some, therefore, a more

[96] Goldoni, 'Politicising EU Lawmaking? The Spitzenkandidaten Experiment as a Cautionary Tale' (2016) 3 ELJ 279
[97] Protocol No. 2 annexed to the TEU and TFEU on the application of the Principles of Subsidiarity and Proportionality, O.J. 2012, C 326/02.
[98] The formal role of national parliaments in the EU is limited to opposing draft legislation. The House of Lords EU select committee developed the idea of the 'green card'. Though it is not a formally recognised power in the EU treaties, in July 2015 the House of Lords and 15 other national chambers submitted their first green card; they invited the Commission to take a more

informal understanding of this nature could support the view that the green card procedure is inconsistent with the Treaties since it is not foreseen by them.[99] However, to others, the development of the powers of national parliaments in relation to the Union's law-making process should take place through informal means, without a Treaty amendment.[100] It is unclear whether all Member States agree to initiatives of this nature, as is necessary to satisfy the unanimity requirement under Article 48 TEU. Indeed, it may only be certain Member States who have a role in pushing forward such changes.[101]

2.3.4) Inter-institutional arrangements (beyond the terms of the Treaties)

Another set of examples of alternative procedural routes to alter the Treaty text are inter-institutional agreements adopted by the Union's political institutions. There are a set of procedural avenues, rules and practices which govern the relationship between the institutions involved in the Union law-making process that are not provided for in the Treaties, and which essentially bypass the written framework.[102] One example suffices to explain this phenomenon.[103]

'Trilogues' are used by the Union's political institutions in the adoption of Union legal acts.[104] Article 294 TFEU enshrines the Union's default ordinary legislative procedure, the structure of which is designed to reflect a tripartite of interests: the Commission initiates legislation, and the Council and the European Parliament are the co-legislators who must agree on the substance of the legislative text. However, the 'trilogues' system envisages that immediately after the first reading of the legislative proposal by the European Parliament and the Council (or during the second reading), an informal conciliation committee is formed to reach a compromise proposal. This

strategic approach to food waste reduction. See House of Lords European Union Committee, *The Role of National Parliaments in the EU*, (2014) 9th Report of Session 2013–14.

[99] See Frans Timmermans, who argues a green card could be introduced 'in compliance with the Treaties' and at a political level to which the Commission would respond to if widespread support existed across national parliaments. See the meeting of COSAC, available at: http://www.cosac.eu/54-luxembourg-2015/meeting-of-the-chairpersons-of-cosac-12-13-july-2015/ (last accessed 21st March 2018.)

[100] See, for example, Jančić, 'The Game of Cards: National Parliaments in the EU and the Future of the Early Warning Mechanism and the Political Dialogue' (2015) 52 CMLRev 939.

[101] Raunio, 'The Finnish Eduskunta and the European Union: The Strengths and Weaknesses of a Mandating System' in Hefftler, *The Palgrave handbook of national parliaments and the European Union* (Palgrave Macmillan, 2015)

[102] Eisselt and Slominski, 'Sub-Constitutional Engineering: Negotiation, Content and Legal Value of Interinstitutional Agreements in the EU' (2006) 12 ELJ 209 in discussing the phenomenon of inter-institutional agreements explained that, when such agreements specify a treaty provision without an explicit authorization, this may result in circumvention of the time-consuming procedure of Treaty amendment, and result in trading higher level negotiations in for lower level ones.

[103] Another example is the 'Barosso initiative' which involves informal communication channels between the Commission and national parliaments. This extends beyond the role of monitoring compliance with subsidiarity afforded to national parliaments in the Treaty.

[104] Hage and Kaeding, 'Reconsidering the European Parliament's Legislative Influence' (2007) 29 Journal of European Integration 341

procedure helps to ensure the efficient functioning of the legislative process, but it is not provided for in the Treaties: conciliation is permitted only after the second reading whilst contributions from the Commission are not foreseen. Not only do these informal meetings derive no authority from the Treaty, they also bypass other commitments of the Union under primary law, such as the principles of democracy, transparency, and inter-institutional balance. The recent case of *De Capitani* explores the tensions prevalent in this system. The General Court held that the principle of transparency is inherent to the EU legislative process, such that no general presumption of non-disclosure of documents in the 'trilogue' system can be upheld. The reasons for this was due to the legitimacy of the legislative procedure as a whole in the eyes of Union citizens.[105]

It is important to acknowledge initiatives of this nature to consider whether more informal avenues are recognised (and implicitly accepted as legitimate) by the Court, or indeed by other means. In other words, it may be the case that the Court, in practice, does not challenge, but essentially condones, their legality. In *De Capitani* the Court also specified that 'trilogues' constitute a decisive part of the legislative process. Moreover, in *Macro-Financial Assistance* the Court discussed the role of 'trilogues.' The Court came to the conclusion that the Commission has the right to withdraw a legislative proposal.[106] It is the way in which the Court reached this conclusion that is of interest for present purposes. In particular, it seems to justify the Commission's right of withdrawal on the basis that it need only inform the European Parliament and the Council of its intentions in, *inter alia,* 'trilogue' negotiation meetings. Nevertheless, it is evident that in 'trilogues' many MEPs and Member States are not represented. Thus, the 'legitimisation' of such channels is problematic in relation to other primary law principles, such as democracy. This is especially the case as it is the institutions that are altering - perhaps even revising - Union primary law, rather than the Member States who hold the prerogative under Article 48 TEU.

2.3.5) 'Political instructions' from the Member States

There is however evidence of an awareness on the part of the political actors of the need to follow the Treaty procedures. For example, 'political instructions' originating

[105] Case T-540/15, *De Capitani v European Parliament,* EU:T:2018:167.
[106] Case C-409/13, *Council v Commission,* EU:C:2015:217

from the Member States (either individually or acting together) have been directed to the Court. The reason for exploring these examples is to determine what impact, if any, political instructions of this nature may exert over Union primary law. Most notably, these 'political instructions' have not (yet) been adopted under the Article 48 TEU procedures. Thus, if it is to be assumed that this provision is exclusive, these instructions should not be recognised as primary law or as enjoying the same effects as a formal Treaty amendment.

A first example is the Decision of the Heads of State or Government concerning a 'New Settlement for the UK with the EU,' agreed in February 2016.[107] One of the elements of the Decision entailed that in circumstances where a policy area in the Treaty is expressly 'reserved' to the Member States, it should not be understood as constituting a derogation from EU law, which when applying the Court's interpretive principles ought to be interpreted restrictively. Instead, policy areas of this kind are solely a matter for the Member States. As an example, the control Member States retain over national security - enshrined in Article 4(2) TEU - must be understood quite literally.[108] Given the UK's decision to leave the EU, this is a hypothetical point, but it still gives rise to the question of whether a set of essentially 'political instructions' may have the effect of dictating to the Court how to exercise its role to interpret primary law under the Treaty (Article 19(1) TEU). An answer to this question ultimately depends on the legal instrument adopted to give effect to these 'political instructions.'

In this respect, the Decision amongst representatives of the Member States' governments has an intergovernmental character. It is not a Decision of the European Council as an EU institution under Article 15 TEU, within the meaning of Article 288 TFEU.[109] This is not unprecedented. For example, similar decisions include the Danish and Irish 'solutions' to the failed referenda on the Maastricht Treaty, and the ratification difficulties of the Lisbon Treaty, respectively.[110] In both cases, agreements

[107] Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union.
[108] Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union: Section C Sovereignty: Article 4(2) of the TEU confirms that national security remains the sole responsibility of each Member State. This does not constitute a derogation from Union law and should therefore not be interpreted restrictively. In exercising their powers, the Union institutions will fully respect the national security responsibility of the Member States.
[109] The addition of the phrase 'meeting within' the European Council aims to clarify that the Heads of State and Government took the opportunity of participation in the European Council meeting to adopt the Decision.
[110] These Decisions were not regarded as legally binding as they were political agreements or an international Treaty in simplified form. Instead, they were considered as a promise of future changes which would be achieved through primary law

were reached by the Member States on a joint interpretation of provisions of the Treaties. In terms of their legal nature, they fell to be understood as instruments of international law, concluded in simplified form. As a result of these similarities, the instrument is legally binding in international law for the Member States, but has to be incorporated within the Treaties, in accordance with the specific procedures.[111] This provides us with some indication of the legal nature of the (now defunct) 2016 Decision.

The second example concerns the effects of Declarations of the Heads of State or Government on Union primary law. The general view in the literature and the case law about the legal effects of Declarations is that they are not legally-binding and therefore do not constitute Union primary law.[112] Thus, any instructions they may contain as regards Union primary law are, in effect, came in the form of an international agreement amongst the Member States. The question then becomes whether and, if so, how may purely political agreements of this nature adopted by the Member States impact upon the interpretation of primary law?

A useful illustration of these issues concerns the Member States desire to retain unfettered control over their nationality laws. In *Rottmann* the intervening Member States argued that EU law could not have any effect on domestic rules on nationality, as the subject-matter (acquisition and loss of nationality) is regulated exclusively by national law.[113] In terms of the support for this perspective, it is settled case law Member States may in principle determine their own nationality laws, but on the proviso that they must do so in conformity with EU law.[114] The Court found that merely because a matter is governed by national law does not mean that it is exempt from the obligations contained under EU law. The most powerful argument against the judgment in *Rottmann* is based on Declaration no.2 on nationality, annexed to the TEU. This reads that, wherever in the Treaty reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a

(particularly a Protocol.) In the context, the European Council agreed on the broader legal and political context of the decision: it was not 'legally' binding, did not constitute a Treaty amendment, and its contents would be set out in a Protocol attached in future. See, Decision of the Heads of State and Government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union Published in the Official Journal, OJ C 348, of31 December 1992, p.2 and Decision of the Heads of State or Government of the 27 Member States of the EU, meeting within the European Council, on the concerns of the Irish people on the Treaty of Lisbon, for which see doc. 11225/2/09 REV 2, p. 17-19.

[111] The Council Legal Service considered that at most the Decision would be of interpretative authority. Opinion of Legal Counsel, Brussels, 8 February 2016 (OR. en) EUCO 15/16.

[112] Toth, 'The Legal Status of the Declarations Annexed to the Single European Act' (1986) 23 CMLRev 803

[113] Case C-135/08, *Rottmann,* EU:C:2010:104.

[114] E.g., Case C-369/90, *Micheletti and others,* EU:C:1992:295

Member State shall be settled solely by reference to the national law of the Member State concerned. However, a Declaration enjoys quite limited legal effects, which can therefore have no (or a very limited) impact in preventing the Court from identifying EU limits to the exercise of national legislative autonomy under such circumstances.[115] Indeed, the Court stated that the Declaration was intended to clarify the specific issue about the concept of nationality of a Member State, and that it had to be taken into consideration as being an instrument for the interpretation of the Treaties. To some, the choice for a relatively weak legal form, rather than a Protocol, may be taken as a concession that there was no serious intention on the part of the Member States to narrow or to derogate from the Treaty text.[116]

Overall, it is not entirely clear what the effect of 'political instructions' from the Heads of State or Government that do not receive their expression in the Treaty (or in a Protocol) will be on Union primary law. In particular, there is very little evidence to suggest that the Court will accept these instructions as the principal source of reference for the interpretation of primary law. Indeed, there is no evidence to suggest that other Decisions of this nature have had the effect of amending the Treaties, without further steps being taken in the context of a formal Treaty revision.

2.3.6) International agreements

The final two examples are purely speculative, but are based on two concrete political initiatives that raise similar issues to those discussed on the theme of 'rewriting' Union primary law through informal political means. The examples highlight the concerns about the extent to which informal political initiatives may alter the Treaty text and the possible role of the Court in responding to these developments. The first concerns the process of withdrawal from the EU, specifically the legal and political implications of the UK's decision to leave. The second concerns the possibility of a forced exit of a Member State from the EMU, agreed upon by the Heads of State or Government.

First, leaving to one side the detailed questions about the procedure for withdrawal from the EU, a set of questions arise about the 'internal' consequences of withdrawal for the Union's constitutional framework. Of particular importance is the relationship between the withdrawal provision and *its possible consequences for the remaining*

[115] See, the AG's Opinion in Case C-135/08, *Rottmann,* EU:C:2009:588
[116] Davies, 'The European Union legislature as an agent of the Court of Justice' (2016) 54 JCMS 846.

primary law architecture. There is a withdrawal provision under Article 50 TEU but there is no provision which addresses how to ameliorate or deal with the consequential effects of a withdrawal.[117] It is clear that the Treaties cease to apply to the withdrawing State from the date of the entry into force of the withdrawal agreement (Article 50(3) TEU.) But, it is unclear whether the remaining Member States ought to amend the Treaty to repeal all provisions that touch upon the departing country and make changes to the primary law architecture once the Member State leaves.[118] This is the case as agreements on withdrawal (as a category of international Treaties) cannot amend Union primary law.[119] Thus, the process of withdrawal poses a set of questions about the extent to which it is possible for changes to be made to the Treaty framework through an international agreement. Can the process of withdrawal have the effect of amending the Treaty without the Member States engaging with the formal amendment process under Article 48 TEU?[120]

One concrete problem which illustrates this issue is Protocol no. 20 (on UK-Irish relations and the Common Travel Area).[121] For some, withdrawal may have the effect that the Protocol will be implicitly amended as Union primary law concerning the UK.[122] If this is the case, important questions arise about how far 'implied amendment and repeal' is able to go. However, the stronger argument is that the 'special treatment' as regards UK-Irish relations will continue, as the UK's withdrawal cannot have the effect of rewriting the rights and obligations of another Member State, the basis of which can be found in the Treaty.[123] Indeed, there are examples of past practice of the

[117] Łazowski, 'Withdrawal from the European Union and Alternatives to Membership' (2012) 37 ELRev 523, 'To start with, it would be necessary to delete all provisions and protocols annexed to the Treaties touching upon a departing country. Furthermore, tailor-made protocols applicable to a departing country [e.g. Protocol on the Charter for the UK] will have to be repealed or revised… owing to the legal character of a withdrawal agreement, a separate treaty between the remaining Member States may prove necessary in this regard.'

[118] See the Bratislava Declaration and Roadmap (September, 2016) available at: http://www.consilium.europa.eu/media/21250/160916-bratislava-declaration-and-roadmapen16.pdfwhere. The EU envisaged no specific Treaty amendments; the aftermath would be dealt with via policy documents and legislative initiatives.

[119] Legal character of the agreement under Article 50(2) TEU is an international agreement between the EU and a departing country.

[120] Similar questions have arisen in the context of the accession of new Member States, and the boundary between a permissible 'adjustment' and an 'amendment' of the Treaty, the latter possible under Article 48 TEU but not Article 49 TEU. See, Tezcan, *Legal Constraints on EU Member States as primary law makers* (Meijers Research Institute, 2015). However, a withdrawal agreement does not form part of primary law, unlike Accession Treaties which enjoy the status of primary law and may alter the Treaties with a view to accommodating new entrants.

[121] Protocol no. 20 on the application of certain aspects of Article 26 TFEU to the UK and Ireland, OJ C 202, 7.6.2016

[122] As part of a (pre-referendum) inquiry into Northern Ireland and the EU referendum, the NI Affairs Committee received evidence from the UK's Brexit taskforce, which suggested that the future of the CTA is not assured. See also, the UK Government's February 2016 Paper on 'The Process of Withdrawing from the EU,' and March 2016 paper on 'Alternatives to Membership: possible models for the UK outside of the EU.'

[123] E.g. there is 'no obvious legal reason' why Ireland could not retain the benefit after the UK leaves the EU: ILPAEU, Referendum Position papers 8: The Implications of UK Withdrawal for immigration policy and nationality law: Irish aspects, 18th May 2016. Therefore, if Ireland wished to enter into bilateral arrangements with the UK then it would not need the consent of all of the other Member States to do so.

EU essentially glossing over possible problems in a piecemeal manner relating to the formal character of Union primary law, and subsequent developments.[124] Overall, it remains uncertain when the boundary is crossed between: on the one hand, when amendment would be conducive for neatness, but where there is no real need for a formal process and, on the other hand, where the provisions are essential to the character of the EU and its arrangements so that amendment is necessary.

Second, although a forced departure from the EMU has not yet materialised, the idea resonates with the precarious position of Greece in the EMU that was exposed by the sovereign debt crisis. The issue featured in debates about the possibility of the Heads of State or Government, sitting in the European Council, reaching a decision that would effectively force Greece out of the Eurozone in the event of a default on its debts.[125] The novelty of this situation is heightened by the fact that the Treaty does not cater for such a possibility. There is no legal mechanism for a Member State to either leave or to be forced out of the euro. Moreover, membership of the EMU is a condition for membership of the EU.[126] Admittedly, there are clear reasons why, in practice, the Member States did not seek to include a 'withdrawal' clause from the EMU in the Treaty (as opposed to Article 50 TEU for EU membership.) Indeed, there was a desire to reinforce and ensure confidence in the permanent nature and the envisaged 'irreversibility' of the euro, for the sake of financial market stability, which might have been undermined by the existence of a mechanism to leave.[127] The logical question is whether political reasons, and ultimately political initiatives, may overshadow the strict legal dynamics of the situation. How far should an informal practice of this kind, outside of the parameters of Article 48 TEU, be allowed to go? For example, would such a situation be recognised as lawful if it were to become the subject of a legal challenge by the Greek government and/or citizens?

[124] See, the changes to the composition of the European Parliament pursuant to the Lisbon Treaty and the European elections in 2009. A Protocol was adopted to remedy problems and overlaps, as the Lisbon Treaty had not yet entered into force. See, de Witte, 'Treaty revision procedures After Lisbon' In Biondi, Eeckhout, Ripley, *EU Law After Lisbon* (OUP, 2012).
[125] The German Finance Minister Wolfgang Schäuble is a strong voice in this regard. See, in the popular press, https://www.theguardian.com/world/2016/dec/04/greece-must-reform-or-leave-eurozone-says-german-minister (last accessed 21st March 2018.)
[126] Athanassiou, *Withdrawal and Expulsion from the EU and EMU,* (2009) Legal Working Paper Series: 'A Member State's exit from EMU, without a parallel withdrawal from the EU, would be legally inconceivable.'
[127] As the euro was originally created 'irrevocably' (Article 140 TEU), there is no explicit procedure in place for a Member State to leave. This irrevocability was designed to prevent financial markets from placing a eurozone state under pressure until it reintroduced its national currency.

Answers to questions of this nature depend upon a consideration of the implications that may follow from the recognition (and essentially creation) of such a possibility outside of the formal processes of the Treaties. In procedural terms, the effects of expulsion from the EMU would create a conflict with the constitutional equality of the Member States in Article 48 TEU for decisions resulting in an amendment of the Treaty; an amendment that would quite naturally follow from a forced expulsion.[128] Given that the expulsion would, by definition, be contrary to the Member State's intention to continue its membership, the right of expulsion on the part of the other Member States would entail an unauthorised Treaty amendment in breach of Article 48 TEU.[129] It is not only the Member States who have a role in negotiating amendments to the Treaty; it is also the Union's political institutions who are involved in the process prior to the inter-governmental conference. This includes representatives from national parliaments and the European Parliament.

3) <u>What are the implications of informal avenues of Union primary law revision?</u>

It is important to map out the possible implications of the procedural restrictions (if any) to Union primary law-making. Of particular interest is the source of these constraints, their capacity for (and actual) enforcement and the impact, if any, a lack of constraints or a weakness in their enforcement has on the integrity and status of the Treaty amendment procedure. To this effect, the overarching question is whether Article 48 TEU provides an *explicit counter-point to any developments to primary law* that are not set out in the Treaty. In other words, is Article 48 the only (legitimate) avenue through which to revise Union primary law? At least on the basis of the benchmark set out by the Court in *Defrenne,* it should not be possible to amend primary law without engaging with the specific Treaty procedures. Even if that is true in theory, it is not always the case that such limits are enforced in practice.

3.1) The relations between Court and the Member States

The purpose of the foregoing analysis was to identify changes that could be understood as 'revisions' to the Treaty. On the basis of the evidence gathered so far, there a set of

[128] E.g. would Greece still be a Member State and have to negotiate an opt-out or derogation from EMU? Also, what would happen to the specific Treaty provisions for the EMU Member States as regards issues such as capital controls?
[129] Athanassiou, *Withdrawal and Expulsion from the EU and EMU,* (2009) Legal Working Paper Series.

actors - such as the Member States, the Union's political institutions and even the Court – that are effectively engaged in a 'bottom up' rewriting of Union primary law. Indeed, there is evidence to suggest that Article 48 TEU is not necessarily the exclusive means through which changes can be made to Union primary law. The legitimatisation of such informal mechanisms demonstrates a key theme of the thesis: how interactions between the Union's constitutional actors work to undermine the formal Article 48 TEU procedures.

Whilst not all examples may strictly amount to Treaty revisions as such, they do alter the way Union primary law is applied. In some instances, the Court has 'legitimised' informal practices, such as in *Pringle* and *Macro-Financial Assistance.* Indeed the Court does not always enforce the procedural conditions strictly against the Member States (or other actors); its approach allows for other actors who may not have a formally decisive role under Article 48 TEU to inform the revision process in practice. The question arises about whether we are comfortable with the Court enjoying such a role given the degree of flexibility it enjoys in reinforcing the mandatory character of Article 48 TEU at certain junctures, whilst overlooking similar sentiments in other contexts? After all, from a formal reading of Article 48 TEU the Treaty is very clear about where the amendment powers lie: with the Member States.

3.2) Is it desirable to ensure Article 48's procedural conditions are enforced?

It is useful to recall the reason why procedural exclusivity is of such importance. A formal Treaty provision (Article 48 TEU) outlines the procedures for amendment, and – in terms of the ordinary procedure - specifies that decisions resulting in an amendment of the Treaty require unanimous agreement amongst the Member States. Before such decisions are finalised, however, the Treaty envisages the establishment of a Convention whereby a range of actors discuss possible amendments. By contrast, an informal procedure or a political agreement (between the Member States and/or the Union's political institutions) may ultimately overlook the interested actors who have been afforded a role in the amendment process. The second point is that these informal agreements may contain decisions which possibly amend the Treaty, but which bypass the democratic and deliberative avenues envisaged under the Treaty to achieve that

purpose.[130] This may seriously compromise, if not entirely undermine, the transparency of the overall revision process, a problem which the Lisbon Treaty sought to tackle. It is important to remember that formal procedures usually provide protection against short-term alterations and the subjugation of constitutional provisions to (generally short-term) political tides.[131] This is perhaps one of the reasons behind the constitutional choice in the Treaty to circumscribe the Union's primary law-making power through procedural conditions and to safeguard the constitutional equality of Member States in the process.

Nonetheless, not all informal avenues of primary law change are without justification. First, the examples raise questions about the line between law and politics, especially in situations where the formal legal framework is rendered largely otiose by the practices of political actors, and where the Court appears reluctant to intrude into the realm of politics.[132] It is possible to understand - and to perhaps sympathise with - certain instances where the Court essentially 'ratifies' changes to primary law agreed upon by the Member States, albeit outside of the formal Treaty structure. Indeed, the general logic behind Article 48 TEU is to keep Member States to the bargains that they have struck in the Treaty, and the inclusiveness of the procedure which requires agreement by common accord. This appears true of *Pringle* and the ESM Treaty. However, this does not justify situations where it is the Court or the Union's political institutions whom also assume a role in effectively revising Union primary law. Still, certain factors help to explain these instances.

Indeed, a second observation relates to the literature on the rigidity of constitutional amendment procedures in general, and under Union law in particular.[133] It is this rigidity that perhaps helps to explain why a degree of flexibility is necessary for the Union to evolve and is aimed at facilitating adaptation to changing circumstances.[134] Therefore, it is possible to sympathise with the development of certain informal

[130] See, Voermans, 'Constitutional Reserves and Covert Constitutions' (2009) 3 Indian Journal of Constitutional Law 84: 'In rigid constitutional systems… debates on the basic constitutional structure should involve the highest level of negotiations and be settled by qualified or supermajorities. If a constitutional issue is regulated in another way, via a lower ranked legislative authority (e.g. the parliamentary legislator), the constitutional restrictions on amendability become idle. Regulating constitutional issues that are or should be the prerogative (or reserve) of the constitutional legislator by different means than the prescribed constitutional amendment procedure may then ultimately undermine or erode the value of a constitution.'
[131] Suber, *The Paradox Of Self-Amendment: A Study Of Logic, Law, Omnipotence, and Change* (Peter Lang Publishing, 1990). Suber, 'Amendment' *Philosophy of Law: An Encyclopedia I* (Garland Pub. Co, 1999), pg.31.
[132] See Weatherill, *Cases & Materials on EU Law* (OUP, 2016), pg. 581: There is a 'judicial disinclination to cut across majoritarian political preferences.'
[133] See, Davies, 'Legislative Control of the European Court of Justice' (2014) 51 CMLRev 1579
[134] The fact that there have only been five formal Treaty amendments so far implies the use of some alternative mechanisms of revision to supplement the formal amendment procedures.

mechanisms and to acknowledge that they are legitimate so far as they are necessary to ensure Union primary law operates effectively in practice. Nevertheless, it is still important to protect the formal procedures envisaged under the Treaty, and the balance of interests that underpin these procedures. The difficulty however is identifying issues that can be settled only by way of a formal constitutional amendment, rather than through less formal political avenues. The question is what areas and/or legal issues require full engagement with the Treaty procedure, envisaged under Article 48 TEU, as opposed to more informal avenues of revision involving other configurations of political actors?

One way of attempting to address this is to take into account a distinction that emerges from the analysis thus far. It is possible to separate situations where the legal framework is clear and binding, from the situations where it remains open to interpretation and evaluation.[135] In the latter type of circumstance, it is not realistic to expect a formal Treaty amendment every time there is some practical elaboration of the terms of the Treaties. This distinction may help to shed light on important questions such as who ought to be responsible for the development of primary law and through what means. On the one hand, there are certain areas where it is entirely legitimate, and indeed necessary, to require *political interpretation and evaluation* to determine how the formal rules should play out in practice.[136] This is true, for example, of constitutional conventions and inter-institutional agreements which help to ensure the efficient functioning of the Union legal order. On the other hand, however, there are examples which do not seem to enjoy the same licence so as to benefit from an unfettered political – or judicial - evaluation and thus sit more uneasily with Union primary law and the integrity of the Treaty structure, most especially Article 48 TEU. In particular, the example of an involuntary departure of a Member State from the EMU undermines the need for 'common accord' under the Treaties, since it is unlikely that the departing Member State would 'agree' to such a development. Furthermore, it is possible that a Member State would be forced to exit by the stronger Member States in the European Council, without the possible safeguards that a formal Treaty

[135] See, for example, Opinion 2/13, re ECHR Accession, EU:C:2014:2454
[136] See Ioannidis, 'Europe's new transformations' (2016) 53 CMLRev 1237, particularly the analysis of the distinction between transformation and interpretation.

provision affords, including the commitment to the constitutional equality of the Member States.[137]

3.3) What are the implications for the 'hierarchy of norms?'

Questions about 'procedural exclusivity' would be less significant if the reforms discussed at the Convention for the Future of Europe were put into effect, so that 'less important' primary norms could be amended with greater ease.[138] In practice, the idea was that there would be two different types of amendment procedure: one with less restrictive requirements for norms of a lower value, and the more rigid amendment procedure would continue to apply to those norms which are more 'entrenched' and thus which should be more difficult to amend. This initiative would help to convey the idea of a 'hierarchy of norms' within Union primary law more clearly.[139] But the idea was followed through only to a limited extent with the introduction of the simplified revision procedures at Lisbon, as more flexible procedures for amending specific parts of the Treaties.

However, with the existing materials it is possible to pose the question of whether the fact that the Court appears less strict in the enforcement of procedural conditions, and that different constitutional actors bypass formal routes in certain circumstances, means that the relevant norms are not as 'entrenched' and therefore are more susceptible to alteration. Indeed, although in a formal sense the Court values Article 48 as the 'highest hierarchical provision' in that it is the exclusive mechanism through which to amend Union primary law, this is not always true in practice. The Court seems to enjoy the flexibility in such circumstances to determine when a formal amendment is necessary, whilst also 'sanctioning' changes to Union primary law that take place outside the confines of Article 48 TEU. It is difficult to predict what approach the Court may employ in different circumstances.

3.4) What do the examples say about the conception of the Union legal order?

The position taken in *Defrenne* reflects the Court's view of the Treaty as the Union's constitutional charter, which naturally enjoys a constitutional nature. In so doing, the

[137] It should not, however, be overlooked that this may also be the case with the formal amendment rules in practice. See, further, Hartley, 'The Constitutional Foundations of the EU' (2001) 117 LQR 236.
[138] See, further, pgs.16-17 of the thesis.
[139] See de Witte, 'Treaty revision procedures After Lisbon' cited supra n.55.

Court claims that it is willing to uphold the integrity of the procedures contained in the Treaty. However, the judicial approach does not always conform to this position. On the one hand, evidence of informal mechanisms of Union primary law change suggests that there is limited support for a constitutional underpinning of the legal order. But the interactions amongst the different constitutional actors involved in the process of revision - the Court, the Union's political institutions and the Member States – undermine the apparent exclusivity of Article 48 TEU. This moves away from the international law view of Union law, where the Member States are the 'masters of the Treaties,' to a view where the Member States share their primary law-making prerogatives with other (supranational) actors. This is not uncommon in other constitutional contexts where courts have developed a role in elaborating upon and subtly altering formal constitutional parameters.[140]

Overall, the Member States do not necessarily enjoy, in practice, the ultimate authority to amend primary law on the basis of Article 48 TEU. Instead, it is sometimes shared with the Court and the Union's political institutions, at least in terms of the procedural routes of amendment. This enables the conclusion to be drawn that there are few examples whereby the Court upholds and thus enforces procedural constraints against the exercise of the Treaty amendment power.[141] In many cases, initiatives of the Member States outside of the formal amendment procedures have been implicitly accepted as constituting Union primary law. To a certain extent, it is true that the Court is merely adhering to the logic of Article 48 TEU in handing certain constitutional matters back to the Member States. However, this is only a persuasive argument where the procedural avenues involve all of the Member States acting by 'common accord.' It cannot provide a sound justification for other procedural avenues involving a different configuration of actors, whilst undermining the constitutional equality of the Member States under the Treaty.

[140] Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP, 2017) pgs.47- 70
[141] But see Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:1996:140

Chapter four: the relations between the Union's primary legal sources in the context of the substantive amendment of Union law

This chapter explores the same themes as chapter three, but it considers the question of whether the Union's primary legal sources function as *substantive limits* to the Treaties' reservation of amendment powers to the Member States. The conclusions draw together the central ideas from both chapters three and four.

1) Substantive constraints to Union primary law-making

It is clear that Article 48 TEU establishes the power (primarily of the Member States) to amend the Treaties, apparently without substantive limitation. But the outstanding question is whether it is possible for any Union primary norms to condition and constrain such a power in substantive terms. There are two separate limbs to this inquiry. The first question relates to whether there are legal limits - as opposed to more political limits - to the exercise of that power, even if there is political appetite to amend primary law in a certain way.[1] The second question concerns how, if at all, limits of this nature can be enforced within the Union legal order given that primary law has traditionally been considered non-reviewable by the Court.[2]

The possible existence of substantive limits to the amendment of primary law enters into very uncertain, and indeed contentious, territory. In light of the speculative nature of this issue, the discussion attempts to build upon the lessons that can be drawn from the first two chapters, in particular as to the possible 'privileged' status of certain primary norms. Such norms could hold the potential to extend their effects into a different context: the ability to exercise primary law-making powers. Thus, the status of certain primary norms may be reinforced by the rules governing amendment. However, the specific constitutional context – amendment of primary law as the constitutional fabric of the Union legal order - has a substantial bearing on the analysis. There are reasons why the legal effects of certain norms should perhaps be different when the Court is faced with the question of limits to amendment. For a start, limits

[1] Political limits mean that an amendment may be unwise in political and practical terms (i.e., political support), but not impossible in legal terms. An example that is commonly used to illustrate this is the removal of access to a judicial remedy for individuals. The commentary surrounding the capacity of the Member States to amend the Treaty usually speaks in terms of it being 'unwise' to adopt certain amendments. Thus, the legality of those amendments has not really been discussed, or has been assumed. See Besselink, 'Editorial: A Constitutional Moment: Acceding to the ECHR (or Not)' (2015) 11 EuConst.2: 'the Member States would be 'unwise' to remove autonomy from the protection of primary law.'

[2] The rationale for the non-reviewability of primary law in the case law is that such law incorporates a political balance of powers that the Court would not be keen to disturb: Joined Cases 31 and 35/86, *LAISA and Others v Council*, EU:C:1988:211.

to amendment in national constitutional contexts are usually contained within the written constitution. For example, the German Basic Law contains an 'eternity-clause' which precludes amendments that would affect the core principles of the German constitution, Article 79(3) *Grundgesetz*. In other words, limits are not judicially self-constructed and/or afforded their sole recognition and legal effects by the judiciary.[3] In the EU context, Article 48 TEU only envisages (possible) procedural limits to the manner in which the Treaty can be amended. The text of the Treaty does not contain any *explicit* substantive limits as regards the contents of primary law.[4] Indeed, *UPA* demonstrates the Court's reluctance to use primary norms - and equally to enforce them to their 'full effect' - where that would lead to a conflict with the Member States' authority to amend primary law. It is useful to explore the extent to which this provides an accurate reflection of the judicial practice.

1.1) Theoretical benchmarks

There are at least two theoretical benchmarks from which it is possible to explore substantive limits to Union amendment. The first is based on the understanding that the Member States remain the 'masters of the Treaties' and, as a consequence, enjoy an unfettered discretion *under Union law* in the exercise of their prerogatives as primary law-makers.[5] On this understanding, the logical conclusion would (or should) be that Article 48 TEU is the 'highest hierarchical provision' given that there are no substantive legal limits as to how the Member State can exercise their power to revise primary law. The second benchmark is rather different. In this sense, an 'untouchable hard core' of Union law, could, in theory, constitute an absolute substantial restriction on revision.[6] Thus, there may be an 'irreversible core' of Union primary law that any 'new' primary law must comply with. This 'core' could constitute 'supra-

[3] Though, the Italian Constitutional Court, in its judgment 15-29 Dec. 1988 No. 1146 (Gazzetta Ufficiale No. 2 of 11 Jan. 1989, I Serie Spec., Corte Costituzionale, 11) stated that the fundamental principles of the system 'may not be subverted or modified in their essential content, not even by laws amending the Constitution or any other constitutional law.' Such fundamental principles include principles 'the Constitution itself expressly regards as absolute limits to the power of constitutional revision…', and other principles which, 'although not expressly mentioned among those not amendable by any constitutional revision, belong to the essence of higher values on which the Constitution is found.'

[4] Though see Article 48(6) TEU, the procedural conditions which by implication have a bearing on the contents of primary law.

[5] It is not the purpose of this chapter to explore the limits stemming from international law more generally, or from domestic law.

[6] Gialdino, 'Some reflections on the acquis communautaire' (1995) 32 CMLRev 1089. A category of fundamental principles has been identified concerning the structure of the legal order and the case law on the essential requirements of the EU which that would not be open to challenge.

constitutional' limits to primary law-making,[7] which would prevail over the rules on revision under Article 48 TEU.[8]

The following analysis has its roots in these benchmarks and explores whether either of them are accurate. One of the main questions is whether a less 'binary' approach is necessary given that these perspectives envisage a sort of hierarchical structure as regards the substance of primary law: with either the Court or the Member States at the apex of that hierarchy. It seeks to ascertain the extent to which the Treaty (insofar as it is supposed to offer an expression of the common political will across the Union) may comprise the 'highest source of EU law,' or whether, on the other hand, there exists a layer of principles which effectively govern and shape its application, and consequently restrict the power of primary law-making. Indeed, it is possible that this could materialise in more *subtle* ways than through 'hard' enforceable limits of the kind identified by the second benchmark. Overall, the analysis seeks to identify whether the Member States remain the ultimate protagonists as regards the substance of primary law. Any substantive constraints that operate on the Member States' prerogative are considered for whether they pose a clear challenge to the position under Article 48 TEU and qualify the status of the provision in the Union framework. This latter inquiry concerns the source of the limits: whether they form part of the Member States' own intentions expressed in the Treaty or whether the Court is essentially identifying and enforcing its own limits of an unwritten nature against the Member States. In keeping with the previous chapters, this chapter focuses on the variable roles of constitutional actors in the Union's primary law framework.

1.2) Conceptualising substantive limits

From the case law and the literature, it is possible to categorise substantive limits to amendment in two ways. On the one hand, there may be *negative* limits to the primary law that the Member States are competent to adopt. It is arguable here that a distinction

[7] This concept relates to a set of core principles, akin to eternal clauses in national constitutions, which exist from the outset and precede textual references. In national constitutions they pre-empt other provisions of primary law, if they are in conflict. In terms of their institutional implications, they constitute non-reviewable principles and/or values. See, e.g. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP, 2000), especially chapter 5.

[8] To some, there is evidence to support the existence of overriding core principles in the EU constitutional order. Amongst others it has been suggested that the 'founding principles' and the values and objectives contained in article.2 and article.3 TEU are indicative of a common core for the EU. E.g. Di Federico, *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, (2001) Springer. 147. See also the case law: Opinion 1/2009, [2011] ECR I-0000, at para 64 in which the court reiterated the 'fundamental elements' of the EU legal order. This implies the existence of not just a general fundamental nature, but specific and distinct principles; and Opinion 1/91, EU:C:1991:490 which implied that provisions concerning the very foundations of Community have priority over other Treaty provisions.

may be made between limits which are purely political in nature – i.e. where it would be politically unwise to amend primary law in a certain way - and those that are capable of being enforced as legal limits. On the other hand, there may be *positive* obligations incumbent upon the Member States to adopt a particular type of primary law. This includes the Court's possible 'power of suggestion' over what primary law ought to look like.

As a starting point, it may be useful to look to the Treaty itself in order to provide a clear frame of reference for any substantive constraints to amendment. For example, the Treaty has, on occasion, enshrined commitments to adopt certain types of primary law. In terms of the possible existence of *positive obligations* to adopt primary law, the Member States have specified certain commitments that ought to be concretised by the Member States for the future. The most recent example of this is the obligation enshrined in Article 6(2) TEU for the EU to accede to the ECHR. Equally, in terms of the inclusion of *negative limits* to the creation of primary law, for some the expression in Article 2 TEU - that the Union is founded on fundamental values - constitutes a clear example of a limit. At the basis of this argument is the suggestion that Article 2 TEU has been (implicitly) accepted by the Member States as a constraint on any further amendment which runs counter to those values.[9]

Whilst these matters in themselves have not been entirely settled,[10] the focus of the analysis for present purposes rather concerns the Court's – as opposed to the Member States' - role in the specification and enforcement *of positive and negative criteria* for the revision of primary law. The purpose of the analysis is to explore whether any such limits do exist within the Union legal order and, if so, in what form. There could be *explicit* limits or requirements that revised primary law must conform. But there may also be *implicit* limits, in the sense of subtler tools for ensuring the revisions conform to the existing Union primary law framework. Ultimately, it is interesting to consider whether Article 48 TEU provides an explicit *counter-point* to any developments and/or limits which have not been set out by the Member States in the Treaty. If that

[9] Rosas and Armati, 'Who is the Boss? In Search of a Master of the Treaties' in *EU Constitutional Law: An Introduction* (Hart, 2012)

[10] E.g., in terms of 'positive obligations' to act, it is not clear what happens when those obligations are not fulfilled either within a specified time limit, or at all. Would the Court be prepared to hold the Member States to account for those positive requirements and to enforce them?

is the case, then Article 48 TEU could hold a place as the 'highest hierarchical provision' of Union law.

1.3) Examples of possible limits

To begin with some purely theoretical possibilities, a common example in many constitutional systems relates to attempts to legislate so as to undermine the fundamental rights of individuals. When applied to the EU context, the focus of the discussion lies with the consequences, if any, that follow if the Member States were to attempt to amend primary law so as to abrogate fundamental rights across the EU.[11] However, examples of this kind do not provide the most fruitful basis upon which to assess the real constraints that may play a role when it comes to the revision of primary law.[12] Indeed, such examples reason backwards from absurd hypotheticals and inevitably tend to fall back upon a discussion of the persuasive 'political limits' to amendment. Indeed, it is highly unlikely that the Member States would collectively introduce such controversial provisions at the EU level, which would then require (amongst other things) ratification at the national level.[13]

It is therefore better to focus on concrete examples of proposed or actual amendments to Union primary law that are specific to the EU. The first relates to the limits proposed for Turkish nationals and their access to Union law rights, if Turkey acceded to the Union. A second relates to the Member States' attempts to ensure the EU's accession to the ECHR, perhaps notwithstanding the concerns relating to the 'autonomy' of the Union legal order identified by the Court in Opinion 2/13.[14] The final example emerges as regards the right to withdraw from the EU, in particular the legality of Article 50 TEU.[15] The first two examples are specific derogations from Union primary law either for a 'new' Member State or are intended to have effect only in limited

[11] E.g. in the UK constitutional context, see Lord Steyn in *R (Jackson) v Attorney-General* [2005] UKHL 56.
[12] This holds true for the questions raised by Passchier and Stremler, 'Unconstitutional Constitutional Amendments in EU Law: Considering the Existence of Substantive Constraints on Treaty Revision' (2016) 5 Cambridge Journal of International and Comparative Law 337: 'Could the Member States use the revision procedure to introduce a principle of fascism in EU law? Could they use the same procedure to exclude certain minorities from the Charter?
[13] Consider, the 'limits' to further integration already recognised at the national level by domestic constitutional courts particularly in Germany, see e.g., Cases 2 BvR 1877/97 and 2 BvR 50/98 *European Monetary Union*, judgment of 31 March 1998 and Cases 2 BvE 2/08 et al. *Ratification of the Treaty of Lisbon*, judgment of 30 June 2009.
[14] Opinion 2/13, on Draft ECHR Accession Agreement, EU:C:2014:2454.
[15] Herbst, 'Observations on the Right to Withdraw from the EU: Who are the "Masters of the Treaties"?' (2005) 6 German Law Journal 1755. Some have argued that the *legality* of the introduction of a withdrawal right is open to challenge on the assumption that EU integration is irreversible, and the Member States have waived their right to dissolve the EU, even by unanimous agreement.

circumstances, such as accession to the ECHR. The final example concerns a revision to Union primary law as a whole, and is not confined to specific circumstances.

It is obviously not possible to offer conclusive answers to questions about the legality of these proposals, not least because of their speculative nature. However, it is possible to look to some of the existing case law which concerns analogous situations in which the substance of primary law has been altered in a way that does not respect other, existing, primary law understandings. Therefore, it is useful to focus on the issue of how the Court responds to (and whether it accepts) certain messages of the Member States about the substance of primary law in the process of revision. This offers space to explore the ability of 'fundamental' principles to be revised in any way the Member States deem desirable. So although the purpose of this piece is not to reach any definitive conclusions on these questions, it outlines different viewpoints that emerge from the case law, and the possible theories which underpin them.

2) Substantive limits to the amendment of EU primary law?

There are 'four' main examples of substantive amendments introduced by the Member States to Union primary law where the Court has had the opportunity to explore how to accommodate such amendments within the primary law framework. The examples which help to shed light on the possible 'positive' limits include the Protocols attached to the Treaties, which appear to derogate from Union primary law on a permanent basis. Another example relates to the codification of established case law into the Treaty, particularly where the Member States introduce a new, and potentially more restrictive, understanding. There are also two examples which may help in the understanding of possible 'negative' limits to amendment. One example is specific to the ex-Third Pillar arrangements regarding the exclusion of direct effect for Framework Decisions in the Treaty (Article 34 EU). The second concerns Accession Treaties and the legality of any amendments (or more specifically adjustments) to existing Union primary law that may result from the accession process.

2.1) Positive limits: are the Member States obliged to adopt certain Union primary norms?

There are two issues to consider in relation to the possible existence of 'positive' obligations to adopt Union primary law. The first is whether the Court is prepared to

offer a solution to a problem - which has not been addressed by the Member States - in order to preserve the status of another primary norm. It is possible that any solution offered on that basis might be indicative of what primary law 'requires' and operates as the Court's 'power of suggestion.' A hypothetical example could be where a general principle of Union law points in a direction that has not been accommodated in the written Treaty provisions. On an entirely abstract basis, it is clear that the general principle of effective judicial protection might positively require certain remedies for individuals.[16] This line of argument was pursued by the parties in both *UPA* and *Segi,* in that despite the Treaty not conferring jurisdiction over certain types of acts/individuals, the absence of the protection of the general principle of effective judicial protection would effectively require such a remedy to be provided. There is an obvious danger if such positive obligations were ever recognised: in effect the Court may be specifying how the authority that has been allocated to the Member States under Article 48 TEU ought to be exercised.[17]

The second issue which follows from the first relates to how the Court might formulate the nature of its 'positive' stipulations and how it may hold the primary law-makers to account in relation to its 'power of suggestion.' In other words, the extent to which the Court is prepared to treat a 'positive' requirement as though it is capable of being enforced is particularly important. From one standpoint, it may be possible to identify a legal obligation to obtain a particular result, extending its effects beyond the mere political and/or practical pressure that exists in the relevant circumstances. Such obligations may have the effect that any primary norms which derogate from or attempt to alter those stipulations are unlawful. On the other hand, the Court may be open to accommodating an alternative solution offered by the Member States and to that effect would merely enjoy a non-binding 'power of suggestion.' Overall, the main point of interest is whether the Court perceives a positive stipulation as a mere guideline and an impulse for reform by the Member States, or alternatively whether stipulations of this nature could take the form of binding requirements. Any indications of how this plays out in practice are crucial for the question of whether the

[16] Case C-50/00 P, *Unión de Pequeños Agricultores*, EU:C:2002:462 and Case C-355/04 P, *Segi*, EU:C:2007:116.
[17] Constitutional change (at least in substance) is primarily considered to be a matter for the politically accountable institutions and the Court's role is generally as a consequence confined to ensuring that the law as it is set out is observed. See e.g., the UK Supreme Court hearing in *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5.

Member States remain the ultimate protagonists in the revision of primary law, as Article 48 TEU seems to suggest.

It is possible to offer some reflections about whether the Court is prepared to provide a solution to a problem that has not been addressed by the Member States. In the absence of an express provision in the Treaty, the Court has not demonstrated any marked reluctance to identify a solution in order to fill a potential gap in primary law, on the basis of its *interpretation* of other primary norms.[18] One of the clearest examples is the recognition of 'implied' external competence as a matter of 'interpretation' of the Treaties. In *ERTA* the Court reasoned that 'in the absence of specific provisions in the Treaty relating to the negotiation and conclusion of international agreements in the sphere of transport policy' one must turn to the general system of Community law in the sphere of relations with third countries.[19] Nevertheless, the Court has acknowledged in cases like *UPA* that there is a limit to that process where such an interpretation effectively leads to an amendment of the Treaty.[20] To that effect, it has been prepared to defer to the Member States for the provision of a specific solution. In these circumstances, whilst the Court may express its dissatisfaction with a prevailing situation, its statements seem to be intended to - at most - provide a basis for reform pursuant to Article 48 TEU. In this way, it is necessary to distinguish positive obligations from a purely interpretive exercise. Whereas the interpretive exercise seeks to reconcile any ambiguity amongst existing provisions, positive obligations essentially *dictate* to the Member States how they should exercise their amendment powers for the future. Although it is tempting to reach the conclusion that this is a consistent judicial practice, and that the line between interpretation and amendment is easy to draw, it is not an accurate portrayal of the issue. At times, judicial interpretation may stray into the boundaries of what some may consider 'amendment' of the Treaty.

In terms of the Member States' response to the Court's stipulations, the examples that shed light on this issue are the 'derogating Protocols' and the codification of case law

[18] Consider also Case C-70/88 *Parliament v Council*, at para 26. The Court stated that 'the absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the EC.'

[19] Case 22/70, *Commission v Council* (*ERTA)*, EU:C:1971:32, at para 12.

[20] For a recent example of AG Kokott adhering to this view, see Opinion 2/13, re EU Accession to the ECHR, EU:C:2014:2475. As regards the proposed expansive interpretation of the CFSP jurisdiction provisions, the Advocate General recognised the limits to a process of principle-orientated interpretation where it would contravene the clear wording of the provisions.

into the Treaty. It is important to examine whether the Member States are able to adopt an entirely different solution to the one suggested by the Court. In this way, the Member States would not be bound by any obligation about *how* to formulate primary law and *how* to exercise their authority.

2.1.1) 'Derogating' Protocols

Protocols are an integral part of the Treaties and have the value of Union primary law (Article 51 TEU). The Protocols that are relevant for present purposes have not been found incompatible with the Treaty by the Court, even if they appear to derogate from Union primary law on a permanent basis. This stands in contrast to the existence of transitional arrangements and possible derogations of a temporary nature.[21] The main 'derogating' Protocols are specific responses by the drafters of the Treaty to unpopular judicial decisions.

The first example which illustrates this broader issue is the '*Barber* Protocol.'[22] The Protocol is significant since it contains an explicit derogation from a Treaty provision – as interpreted by the Court - in a manner which is not limited geographically. A geographical limitation is a usual characteristic of 'derogating' Protocols. The Protocol itself was considered a response to the 'ambiguity' in the *Barber* judgment over the Court's limitation of the retroactive effect of its ruling on the applicability of Article 119 EEC to 'contracted out' pension schemes in the UK. The Court had held that benefits paid to workers in connection with compulsory redundancy fell within the scope of now Article 157 TFEU. Moreover, it was incompatible with Union law to maintain a national rule which deferred a pension payable at a retirement age when the retirement age was different for men and women.[23] The Court limited the temporal effects of the ruling, so that Article 157 could not be relied upon in order to claim entitlement to a pension with effect prior to that judgment. However, the Member States - through the adoption of a Protocol - sought to (re-)interpret the meaning of the Treaty article, and, in effect, to present the matter to the Court almost as a *fait accompli*.[24] The Protocol explained that benefits under occupational security schemes

[21] Transitional arrangements have applied in most of the EU's enlargements. For example, the transitional arrangements on the free movement of persons were annexed to the two Acts of Accession in 2003 and 2004: Treaty of Accession 2003, [2003] O.J. L236/17, Treaty of Accession 2005, OJ L 157, 21.6.2005.
[22] Protocol on Article 119 of the Treaty, annexed to the TEU
[23] Case C-262/88, *Barber*, EU:C:1990:209
[24] Prechal, 'Bommen ruimen in Maastricht: wijziging van art. 119 EEG' (1989) Nederlands Juristenblad 349

more generally were not, for the purposes of Article 157, to be considered as remuneration if and insofar as they were 'attributable to periods of employment prior to 17th May 1990.'[25]

What is most interesting is the Court's subsequent response to the Protocol. The response offers some useful indications about the relative status of a previous interpretation of the substance of primary law by the Court, which has subsequently been nuanced in its effects by the Member States in the adoption of primary law. On the one hand, some commentators were of the view that the Protocol should be deemed incompatible with primary law. For example, Mancini argued:

> '*preventing a court from freely interpreting a former decision of its own, and this while it is being requested to do so by other courts under a constitutional provision (Article 177) (. . .) is an outright assault on the separation of powers; namely on a ground-rule of such crucial importance that even a constituent assembly could not limit it without calling in question the democratic nature of the polity for which it frames a new constitution.*' [26]

However, the Court took into account the modified primary law structure introduced by the Member States, as distinct from its initial interpretation in the case law.[27] This perhaps supports the view that the Member States have the legal authority to amend and to define the parameters of primary law, almost so as to repeal the previous understanding of its substance as expressed in the case law.[28] In this way, whilst it is possible to identify dialogic interactions between the Court, the Member States and the Union's political institutions, it is clear that the ultimate prerogative for the amendment of primary law remains with the Member States, who may essentially ignore the Court's limited 'power of suggestion' over what primary law requires.

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[25] A similar phenomenon has been explored previously as regards the 'political instructions' from the Member States over the interpretation of primary law, see pgs.177-179. However, Protocols are very different to Declarations since they are legally-binding and have the same value as the Treaties.

[26] See Mancini, 'Language, Culture and Politics in the Life of the European Court of Justice' 1995 at the Annual Meeting of the Association of American Law Schools, (p. 17 of the transcript).

[27] Case C-109/91, *Ten Oever*, EU:C:1993:833, Case C-57/93, *Vroege*, EU:C:1994:352, Case C-128/93, *Fisscher*, EU:C:1994:353, Case C-7/93, *Beune*, EU:C:1994:350.

[28] '…breach of the acquis is not a sufficient ground upon which the Protocol might be said to be unconstitutional, after all, the separation of powers in the Community is not complete, the institutional balance is constantly developing and intergovernmentalism has always been a part of Community practice, and even provided for in Community treaties.' Hervey, 'Legal issues concerning the Barber Protocol' in O'Keeffe and Twomey, *Legal Issues of the Maastricht Treaty* (Wiley, 1992) pgs. 335-336.

However, an alternative view, expressed in particular by the Advocate Generals, suggests that the *Barber* Protocol amounts to a declaratory statement of the Court's previous case law.[29] The logical question is whether this implies that an entire alteration of the judicial assessment would be less readily accepted by the Court, perhaps in circumstances where there is less ambiguity about the meaning attributed to the Treaty article in the case law. In other words, it is possible to envisage circumstances of a more *direct conflict* between the Member States and the Court, which the Court would have to grapple with.

Nevertheless, there is a plethora of other – geographically limited – 'derogating' Protocols which have not been challenged as to their validity. A first example is Protocol no 32 on the Acquisition of Property in Denmark.[30] The Protocol reads that 'notwithstanding the provisions of this Treaty, Denmark may maintain the existing legislation on acquisition of second homes.' In this respect, Danish legislation prohibits the acquisition of a second home in Denmark by nationals of other Member States. The Protocol thus provides a permanent derogation from the Treaty provisions governing the principle of non-discrimination on grounds of nationality and freedom to provide services, as well as the free movement of capital.[31]A second example is Protocol no 35 on Article 40.3.3 of the constitution of Ireland.[32] This Protocol seeks to carve out a special position regarding the Irish constitutional provision guaranteeing the right to life of the unborn.[33] This was introduced as a direct response by Ireland to the Court's *Grogan* judgment on access to abortion services.[34]

There are also numerous opt-out Protocols from Treaty provisions that are specific to the UK, and some interesting discussions about their legal status. For example, in relation to the Protocol on the UK's position on the CFR,[35] the response of the Advocate General in *NS* seems to confirm the prevailing view in the academic literature: that is, the Protocol clarifies the scope of application of the Charter but it

[29] In the opinion of A.G. Van Gerven, the Barber Protocol does not breach the acquis in so far as it contains only a "declaratory interpretation" of Art. 119 EC and of the relevant case law (Case C-109/91, *Ten Oever*, EU:C:1993:158, para 23). This view is shared by A.G. Jacobs in his Opinion in Case C-7/93, *Beune*, EU:C:1994:173, para 60.
[30] Protocol no.32 on the acquisition of property in Denmark, OJ C 202, 7.6.2016.
[31] '…access to ownership and use of immovable property is guaranteed by Article 59 Treaty:' Case 305/87, *Commission v Greece*, EU:C:1989:218. Such access must be appropriate to enable the freedom to provide and receive services to be exercised effectively and may not be subject to discriminatory restrictions.
[32] Protocol no 35 on Article 40.3.3 of the constitution of Ireland.
[33] The Eighth Amendment of the Constitution of Ireland introduced a constitutional ban on abortion by recognising a right to life of an unborn child.
[34] Case C-159/90, *Grogan*, EU:C:1991:378
[35] Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, OJ C 115, 9.5.2008.

does not provide the UK with a genuine opt-out from its provisions.[36] This is perhaps revealing about the judicial approach when there is ambiguity about the Member States' overall view of the matter. Without a clear derogation, the Court may be inclined to interpret any uncertainty to the benefit of the prevailing understanding of Union primary law in the case law.

The fact that the Court has not found any of these Protocols to be unlawful – even though they clearly derogate from Union primary law - has been the subject of criticism. In particular, it has been argued that although Protocols are generally limited in their effects (insofar as they apply to specific Member States), the premise that they allow for limitations to Union primary law has the potential to undermine the cohesiveness and the primacy of Union law. They represent the possible beginning of a trend towards the acceptance of permanent derogations from the *acquis*.[37] Nevertheless, even if one agrees or disagrees with this approach, the evidence suggests that the Court takes into account the modified understanding of Union primary law by the authors of the Treaty, at least when the Member States convey that understanding clearly. These examples therefore work to negate the possible existence of 'positive' obligations to adopt a certain type of primary law.

2.1.2) The codification of case law into the Treaty by the Member States

The second set of examples touch upon how far the codification of established case law into the Treaties may act as a definite statement for the future development of Union primary law. In other words, the issue concerns how the Court's attitude might change after the introduction of textual provisions which seek to codify its case law. For example, in *Les Verts* the Court took into account the context surrounding the European Parliament's enhanced role in the legal framework at the time to ensure that measures adopted by the European Parliament may be the subject of an action for annulment, even though the Treaty did not include such measures explicitly.[38] The Court reached its conclusion by identifying guidance from the general scheme of the Treaty, in the absence of any specific signals to the contrary contained in the text. The

[36] Joined Cases C-411 & 493/10, *N.S.*, EU:C:2011:865, paras 165-177.
[37] Curtin, 'The Constitutional Structure of the Union: a Europe of Bits and Pieces' (1993) 30 CMLRev 17.
[38] E.g., cited supra n. Advocate General Mancini explained that the Treaty being silent on the point, a limitation in this respect may not be presumed.

finding of the Court was subsequently codified by the Member States.[39] However, this example does not address the question of whether an express provision that the Member States do not want to accept a particular judicial interpretation, and wish to restrict the jurisdiction of the Court, would be compatible with Union primary law.

On one view, it is possible that the Member States may retain the prerogative to alter the trajectory set by the Court in its case law. This follows from a reading of Article 48 TEU, given the centrality of the role afforded to the Member States therein. This would mean that, the Court has less, if any, room to reshape the primary law landscape through its own assessment of the relevant legal materials. Another view, however, is that it may be possible that the new (codified) primary law framework remains flexible and therefore amenable to judicial creativity in relation the existing sources of primary law.[40] As a result of this understanding, there may be certain 'limits' to altering the understanding of primary law in an area in a way that the Court had not envisaged. This sheds light on the nature of the interactions between the Court and the Member States as primary law-makers.

The first concrete example is the development of the doctrine of implied external competence in the case law and its subsequent codification in the Treaty pursuant to the revisions agreed at Lisbon. The legal framework on external competence now flows from Article 3(2) TFEU and Article 216(1) TFEU, which seem to have been intended to provide the main frame of reference for dealing with such matters in positive primary law.[41] These provisions codify the original *ERTA* test, where the Court held that in absence of an express external legal basis, Member States may no longer act externally if their external action would 'affect internal EU measures or alter their scope.'[42] Beyond the original test the Court has interpreted the doctrine of implied powers in a fairly broad manner. For example, in Opinion 2/91 the Court explained that internal and external measures do not have to coincide fully, but instead it may suffice that there is an area covered to a large extent by EU measures.[43] Moreover, in Opinion 1/03 the Court explained that regard should be had not only to

[39] See now Article 263 TFEU and more generally, Jacobs, 'Constitutional Control of European Elections: The Scope of Judicial Review' (2005) 28 Fordham International Law Journal 1049.
[40] Klamert, 'New conferral or old confusion? – The perils of making implied competences explicit and the example of the competence for environmental policy' CLEER Working Paper, Centre for the Law of EU External Relations, (2011)
[41] See, the Draft Constitution negotiations which specified that the intention was to consolidate the jurisprudence of the Court and to make it more explicit. Final Report of Working Group VII on External Action, CONV 459/02, 16 December 2002.
[42] Case 22/70, *Commission v Council* (*ERTA)*, EU:C:1971:32.
[43] Opinion 2/91, EU:C:1993:106

internal EU measures that were already effectively adopted but also to 'foreseeable future developments.'[44] There is no reference in the Treaty to these broader interpretations of the *ERTA* test, and there is no express exclusion of elements of the previous case law in the Treaty articles.

This gives rise to the question of whether the Treaty is to be accepted as a complete regulatory code, even despite the fact that it may imply a different understanding of implied competence. If so, it is logical to assume that codification need not reflect in precise detail the regime that was applicable before the adoption of written provisions.[45] To some, this demonstrates that Lisbon reinforces the Member States' 'mastery' of the Treaties, such that they can 'codify,' 'contain' and 'reverse' case law.[46] The contrary view is that the express provisions should be interpreted in light of prior case law. In this way, the Court may be able to continue to apply its previous standards in the case law which elaborated upon the *ERTA* test. In Opinion 1/13, the Court seems to have rejected any attempt there may have been on the part of the Member States to reverse its prior case law.[47] It therefore helps to illustrate the key questions surrounding the Member States' attempts to codify case law into primary law, and the Court's reluctance to allow codification to prevent it continuing its previous practice, and continuing to develop new practices, as regards the circumstances when the EU enjoys exclusive competence in external relations. The Court maintained that the *ERTA* test mentioned in Article 3(2) must be interpreted in light of its case law (which aimed to apply and not to alter the test), in particular the 'scope of EU rules may be affected or altered by international commitments where such commitments are concerned with an area which is already covered to large extent by such rules.'[48]

[44] Opinion 1/03, EU:C:2006:81
[45] Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (OUP, 2010), at pg.167: 'The translation of highly complex case law into the form of a Treaty article is always difficult. The almost inevitable tendency is to shed certain of the nuances from that jurisprudence in order to be able to put something down on paper in manageable form.'
[46] See, the Council's arguments in Opinion 1/13, EU:C:2014:2303. It effectively took the view that Lisbon served the purpose not only of codifying the case law in relation to implied powers, but also to choose what aspects should be upheld. A similar argument was also raised by the Council, whereby it argued that the Lisbon signatories clearly intended to refuse to enshrine the test of an area largely covered by EU rules. Moreover, some Member States intervened and pointed out that any other interpretation would result in an unlawful extension of the scope of article.3(2) and would be contrary to the principle of conferral. See Case C-641/15, *Verwertungsgesellschaft Rundfunk GmbH*, EU:C:2017:131 at [60]. Govaere, '"Setting the international scene": EU external competence and procedures post-Lisbon revisited in the light of ECJ Opinion 1/13' (2015) 52 CMLRev 1277
[47] Opinion 1/13, EU:C:2014:2303
[48] Judgment, at para 73.

This example perhaps represents an attempt to restrict the scope of application of an unwritten primary law doctrine through codification. Thus, it is interesting to consider whether the attitude of the Court alters in any way when the Member States attempt to expand (rather than restrict) the Court's previous appraisal in the case law.[49] An analogy could be drawn with the reforms to the Common Commercial Policy (CCP) introduced by the Lisbon Treaty. Many commentators were of the view that the inclusion of Commercial Aspects of Intellectual Property (CAIP) in Article 207 TFEU was not a codification of the Court's previous case law, but gave expression to the desire to bring the field of CCP in line with the field of operation of the WTO.[50] Thus, the Court would have jurisdiction over any agreement within the scope of the CAIP, falling within the EU's exclusive competence. In practice, *Daiichi* provides evidence of a broad interpretation of the scope of the CCP confirming that the Treaty amendments agreed at Lisbon brought the Trade-Related Aspects of Intellectual Property Rights (TRIPs) agreement in its entirety within the scope of the CCP, thus overturning the previous case law on TRIPs.[51] The Court was explicit that in view of the significant development of primary law, the question of distribution of competences of the EU and its Member States must be examined on the basis of the Treaty in force.

The second concrete example is the codification of fundamental rights in the Charter. This example raises two distinct issues. The first is whether the scope of application of the Charter is more restrictive than the general principles of Union law. This area had been beset with ambiguity as the threshold set by the general provision in Article 51(1) CFR explains that the Charter binds the Member States 'only when they are implementing Union law.'[52] The question thus arose as to whether the previous set of circumstances falling under the scrutiny of the Court as regards compliance with

[49] See also the environmental crimes case law Case C-176/03, *Commission v Council*, EU:C:2005:542, Case C-440/05, *Commission v Council*, EU:C:2007:625 and the subsequent introduction of competence into the Treaties (which to some extent extended the ambit, but in other ways restricted it.)

[50] Ankersmit, 'The Scope of the CCP After Lisbon: *Daiichi Sankyo* and *Conditional Access Services*' (2014) 41 LIEI 193

[51] See, Opinion 1/94, EU:C:1994:384 where the Court held only part of TRIPs fell within scope of CCP (relating to free circulation of counterfeit goods.) All other provisions did not fall within the scope as they did not specifically relate to internal trade, but would amount to harmonisation of intellectual property rights within EU (for which Article 207 TFEU was not the proper legal basis.)

[52] See e.g.: Safjan, 'Areas of Application of the Charter of Fundamental Rights of the European Union: Fields of Conflict?, *EUI working paper Law* 2012/22. Various approaches had been discussed in the literature; Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: A Fountain of Law or Just an Inkblot?' 4 *Jean Monnet working paper* (2001) at p. 4; Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question', (2002) 39 CMLRev 945. See also: Opinion of AG Bot in Case C-108/10, *Scattolon,* EU:C:2011:211, paras. 116-120, where the AG considered that the scope of application of Art. 51(1) CFR should be identical with that of the general principles of EU law as established by the case-law; Opinion of AG Cruz Villalón in Case 617/10, *Fransson*, EU:C:2012:340, para. 57; Opinion of AG Trstenjak in Case C-245/ 11, *K*, EU:C:2012:389, para. 63.

fundamental rights would be retained, given this narrower formulation. It was not entirely clear whether the intention of the Member States was to narrow the scope of application of the Charter or whether this issue was just a matter of general imprecision. Nevertheless, the scope of application of the Charter has been defined in *Fransson,* where the Court interpreted the word 'implementation' in the light of the explanations of the Charter according to which 'the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States *when they act in the scope of Union law.*'[53]

The second key issue is whether the Charter serves to reduce the scope of protection of certain rights as compared to the manner in which they were protected as general principles of Union law. This is a concern that arises, for example, with the right to good administration, pursuant to Article 41 CFR.[54] There are therefore outstanding questions about the relationship between fundamental rights as they are defined in the Charter and those which were originally protected as general principles of Union law. If a right is formulated in the Charter with a narrower scope of protection than the Court has granted under the general principles of Union law, a question subsequently arises about the consequences of the reduced scope of protection.

On the one hand, a *narrower* formulation of a right may be understood as an expression of the intention of the Treaty authors to limit that right; as an explicit limit in written primary law to the protection which would have been enjoyed under the general principles of Union law. In this sense, the Charter may constitute an 'exclusive' catalogue of rights and a 'complete' system of fundamental rights protection, which would preclude any further recourse to the general principles of Union law. Such a view receives support through a 'hierarchical' understanding: if the Charter did not take precedence over the general principles of Union law, the legal system would run the risk of lacking transparency, since positive law would be replaced by unwritten law and give rise to a parallel structure of fundamental rights protection.[55] Ultimately, this risks undermining the intention of the authors.[56] On the other hand, the formulation of rights in the Charter could be interpreted as only a

[53] Case C-617/10 *Fransson,* paras. 19-21
[54] Hofmann and Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case' (2013) 9 European Constitutional Law Review 73
[55] See, Dougan, 'The Treaty of Lisbon 2007: Winning Minds Not Hearts' (2008) 45 CMLRev 617
[56] Calliess, *Die neue Europäische Union nach dem Vertrag von Lissabon, Mohr Siebeck* (Tübin- gen 2010) p. 322

partial clarification of rights and one which does not exclude the continuous application of unwritten general principles to questions which are not expressly excluded in the written primary law structure. This understanding is also supported by the express recognition in Article 6 TEU of 'plural' fundamental rights sources, thus suggesting that the general principles retain their value, and some form of interaction amongst the sources is envisaged by the Treaty authors. In this way, the general principles may enjoy a role to fill gaps in the scope of protection of the rights laid down in the Charter.

In practice, the Court has not been able to work out the correct approach to this issue. For example, in some cases, the Court employs a restrictive approach to the interpretation of the right to 'good administration' due to the (limited) institutional scope of Article 41 CFR. Good administration is protected as a general principle of Union law and is applicable to all Member States' action in the scope of EU law, but the institutional scope of Article 41 CFR is limited to 'institutions, bodies, offices and agencies of the Union' set up by Treaties or by secondary legislation. In *Cicala*, the Court explained that Article 41 is addressed 'not to the Member States but solely to the EU institutions and bodies.'[57] Thus, according to the wording of the Charter, Article 41 has a more limited scope of application, linked to the implementation of EU law by an EU body, institution, or agency. However, there is evidence of a broader interpretation of the scope of the right, so that the threshold established in the case law on the general principles before the entry into force of the Lisbon Treaty may apply to Member States when they are acting within the scope of EU law.[58] The Court held in *Laub* that a Member State, when implementing a Regulation, was bound in its interpretation and the applicable procedures by the principle of good administration. The principle precludes a *public administration* from penalising an economic operator acting in good faith for non-compliance with the procedural rules, when this non-compliance arises from the behaviour of the administration itself.[59]Advocate General Kokott in *Commission v Spain* referred to *Laub* stating that according to Article 41 CFR public authorities must fulfil their obligations in compliance with the principles of good administration, to which Member States must have regard to when applying

[57] Case C-482/10, *Cicala*, EU:C:2011:868 para. 28
[58] E.g., Case T-450/93, *Lisrestal* v *Commission*, EU:T:1994:290; Joined Cases T-186/97, *Kaufring* v *Commission*, EU:T:2001:133, paras. 150-153.
[59] Case C-428/05, *Laub* v *Hauptzollamt Hamburg-Jonas*, EU:C:2007:368, para. 25.

EU law.[60] Such uncertainty in the overall judicial approach cannot therefore provide a conclusive answer as to the approach the Court may adopt to a more 'restrictive' interpretation of Union primary law by the Member States.[61]

The third example concerns the Treaty provisions on the free movement of capital and the exceptions as regards taxation. The Member States made capital liberalisation an obligation in the Maastricht Treaty, but they also sought to exclude certain taxation measures from the liberalisation obligation. Article 65(1)(a) TFEU extended the range of exceptions and allows Member States to: apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence. The provision is ambiguous, making it difficult to ascertain its precise meaning and scope of application. Nevertheless, a likely explanation for the inclusion of the exception is that Member States feared full liberalisation of the capital rules would undermine their tax sovereignty.[62] Article 65(1)(a) therefore appears to be a message from the Member States that they wish to retain their control over tax sovereignty. In practice, however, the Court has not shown a high level of deference to the Member States. For example, in *Verkoijen* the Court dismissed the tax derogation within Article 65(1)(a) as nothing more than an expression of the pre-existing principle that Member States could treat objectively different situations differently.[63] The Court insisted that the provision was a consolidation of the established case law.

There are three other examples of the codification of existing case law into the Treaty which tell us something about the Court's reception of these stipulations in positive primary law. These examples do not follow the general pattern identified above: the continued flexibility of the Court's interpretation of the materials after the introduction of possibly more restrictive written stipulations. Rather, in these circumstances, the Court has refused to elaborate upon the choices of the Member States as they have been expressed in the Treaty. For example, the Member States have clarified the allocation of jurisdiction in CFSP matters, which has had the effect of expanding the

[60] Opinion of AG Kokott in Case C-392/08, *Commission* v. *Spain*, EU:C:2009:773 para.16. It is interesting to observe that in an earlier Opinion, the same AG stated that 'it follows from the very wording of Art. 41(1) of the Charter, just as from Art. 253 EC, that the obligation to give reasons mentioned there applies only to institutions of the Community. It therefore cannot simply be transposed without much ado to bodies of the member states, even when they are implementing Community law' in Case C-75/08, *Mellor* v. *Secretary of State for Communities and Local Government*, EU:C:2009:279, para. 25.
[61] See, recently, Case C-560/14, *M*, EU:C:2017:101 which indicates it does apply as a general principle of Union law.
[62] Peters, 'Capital Movements and Taxation in the EC' (1998) 7 EC Tax Review 5
[63] Case C-35/98, *Verkooijen*, EU:C:2000:294. It argued that the article added nothing new to existing case law under the other freedoms – citing Case C-279/03, *Schumacker*, EU:C:1995:31

Court's jurisdiction, but not in complete terms.[64] A further example relates to the categorisation of exclusive competences in the Treaty, and in particular the Court's recognition of the exhaustive nature of that categorisation.[65] In both instances, the Court accepts the 'completeness' of the Member States' stipulations in the Treaty and declines to elaborate on those provisions any further.

The third example is standing for non-privileged applicants for an action for annulment under Article 263 TFEU. The Member State's introduced their own (more restrictive) solution into the Treaty to the tensions recognised in the case law between the Treaty requirements on standing for non-privileged applicants and the principle of effective judicial protection.[66] Article 263(4) TFEU explains that any natural or legal person may institute proceedings against a regulatory act which is of direct concern to them and does not entail implementing measures. The Court has subsequently accepted the solution adopted by the Member States in the Treaty in *Inuit*, irrespective of any remaining problems that were recognised in terms of access to justice.[67] In the judgment, the Court discussed the relationship between Article 263(4) TFEU and the Charter, specifically in terms of whether the Treaty provision was capable of infringing the requirements of effective judicial protection in the Charter. On the whole, the conclusion was that the right does not *require the extension* of direct legal remedies available to natural and legal persons against EU acts of general application.[68] Therefore, the extension of the standing requirements as desired by the applicants could not be carried out by the Court by way of interpretation, but would require an amendment of the Treaty. This supports the conclusion that the Court allocates ultimate authority for altering the substantive terms of the Treaty to the Member States, and that it will 'accept' the choices of the Member States expressed in the process of amendment, even if the result is more restrictive than may perhaps have been expected.

[64] E.g. see Opinion 2/13 where AG Kokott explained that jurisdiction over CFSP matters is the exception and not the general rule, and thus cannot be expanded through the case law. View of AG Kokott, Opinion 2/13, re EU Accession to the ECHR, EU:C:2014:2475.
[65] E.g. in Case C-274/11, *Spain v Italy*, EU:C:2013:240 the Court confirmed that the category of 'exclusive' competences in the Treaty provides an 'exhaustive' list.
[66] See, e.g., Case C-623/02, *Jégo-Quéré*, EU:C:2004:210
[67] Case C-581/11 P, *Inuit Tapiriit Kanatami and Others*, EU:C:2013:625. Compare AG Wathelet in Case C-132/12, *Stichting Woonline*, EU:C:2013:335 who suggested that the reformulated primary law *must account for the concerns that had triggered the need for reform in the first instance*. In order to ensure that those concerns where accommodated, the AG considered that such a result could be achieved through interpretation.
[68] The Court noted that the Member States also inserted Article 19(2) TEU which obliged national courts to provide sufficient remedies to ensure effective judicial protection.

Overall, the Court does not appear to be sure of its prevailing approach. On the one hand, it could be argued that the Court sees that the ultimately responsibility for determining (and possibly for restricting) the substantive content of primary law lies with the Member States. In other words, there are no obligations to adopt a certain type of primary law. This is clear in the cases dealing with the rights of standing of non-privileged applicants, and at least to a certain extent with the right to good administration in the Charter. However, on the other hand, the Court appears to be prepared to nuance the written primary law trajectory, in light of its prior understanding of Union primary law. This is clear in the case law on implied external competence, the scope of the Charter and also the free movement of capital. In these cases, the general pattern is that the Court treats Member States' attempts at codification as a *mere clarification* of existing case law. Under no circumstances, however, has the Court found the stipulations in positive primary law 'unlawful.' It at most embarks upon a (generous) interpretation of the provisions in light of existing primary norms. This provides evidence of interactions between the Court and the Member States and a negotiation about the trajectory of primary law. Such interactions provide the Court with a significant amount of discretion subtly to shape the development of Union primary law in ways perhaps not intended by the Member States.

2.1.3) Summary of 'positive' limits: lessons for accession to the ECHR

On the basis of the evidence, the Court has not asserted a mandate to make binding choices about the required level of protection of Union primary law, which the Member States in their capacity as primary law-makers must follow. This is illustrated by the different stages of the institutional interactions that followed *UPA*.[69] The Member States codified their 'solution' in Article 263(4) TFEU as a response to the problems that the Court highlighted in *UPA* as regards the provision of effective judicial protection for individuals. The Court then accepted the solution of the Member States in *Inuit*, although there were alternative solutions that could have been adopted, which may have safeguarded effective judicial protection to a greater degree.[70] Nevertheless, there seems to be an important qualification, or at least a difference of approach, that should be highlighted at this stage. Indeed, there are important

[69] Case C-50/00 P, *Unión de Pequeños Agricultores*, EU:C:2002:462.
[70] Case C-581/11 P, *Inuit Tapiriit Kanatami and Others*, EU:C:2013:625

differences between *UPA* and *Inuit* and the judicial response to the codification of implied external competence. In *Inuit*, the Court did not require the solution offered in *UPA* to be preserved in the face of the revised regime adopted by the Member States. This is a clear example that an alternative way of accommodating the problem is accepted by the Court, and the Court's envisaged solution is not a prior requirement of Treaty amendment. However, in Opinion 1/13 the aim of the Court seems to lie in preserving its existing case law on implied external competence.[71] This is the case despite the fact that the Lisbon Treaty may have been intended to offer an exhaustive statement of Union competences. The main difference is the degree of ambiguity in the meaning and intended scope of Union primary norms. For example, a threshold may operate in this context: between the Member State's express intention to introduce a certain type of primary law, and a situation which is characterised by ambiguity as regards the political will over the contents of primary law.

At present, there are two possible lessons that may be taken from these examples. On the one hand, the response of the Member States to *UPA* and the Court's acceptance of the possibly more restrictive response in *Inuit* is an example of the fact that written primary law cannot be entirely altered by the application of unwritten norms. Yet, Opinion 1/13 also offers the suggestion that unwritten norms cannot be entirely altered by the introduction of written norms (at least unless that intention is expressed clearly by the Member States). Thus, it is not entirely free from doubt that the Member States do in fact retain the ultimate prerogative for amendment: the Court may be inclined to resolve any ambiguity by reference to its understanding of Union primary law. And although this may be an example of *subtle* limits, they are still quite constraining in the sense that they may make it more difficult for the Member States to respond - even if that is at most in practical or political, rather than strictly legal, terms.

Against the background, it is possible to discuss a hypothetical example relating to the Accession of the Union to the ECHR. The focus here is the possible response of the Member States to Opinion 2/13 as the Union's primary law-makers. In particular, it may be useful to consider how the Court might respond if the Member States expressed their desire in primary law to accede to the ECHR irrespective of the constitutional obstacles recognised by the Court. The Court found fault with the Draft

[71] Opinion 1/13, EU:C:2014:2303

Accession Agreement due to the fact that, *inter alia*, an international Court (ECtHR) would acquire jurisdiction to review EU acts adopted in CFSP matters.[72] This was particularly problematic for the Court given its own jurisdiction as regards CFSP matters is restricted under primary law.[73] The Court seems to have implied that there is a 'binary' solution to the issue, if the EU still wishes to accede to the ECHR: the Member States should either 'exclude' the ECtHR from acquiring jurisdiction, or alternatively they should confer jurisdiction over CFSP matters to the CJEU.[74] The first solution is not feasible, due to the fact that reservations of a general nature are not permitted under the ECHR.[75] It is also unlikely that the second solution would materialise given the sensitivity of the area for the Member States.[76] However, it is possible to offer a third 'solution.' The Member States could stipulate in primary law that, irrespective of the CJEU's lack of jurisdiction, they would be willing to allow the ECtHR to acquire jurisdiction over CFSP matters. That eventuality raises the issue of whether the Court set out a positive obligation for the Member States to preserve the autonomy of the legal order in the creation of primary law by following its 'binary' options. This therefore touches upon sensitive questions about who is ultimately responsible for determining *how* the EU is able to accede to the ECHR and the exercise of the obligation to accede under Article 6(2) TEU: the Court or the Member States. This closely resembles the line of reasoning explored above in relation to the attempts of the Treaty authors to codify the Court's case law, but perhaps rather differently to how the Court conceived of the relevant legal interpretations.

On the one hand, the Member States may be bound when amending the Treaty to take into account any concerns raised by the Court. Thus, the fundamental principles that were recognised as 'specific characteristics of Union law' such as primacy, mutual trust and the autonomy of the Union legal order would not be susceptible to circumvention at all. As a result, values enshrined in primary law may constrain the attempts of the Member States to facilitate accession to the ECHR. In this way, the Court may have a role in 'amending' primary law, and consequently sharing the

[72] Opinion 2/13, on Draft ECHR Accession Agreement, EU:C:2014:2454
[73] Pursuant to Article 24(1) TEU, the Court generally lacks jurisdiction over CFSP matters. The exhaustive exceptions are monitoring compliance with Article 40 TEU (stating that the implementation of CFSP measures shall not affect the application of other Union policies) and Article 275 TFEU (governing the Court's judicial review of restrictive measures against natural or legal persons).
[74] For example, see 'Editorial comments: The EU's Accession to the ECHR – a "NO" from the ECJ!' (2015) 52 CMLRev 1 which offer the suggestion that the Opinion could potentially be viewed of as a strategic move in that direction.
[75] Article 57(1) ECHR does not permit reservations 'of a general character.'
[76] Gosalbo Bono, 'Some Reflections of the CFSP Legal Order' (2006) 43 CMLRev 337

prerogative of the Member States which is expressly recognised in Article 48 TEU. Another view may incline a 'softer' interpretation. What could be required under such circumstances is an express intention to alter the judicial assessment for the purposes of ensuring accession. The Member States would still have *the capacity to* amend primary law in substance, but the exercise of their power and their *practical capability* may have been *conditioned*.[77] In this way, the Member States retain their prerogative to have the 'final say' on the amendment of primary law: the matter will be handed back to the Member States, in accordance with the logic underpinning Article 48 TEU.

If it is desirable to continue with the attempts to accede to the ECHR, despite the Court's negative Opinion, it has been argued that the Member States could negotiate a 'Notwithstanding Protocol' to remove the concerns enshrined in Article 6(2) TEU and Protocol No.8 that (supposedly) informed the negative Opinion.[78] A Protocol of this kind would constitute an amendment to the express will of the primary law-makers for the EU to accede to the ECHR notwithstanding the Court's Opinion. In terms of simplicity, this obviates any need to deal with a number of possible solutions to the problems outlined by the Court, as it would only 'derogate' from Union primary law insofar as is necessary to secure accession to the ECHR. Thus, for the purposes of accession, the obligation to accede would acquire central importance in Union primary law over and above any of the 'specific characteristics of Union law' which at least in Opinion 2/13, and on a possible reading of the Treaty and Protocol no 8, conditioned the realisation of that obligation.

Two important questions arise on this basis. The first concerns the legal effects of Protocols in the EU legal order.[79] In theory, it is unclear whether Protocols themselves can amend and/or derogate from primary law, since they are supposed to be of equal value to the Treaty, or whether their role is confined to clarifying their scope.[80] For the most part, the available evidence in this chapter suggests that the Court will accept the Member States' intentions insofar as they are clearly expressed in the Protocol.[81]

[77] See, Gordon, *Parliamentary Sovereignty in the UK Constitution* (Hart, 2015)
[78] Proposal of a "Notwithstanding Protocol" Besselink, "Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13" www.verfassungsblog.de/en/acceding-echr-notwithstanding-court-justice-opinion-213/ #VKrsffmQCOw.
[79] See, Besselink's explanations, ibid: 'an instrument that could set aside all the obstacles identified in the Opinion in a single, legally watertight instrument that solves all issues, notwithstanding the provisions of the Treaties as interpreted by the Court.'
[80] See the discussion of the 'Barber' Protocol pgs.195-196. Also in Case C-280/93, *Germany v Council*, EU:C:1994:367 the Court explained that the 'Banana' Protocol - annexed to the Implementing Convention on the Association of the Overseas Countries and Territories with the Communities, adopted under art.136 EC – 'cannot have the effect of derogating from a basic provision of the Treaty' (at para 117).
[81] See further, above section 2.2.1.

Still, even if this suggestion is workable in terms of the available legal instrument, the question is whether its substance may be incorporated by way of a Protocol, or whether there are any 'harder' substantive limits which operate to prevent that.

From one perspective, it is possible to envisage that there may be substantive constraints that operate on the Member States' desire to continue in their attempts to secure accession to the ECHR. In the Opinion, the Court is quite assertive when it comes to the autonomy of Union law, and the protection of the Union's primary law architecture. Indeed, it is in the realm of external relations where the initial proponents of 'substantive' limits to the amendment of Union law gathered their evidence. For example, the existence of an 'untouchable' hard core has been used to rationalise the Court's First EEA Opinion.[82] Here, the Commission asked the Court to assess whether any incompatibilities found to exist between the judicial mechanisms provided for in the EEA Agreement and the Treaties might be resolved by way of amendment to the Treaty, specifically to Article 238, permitting the establishment of the envisaged court system. The Court's response was that even Treaty amendment would 'not cure the incompatibility,' as the proposed system of courts (functionally integrating the CJEC and the CFI into EEA courts for EEA purposes) conflicted 'with the very foundations of the Community.'[83] In other words, the autonomy and integrity of the Community legal system constitutes a fundamental value, which even Treaty amendment should not violate. To some, the Opinion can be interpreted as meaning that fundamental elements of the legal order, such as the judicial system, are incapable of amendment, especially where there is an interference with the autonomy of the legal order.[84]

On the other hand, if the Member States had to adhere to the full terms of the Opinion and negotiate any future arrangements in light of it, it would render the wording of Article 218(11) TFEU – which in the case of a negative opinion foresees a possible amendment of the Treaty - largely otiose. It would also effectively invest the Court with primary law-making authority, which is at variance with the Treaties and Article 48 TEU. Indeed, most constitutional systems allow for the possibility to overcome judicial decisions if the proper procedure is followed, and the EU is not considered as

[82] Opinion 1/91, EU:C:1991:490
[83] Judgment, at paras 46 and 71.
[84] Gialdino, 'Some reflections on the acquis communautaire' (1995) 32 CMLRev 1089.

an exception to this trend.[85] An even stronger counter-argument relates to the cases subsequent to Opinion 1/91 where the Member States have introduced modifications to the judicial system, and in particular restrictions to the jurisdiction of the Court for example on CFSP matters.[86] Taken together, this suggests that the judicial system is not beyond amendment through primary law, but only that it must be protected in the negotiation of international agreements, which have the status of Union secondary law. Indeed, the Court itself in Opinion 2/13 recognised that it may be possible in theory for the EU and the Court to come under the control of an external body, including the ECtHR. This therefore provides a good example of the 'power of suggestion' enjoyed by the Court, particularly in the presence of ambiguity in Union primary law about how to reconcile the obligation to accede to the ECHR with the limiting conditions on that obligation that also have a basis in primary law. But, it is likely that the Member States could in theory remove that ambiguity so as to state their intention to accede notwithstanding any obstacles through, for example, the adoption of a Protocol (or other form of primary law.) There is (as of yet) no particularly convincing evidence to suggest that the Court would prevent them from doing so.

2.2) Negative limits: are amendments to Union primary law impermissible?

The second key inquiry relates to the negative limits to the revision of Union primary law, which correspond with the way that Union primary law with an 'elevated' status within the legal order is afforded protection from 'abrogation' by the Member States in the exercise of their primary law-making powers. Indeed, the extent to which the Court is willing to preserve a primary norm in the face of a challenge, and possible circumvention, is an important determinant of the position of that norm within the legal order.

From one perspective, it is arguable that there could be 'implicit' limits to amendment. So whilst no limits are written into the Treaty, there may nevertheless be certain primary norms that are considered so *fundamental* that they could operate as unwritten limits to amendment that the Member States are unable to depart from in the exercise

[85] This also applies to Member State's constitutions that contain an eternity clause, Besselink, *National Constitutional Avenues for Further EU Integration* (2014) Report for the European Parliament's Committees on Legal Affairs and on Constitutional Affairs.
[86] See further pg.204 of this thesis, and also n.64 of this chapter.

of their primary law-making powers.[87] This potentially includes the measures creating the internal market, and the principle of conferral, both of which have been recognised as 'fundamentals' of the legal order by the Court.[88] Such considerations speak directly to the question of whether Turkish nationals may have restricted rights upon Turkey's (possible) accession to the EU, insofar as they suggest restrictions to the usual scope of the free movement provisions, and the attempts by the Member States to 'reverse' previous primary law understandings.[89] However, although it may be easy to speculate about the possible existence of 'implied' negative limits, the reality of the matter suggests that the Member States are on the whole not constrained *in legal terms* by 'fundamental' principles in the exercise of their primary law-making powers. It is important to emphasise that this does not mean that the Member States are free from political and practical limits. Two concrete examples best illustrate this point.

2.2.1) The exclusion of direct effect in the Treaty

The first example stems from the ex-Third Pillar arrangements, and in particular the exclusion of direct effect for Framework Decisions in the Treaty (Article 34 EU). The Court effectively accepted this exclusionary position introduced by the Member States in *Pupino.*[90] This demonstrates the ability of the Member States to oust unwritten principles of primary law as they have been developed by the Court, even though they constitute principles which underpin the foundations of the Union and its relationship with national legal orders. Another example is the exclusion in trade agreements of the Court's case law and specifically the preclusion of direct effect. Traditionally, provisions of international agreements to which the EU is a party can be invoked in national courts in accordance with the doctrine of direct effect. However, in the case of some trade agreements concluded by the EU, including the Association Agreements with Ukraine, Georgia and Moldova, the Council decisions on signing these agreements contain provisions precluding their direct effect. [91]

[87] Two opinions are understood to have paved the way for the recognition by the Court of the existence of implied substantive limits to Treaty amendment: Opinion 1/91, EU:C:1991:490 and Opinion 2/94, EU:C:1996:140.
[88] Nuno Piçarra, 'Are there substantive limits to the amendment of the Treaties' in, José Luís da Cruz Vilaça, *EU Law and Integration: Twenty Years of Judicial Application of EU law* (Hart, 2014).
[89] For reflections on this view, see Ott, 'Constitutional Boundaries to Differentiation: How to Reconcile Differentiation with Integration?' in Ott and Voss, *Fifty Years of European Integration: Foundations and Perspectives* (TMC Asser Press, 2009)
[90] Case C-105/03, *Pupino*, EU:C:2005:386.
[91] See, e.g., Article 3 of Decision (EU) 2017/1248 of 11 July 2017 on the conclusion, on behalf of the EU, of the Association Agreement between the EU and the EEA and their Member States, of the one part, and Ukraine, of the other part, as regards provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other party OJ L 181, 12.7.2017.

There are two other examples that, while not specific to the doctrine of direct effect, still inform the discussion. The first concerns the limitations of the jurisdiction of the Court in CFSP matters. Pursuant to Article 24(1) TEU, the Court generally lacks jurisdiction over CFSP matters. The *exhaustive* exceptions are monitoring compliance with Article 40 TEU (stating that the implementation of CFSP measures shall not affect the application of other Union policies) and Article 275 TFEU (governing the Court's judicial review of restrictive measures against natural or legal persons). In practice, the Court seems to respect the choice of the Member States to restrict its jurisdiction, although it is also clear that the result may be unsatisfactory from the perspective of the EU's commitment to fundamental rights protection under primary law.[92] A second example relates to the introduction of Article 65(4) TFEU on the free movement of capital, which allows the Council, or the Commission, to approve what would otherwise be a restriction to the free movement of capital as regards third country movement. In a sense, the Article provides instructions to the Court as regards the location of the 'control' over domestic taxation systems.[93] The Member States introduced the mechanism to bypass judicial scrutiny of their tax laws: it is traditionally for the Court to decide whether national measures are compatible with the Treaty. Nevertheless, the provision may have had an influence on the way in which the Court approaches tax cases, since it has taken a more deferential approach towards the restrictive tax practices in the third country context.[94] This provides another example of the Court responding to clear messages sent by the Member States, and adapting its approach accordingly.

Against this background, the question arises as to whether these examples reflect a common theme of 'permissible' exclusions and restrictions to the application of Union primary law in particularly sensitive areas: ex-Third Pillar arrangements, CFSP matters, and the free movement of capital. For example, was the exclusion of direct effect 'permitted' by the Court given the intergovernmental nature of the Third Pillar arrangements at the time? Thus, would such a limit be met with any reservations post-Lisbon, especially in the context of a single Union framework? Or may the Court adopt a similar approach, so as to respect the Member States' choices, irrespective of the

[92] See, further, View of AG Kokott, Opinion 2/13, re EU Accession to the ECHR, EU:C:2014:2475
[93] Snell, 'Free movement of Capital: Evolution as a non-linear process' in Craig and de Burca, *The Evolution of EU Law* (2011, OUP)
[94] Case C-101/05, *Skatteverket*, EU:C:2007:804

area of Union law? Although there is very little evidence either way, it seems that the Court for the most part strives to respect the Member States' choices under primary law. There is no concrete evidence that the Court will consider any attempted revisions of Union primary law that may circumvent other provisions – whatever their nature - 'unlawful.'

2.2.2) Accession Treaties and possible amendments to Union primary law

The exploration of the effects of Accession Treaties on the substance of primary law is useful for ascertaining the legality of the proposed limits to the access to Union citizenship rights for Turkish nationals. In general, temporary derogations and/or transitional periods to the application of EU rules are common features of the negotiations preceding membership of the Union. Therefore, such temporary derogations traditionally constitute an integral part of accession Treaties.[95] The importance of the Turkish question is that the negotiations introduce a novelty of permanent safeguards and 'clauses which are permanently available' in the Negotiating Framework.[96] These safeguards have been envisaged in areas such as free movement of persons, structural policies and agriculture.

To this effect, it is crucial that in the case law the Court has explained, or at least implied, that the differences between Article 48 and Article 49 TEU must be respected by the Member States.[97] For example, in *Hauptzollamt Bielefeld v OHG König*[98] the Court considered that Accession Treaties can only adjust primary law, and anything going beyond 'adjustments' would need to follow the Article 48 TEU procedures. This may mean that, although not necessarily impossible, substantive stipulations of the kind envisaged for the (possible) accession of Turkey could not be introduced through an Accession Treaty.[99] Rather, they would have to be introduced through the Article 48 TEU procedures and thus gain the unanimous consent of all Member States, after the fulfilment of the 'consultation' requirements with the Union's political institutions.

[95] See, the 2003 Accession Treaty signed with the ten countries that acceded to the Union on 1 May 2004 contains various examples of such transitional arrangements, OJ [2003] L 236/33; further: Inglis, 'The Union's fifth accession treaty: New means to make enlargement possible' (2004) 41 CMLRev 937; Dougan, 'A Spectre is Haunting Europe … Free Movement of Persons and the Eastern Enlargement' in Hillion (ed.), *EU Enlargement – A Legal Approach* (Hart Publishing, 2004) p. 111; Hillion, 'The European Union is dead. Long live the European Union … A commentary on the Treaty of Accession 2003' (2004) 29 ELRev 583.
[96] Council of Ministers, *Accession Negotiation with Turkey: General EU Position*, 12823/1/05 REV 1, Brussels, 12 October 2005, at p.11
[97] Case C-77/05, *UK v Council*, EU:C:2007:803.
[98] Case 185/73, *Hauptzollamt Bielefeld*, EU:C:1974:61
[99] This is also a question of procedure, see chapter three above.

And, as of yet, there is almost no evidence that suggests the Member States could not exercise their primary law-making powers in such a way, if they so desired (at least in a purely legal sense.)

2.3) Summary

On the basis of the available evidence, there are no clear substantive limits arising from Union primary law to the revision of primary law, at least of the harder 'supra-constitutional' nature that are the subject of much discussion in the literature.[100] Indeed, it seems as though any amendment is plausible in theory, regardless of its contents and parameters. Thus, the debates about the existence of *hard* 'supra-constitutional' limits within Union primary law must ultimately be considered inconclusive, as the support from current authority for the theory is limited. The arguments tend to rely on the First EEA Opinion on the legality of the draft EEA Agreement in 1991 or *Kadi,* both of which are quite particular to the context of external relations.[101] As Walker points out:

> *'while the idea of a supraconstitutional norm may be appropriate in a context, such as with the EEA decision, where one legal order is in a clear position of superiority over the other and is seeking to validate the other in its own terms, it is difficult to see how supraconstitutionality has a coherent and authoritative role in the context of a dispute between legal orders neither of which will concede the superiority of the other. The difficulty lies in discovering an objective basis for a legal norm to prevail over the preferred/conflicting solutions of the actors internal to each legal order; this question is not avoided by the invocation of the language of supraconstitutionality.*'[102]

With this in mind, it is more fruitful to highlight the *subtle* means through which the Court alters the substance of primary law, in a way that constrains the Member States' in the exercise of their prerogative to amend Union primary law. In particular, the evidence suggests that the Court has a role in imposing its own view of Union primary law to modify how it is ultimately understood and applied. Although the Court is not

[100] The Court has not ruled out assessing the legality of Union primary law on the basis of the ECHR. See, for example, Case C-432/04, *Cresson*, EU:C:2006:455 and Case C-229/05 P, *PKK & KNK*, EU:C:2007:32 in relation to checking compliance with Union primary law with the ECHR. In *PKK*, at para 83, the Court explained that 'in the circumstances of the present case no conflict between the ECHR and the fourth paragraph of art.230 EC has been established.' See, also, *Cresson*, at para 111-114.
[101] Case C-402/05 P, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, EU:C:2008:461
[102] See, Walker, 'Sovereignty and Differentiated Integration in the European Union' (1998) 4 ELJ 355

always consistent in its approach, it does make use of its interpretive power to nuance the full effects of primary law written into the Treaties: consider, for instance, the provisions on implied external competence, the Charter and the free movement of capital provisions, all of which were discussed above. An example which illustrates the importance of, and continued interest in, this point quite well is the process of Accession to the ECHR, and the negotiations amongst and between the Court, the Member States and the Union's political institutions about how best to ensure accession in a way that respects the prevailing primary law framework. Whilst the Court's Opinion 2/13 on the legality of the DAA need not mean that the Member States are unable to respond through further Treaty amendment, the practicalities of embarking upon a prolonged process of amendment render such opportunities limited. Thus, in practice, the Court and its interpretation may become the sole authority for the understanding of Union primary law, such that - for the determination of the substantive parameters of primary law - the Court plays a role alongside (or even sometimes above) the Member States. The practical and political difficulties of formulating a response through Article 48 TEU may have the effect of elevating the Court to a similar, or perhaps a 'higher,' position than the Member States when it comes to the revision of primary law.[103] It is therefore important to explore the reasons why the Court may be prepared to limit the Member States' attempts to modify primary law, and to acknowledge more *subtle* limits to the formulation of primary law.

3) What factors inform the judicial approach to substantive amendments to Union primary law?

This section considers the patterns that emerge from the case law about how the Court approaches attempts of the Member States to amend primary law as to its substance in a manner that may undermine or curtail other Union primary norms. This is important for considering speculative amendments and for gauging whether they may be accommodated within the Union's primary law framework. It also helps to shed light on the nature and scope of the Court's prerogative in the context of amendment and how, if at all, it limits the Member States' powers under Article 48 TEU.

[103] See, Arnull, 'Judicial Dialogue in the European Union,' in Dickson and Eleftheriadis, *Philosophical Foundations of European Union Law* (OUP, 2012)

One of the most persuasive factors relates to the types of message that the Court will most likely to respond to and/or accept. It is possible to identify a pattern from many of the examples discussed, as to the degree of ambiguity in Union primary law as regards the intention to derogate from other primary law sources. On this basis, it is arguable that the Court's reception of any attempted derogations from, or qualifications to, the substance of other primary norms depends on the degree of clarity of the message contained in the Treaty (or other materials which enjoy the same legal effects.) In other words, the assumed intention on the part of the Member States may be not to alter or to derogate from existing Union primary law, unless the intention to do so is explicit.[104]

For example, in circumstances of a clear and express stipulation to the effect that the intention of the Treaty drafters was to derogate from the principle of direct effect - despite it being inherent in system of the Treaty – the Court was open to accepting such a qualification of the effects of the doctrine in *Pupino*.[105] But in circumstances where there is any ambiguity, and the political will on the issue of derogation is not entirely clear, then the Court seems inclined to nuance its effects, so as to ensure that it is interpreted restrictively. This is true of implied external competence in Opinion 1/13.[106] In circumstances of greater ambiguity there may be more leeway for the Court to protect what is deems important to the primary law architecture, since the textual uncertainty may connote that there are a number of possible interpretations of the derogation. Ultimately, it has the discretion to accept or reject an interpretation that complies with its conception of how primary law ought to be arranged. As a result, ambiguity is perhaps the relevant factor that enables the Court to operate 'flexibly' within the framework laid down by the Member States, since it surpasses any direct constitutional conflict.[107]

An example that provides a good illustration of the role of this factor in the judicial reception of amendments to Union primary law is the judgment in *Melloni.*[108] This

[104] This understanding shares similarities with parliamentary sovereignty, in the sense that in some cases the Court has explained that it would give effect to parliament's expression provided that was clear and precise, otherwise it would consider an implied intention not to derogate from fundamental constitutional norms. See, *R v Secretary of State for the Home Department ex p. Simms and another* [1999] 3 All ER 400.
[105] Case C-105/03, *Pupino*, EU:C:2005:386
[106] Opinion 1/13, EU:C:2014:2303, discussed pgs.199-200 of this thesis.
[107] This is not to say that the approach is not problematic, since it affords the Court a degree of discretion that may best be left to political actors.
[108] Case C-399/11, *Melloni*, EU:C:2013:107.

offers a strong counter-example to *Pupino.* In terms of the relevant background, some commentators had interpreted Article 53 CFR – which allows for the application of 'higher' fundamental rights standards in a Member State than those contained in the Charter - as an indirect exception to the principle of primacy.[109] Nevertheless, the Court found that higher fundamental rights cannot be applied where their application compromises the principles of primacy, effectiveness and unity of Union law.[110] This judicial approach may be attributable to the fact that the Charter is not explicit about its effects on the foundational principles of Union law. As a result, the Court interpreted the materials consistently with its existing case law.

A second example arises from the judicial treatment of the efforts of the Member States and the political institutions to facilitate the EU's accession to the ECHR. The pattern of developments displays quite clearly the interactions between different constitutional actors at play when it comes to the revision of primary law. First, the Court in Opinion 2/94 recognised limits to an unwritten requirement to accede to the ECHR on the basis of fundamental rights arguments, due to the constraining effects of the principle of conferral: the decision to accede is not for the Court to 'sanction' through the case law. There is now an express competence provision agreed to by the Member States in the Treaty to accede.[111] On this basis, it is for the Member States and the Union's political institutions to determine when and how to exercise the competence to accede. It is the contention of this piece that the Court is not competent to render the obligation to accede 'unlawful,' but it has through Opinion 2/13, in practice, elevated other primary values to a higher position in the framework so as to determine what the Union's political actors must respect in the accession process. It is arguable that the ambiguity in Union primary law regarding accession to the ECHR informed the response of the Court.

Indeed, the framework does not address the issue of how to reconcile any tensions between existing Union primary law and the intentions of the Member States expressed in the Treaty. The conditional nature of the obligation to accede under Article 6(2) TEU is emphasised by Protocol no.8 and Declaration on Article 6(2) TEU

[109] Although in academic circles it is generally accepted that that was not the intention of Article 53 CFR. See, further, Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: A Fountain of Law or Just an Inkblot?' (2001) 4 *Jean Monnet Working Paper*
[110] Judgment, at para 60.
[111] Article 6(2) TEU.

which specify that any agreement concerning the Union's accession must reflect the need to preserve the 'specific characteristics' of the EU and Union law and that accession shall not affect Union competences as they are defined in the Treaties. Did the authors introduce a 'hard' obligation to accede so that it would be capable of modifying the 'specific characteristics' of Union law as they have been traditionally understood? Or was the obligation intended to have a 'softer' nature, with the signals contained in the Protocol operating as refinements to what otherwise could be viewed as a *duty* to accede? With this ambiguity, it is possible that the Court followed a presumption that fundamental principles underpinning the legal order were to be preserved by the Union's political actors in the process of making arrangements for accession.[112]

A final example that illustrates this point is the codification of the doctrine of implied external powers, and the question of the possible reversal of the Court's previous case law in the Treaties. Opinion 1/13 seems to demonstrate that if it were really the intention of the Member States, as the authors of the Treaty, to reverse the previous case law, it is possible that the only option would be to ensure that this was unequivocally written into the Treaties: 'an area largely covered by EU law does not entail exclusive competence.'[113] As discussed, at present, the Treaty is unclear about whether elements of the *ERTA* test – as elaborated in the case law – are excluded from the now codified doctrine of implied competence. The Court's response therefore serves to demonstrate the interactions between the Member States and the Court in the revision of primary law, and the more *subtle* limits that operate on the Treaties' reservation of amendment powers to the Member States.

It is important to be cautious about jumping to too broad a conclusion about the judicial motivations behind its adherence to the intentions expressed in Union primary law and its response to the (clear or ambiguous) signals of the Member States. Other factors may inform the Court in its adoption of a more deferential approach in a particular area. For example, it may not always be the case that the Court is necessarily responding to the Member States' written signals, but, for example, the political and

[112] This is not to overlook the arguments to the effect that the Court's Opinion was 'selfish.' See Horsley, '"The Court Hereby Rules..." - Legal Developments in EU Fundamental Rights Protection' (2015) 53 JCMS 108

[113] See, similarly, Govaere, '"Setting the international scene": EU external competence and procedures post-Lisbon revisited in the light of ECJ Opinion 1/13' (2015) 52 CMLRev 1277.

economic climate may in practice influence its approach.[114] But, on the whole, the level of ambiguity in the relevant framework is a plausible explanatory factor.

4) What are the implications of how the Court organises Union primary law regarding substantive limits to amendment?

4.1) The relations between the Court and the Member States

Substantive limits under Union primary law to the exercise of the amendment powers under Article 48 TEU would mean that Member States no longer hold the ultimate prerogative for revising primary law. Much of the existing literature on limits focuses on the apparently 'hard' effects that substantive limits are considered to enjoy and place emphasis on the possible role of the Court in enforcing such limits against the Member States. However, the purpose of the chapter has been to demonstrate that there is limited evidence to suggest that the Member States are unable to amend primary law as to its contents due to the limits stemming from existing Union primary norms. Thus - if no direct or explicit limits to possible amendments can be found - for the most part the Member States seem to enjoy the ultimate prerogative for formulating primary law.

Nevertheless, the focus on *hard* limits overlooks the Court's more *subtle* avenues of influence over the process of amendment, whereby Member States are not necessarily 'injuncted' from adopting certain primary law. In these circumstances, it becomes clear that Court reserves for itself a role in the creative development of primary law and introduces nuancing effects on the Member States' primary law trajectory in light of existing primary norms. These latter norms may be afforded an almost 'semi-entrenched' status in the Union legal order, which may become difficult (though not impossible) for the Member States to change. In practice, therefore, the Member States may not enjoy the ultimate prerogative for amendment as such, as the meaning of certain amendments may be substantially altered through judicial interpretation. This need not constitute a *hard* limit in the sense that Member States cannot respond to the judicial stipulations. Indeed on the basis of the available evidence, this seems quite

[114] E.g. see the relationship between the judiciary and the legislature in the context of the free movement of capital in Murphy, 'Changing treaty and changing economic context: the dynamic relationship of the legislature and the judiciary in the pursuit of capital liberalisation' in Syrpis, *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press, 2012).

unlikely to be the case, as clear derogations of the kind explored in *Pupino* and the 'derogating' Protocols have not been challenged by the Court.[115]

In the context of the interactions between the Court and the Member States, the outstanding question is whether the Member States have the final say in revising primary law. To use the example of Accession to the ECHR, there is a back and forth process between the Court, the Member States and the Union's political institutions. The Treaty obligation to accede and the limiting conditions attached to any arrangements for accession were operationalised in the Draft Accession Agreement, which the Court ultimately found incompatible with primary law. The next stage of the interaction has been handed back to the Member States: can they ignore the Opinion and introduce a more explicit obligation to accede or are they bound to follow the Court's concerns? It should be acknowledged that whilst, in principle, it seems possible that the Member States have the legal *capacity* under Article 48 TEU to change the trajectory of primary law explicitly, this may not always align with practice and, in particular, the difficulties associated with engaging in a formal revision process. Thus, the interactions between constitutional actors in this context may work to create an environment where legal change through Union primary law becomes difficult. This is due to the power of non-legal factors in the amendment process, which significantly affects the Member States' practical *capability* to make particular amendments. The Court's understanding of Accession to the ECHR may then become 'ossified' or 'entrenched' in the Union legal framework.

Overall, whilst it is fairly clear that there are (at present) no *hard* substantive limits to amendment that are enforceable against the Member States (either in a positive or a negative sense,) it is not the case that the Member States have *carte blanche* to amend primary law in any way they see fit. The Court has a role in altering the parameters of the formal Union primary law scheme. This is especially true in circumstances where the intentions of the Treaty authors remain ambiguous, and the consequences of their actions are not directly confronted. The significance of its role is reinforced by the

[115] There is a clear distinction between directly confronting the Court through the amendment of primary law and legislating in the shadow of the judicial interpretation. For the most part, the latter approach seems to prevail. See, e.g. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP, 2000) .

rigidity of the amendment procedures and the need, in particular, to reach a positive political consensus across the Member States for a successful amendment.[116]

4.2) Are substantive limits to primary law-making constitutionally desirable?

The fact that there is almost no evidence of *hard* limits stemming from Union primary law to amendment is the correct approach, in constitutional terms, to the question of how the amendment power is capable of being exercised. On the whole, substantive limits of a *hard* nature arising from Union law would not adhere to the logic of Article 48 TEU, which indicates that the ultimate authority for amendment of primary law lies with the Member States. After all, it would be the Court that develops, asserts and enforces limits *against* the Member States, on the basis of its own view of Union primary law, even when the Member States have expressed their intention to achieve a certain result in a clear manner. This is problematic if it takes place in the absence of negotiations between the Member States in line with the Treaty, and in the absence of a written text similar to that of say the German Constitution which explicates that certain norms are of a higher value, and thus immune from revision.[117]

After all, constitutional change (at least in substance) is primarily considered to be a matter for politically accountable institutions. The Court's role is generally as a consequence confined to ensuring that the law as it is set out is observed. It would be contentious for the Court effectively to tell the Member States how to exercise their primary law-making powers under Article 48 TEU. And despite the challenging examples of possible amendments explored in the literature including the abrogation of the fundamental rights of individuals, the legal status of the Member States' primary law powers is not contingent on how desirable the (hypothetical) exercise of such powers may be. Indeed, such accounts tend to overlook the fact that practical and political limits are important factors which commonly underpin the exercise of law-making powers in many domestic constitutional contexts; they perhaps make more acceptable the existence of legally unlimited substantive law-making powers.[118]

[116] This raises broader questions about how enlargement shapes the terms of the debate on the dynamics of Treaty amendment. For example, should every Member State still enjoy a veto over amendments, when the diversity of the Member States' views is pronounced in a Union of 27/28 Member States, as opposed to a Union of 6 Member States?

[117] Article 79(3) of the German Basic Law prohibits amendments to the constitution affecting the division of the Federation into Lander, human dignity, the constitutional order, or the basic institutional principles establishing Germany as a democratic and social federal state

[118] In the UK context, see Gordon, *Parliamentary Sovereignty in the UK Constitution* (2015) pg.107. In the EU context, this translates into a question of whether the Member States would refrain from adopting certain primary law provisions owing to the political pressure surrounding a particular issue, as opposed to whether they would actually be prevented, in legal terms, from adopting such provisions.

Rather than seeking to question their legality, the recognition of such limits provides us with a framework for understanding their implications. The most significant implications for present purposes concern what this framework may tell us about the central position of the Court in the primary law architecture. A common theme seems to emerge which indicates that Article 48 TEU operates almost as a 'shield' to the Court for its approach to 'interpreting' primary law.[119] For example, in order for a judicial appraisal to be changed it is necessary to launch a formal revision process where the Member States must reach unanimous agreement, and the ratification requirements in each Member State must be satisfied.

Even with more *subtle* limits the extent of the Court's power is potentially problematic. As it is usually difficult to respond to judicial interpretations of Union primary law, the result is that the Member States' powers are indirectly constrained by the Court. Indeed, provisions either expressly or impliedly introduced by the Member States (in written primary law, or the 'systemic' principles that are inherent in the Treaty[120] or the general principles which have been influenced by the Member State's systems)[121] could effectively be used against them to constrain their powers of revision. For example, questions about limiting the rights of Turkish nationals upon accession depend upon the enforcement of the fundamental freedoms contained in the Treaty against the Member States in negotiating the accession of a new Member State. In terms of the institutional implications, this provides the Court with substantial power for the development and the management of primary law, contrary to the purported logic enshrined in Article 48 TEU, amongst other things.

By way of example, in Opinion 2/13 given that the 'specific' characteristics of Union law largely appear to be those identified by the Court, the 'constraining effects' in relation to the Member States' efforts to facilitate the EU's accession to the ECHR, if any, stem from unwritten primary law. The Treaty did not feature often in the judicial summary of the EU's constitutional framework, a framework which seems to have exerted quite a substantial influence over the conditions necessary for accession. The

[119] See, Weiler, *The Constitution of Europe*, (CUP, 1999).
[120] AG Tesauro in Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur*, EU:C:1996:79 (at paras 24-34) underlined that the creation of the principle of state liability sought to uphold, rather than undermine and/or infringe, the vertical and horizontal division of powers: it was the infringement of EC law itself which creates the imbalance between the division of powers subscribed to by Member States. 'Consequently, to hold that liability exists for failure to fulfil obligations would not involve any activity supplementing – let alone supplanting – the legislator.'
[121] See, regarding fundamental rights, Case 29/69, *Stauder v City of Ulm*, EU:C:1969:57 and Case 11/70, *Internationale Handelsgesellschaft*, EU:C:1970:114

principles which the Court has developed on the basis of their being 'inherent in the system of the Treaty'[122] in their basic form could be said to be initially 'created' by the Member States. However, the nature of these 'unwritten' values still leaves discretion to the Court to determine their scope and limits – potentially beyond that which was or could have been contemplated, and outwith further amendments to the Treaty.[123] This latter category includes supremacy, autonomy and mutual trust, which operated to render the Draft Agreement incompatible with primary law. How far can, and should, those principles be used against the Member States so as to constrain their ability to respond? On the basis of the available evidence, it seems that a 'softer' approach of judicial 'suggestions' applies based on the Court's own understanding of Union primary law, which the Member States are in formal legal terms free to disagree with. But, the Member States may still be constrained in practical and political terms, such that formal amendments are rare. The result is that the Court's assessment of the matter is left as the governing understanding.

4.3) Is there a 'hierarchy of primary norms?'

Whilst there is no evidence of 'higher' Union primary law that constrains the rules of revision *per se*, there is some evidence that the Court will ensure the rules and principles that it deems important to the Union legal order are protected as far as is possible. Consider, for example, the doctrine of implied external competence or the autonomy of the Union legal order. But, this is not to say that certain norms are beyond amendment in practice. There is evidence to suggest that the Member States retain legally unlimited power, but it is perhaps the procedure for revision itself that erects obstacles of a practical nature to the full realisation of their powers, specifically in response to the Court's interpretation of Union primary law.[124] As a result, it is possible that some norms receive a sort of 'semi-entrenched' status within the Union legal order, unless and until the Member States exercise their primary law-making powers so as to override or to derogate from those norms. But it is clear that the opportunities successfully to amend the Treaties are limited by political and practical forces. Thus, it tends to be the judicial interpretation of Union primary law that is

[122] E.g. Case 26/62, *Van Gend en Loos*, and Cases C-6/90 and C-9/90, *Francovich*.
[123] See, e.g. Becker, 'Application of Community Law by Member States' Public Authorities: Between Autonomy and Effectiveness' (2007) 44 CMLRev 1035
[124] See, Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP, 2010), pg.303 who argues that with conditions which are procedural in form but substantive in effect the difficulty in responding could diminish the primary law-making power.

placed at the apex of the Union's 'hierarchy of norms.' The Court can thus decide which norms to prioritise in which circumstances, including judgments about the weight to be afforded to Article 48 TEU.

4.4) What does this say about the nature of the Union legal order?

On the basis of the available evidence, the nature of the amendment power under Article 48 TEU does not seem at all clear. On the one hand, it appears to enjoy a largely inter-governmental nature, as the Member States can ultimately alter the substance of primary law as they wish, as a matter of law. But on the other hand, it is not strictly an exclusive power of the Member States in practice. A set of other constitutional actors have a stake in the informal development of primary law, including the Court and the Union's political institutions. This works to render the role and power of the Member States as the 'masters of the Treaties' almost illusory in practical terms.

5) Conclusion

Chapters three and four focused on the possible limits that stem from *the Union's primary legal sources* to the Treaties' reservation of amendment powers to the Member States. The analysis was split across two distinct inquiries: procedural limits in chapter three and substantive limits in chapter four. The main question permeating these chapters is whether Article 48 TEU constitutes the 'highest hierarchical provision' in Union primary law which must be complied with in the amendment process. In one sense, this means that the Member States are able to formulate primary law in any manner that they wish, provided that they comply with its procedural requirements. In other words, the constraints on the formulation of primary law would be the contents of Article 48, with the result that no substantive limits to Union primary law exist. The opposing view is that the Member States may essentially enjoy *carte blanche* under Union law – both procedurally and substantively – when it comes to the formulation of primary law. Both positions share in common the fact that they afford a central role to the Member States in the process of revision in line with Article 48 TEU.

As regards procedure, chapter three explored *how* the Court values Article 48 TEU and its procedural conditions in relation to other Union primary law. From the

examples considered, the Court seems to allow informal changes to Union primary law orchestrated by the Member States and/or the Union's political institutions, which do not follow the prescribed procedures. This includes changes to the EMU in relation to crisis management and informal practices which govern how the formal Treaty provisions operate, such as the 'trilogue' system. So whilst the Court formally, in cases like *Defrenne*, values Article 48 TEU and places it on a high footing in the Union hierarchy, in practice, it allows for informal manoeuvring on the basis of other Union primary law provisions (and their (re)-interpretation.) On one possible reading this suggests that norms of a 'lower' value are susceptible to alteration by informal means. But since the Court does not demonstrate a particularly clear approach here, another view is that the Court (or other constitutional actors) make(s) a political choice about the value of Article 48 TEU in certain cases depending on the circumstances.

As regards substance, chapter four revealed *how* the Court values Article 48 TEU as the 'highest' provision to make substantive changes to Union primary law. Indeed, the Court has not explicitly set any *legal limits from the Union's primary sources* to what can be achieved through the use of Article 48 TEU. Thus, it formally respects the capacity of the Member States recognised in the Treaties for amendment. The Court has not yet questioned the legality of substantive amendments to primary law: it has only ever done so in a less explicit manner, such as through the interpretation of primary law in light of existing understandings. It is the scope of the Court's interpretive power which means the Court has a strong influence on the development and effects of Union primary law.

As a result, in terms of *how* the Court arranges Union primary law in the context of amendment, the Court formally attempts to respect the power of the Member States recognised in the Treaties. But there is certainly a more fluid approach, whereby the Court is not always minded to respect the Member States' powers in practice, but does not explicitly place certain values/principles above the Member States' powers. This provides us with further evidence that in this more subtle hierarchical ordering, the Court's role is elevated to a very high position: although the Court does not recognise any explicit limits under Union primary law to the Member States' power, it has subtle influences that – combined with the difficulties of successfully amending the Treaties - constrain what can be achieved through Treaty revision.

When it comes to looking at *what* the implications of the relationship between the Union's primary legal sources are for the Union legal order, the most interesting implication is the power the Court enjoys in the context of amendment. Thus, chapters three and four reveal that as regards the relations between the Member States and the EU, the Member States are the 'formal' masters of the Treaties, but with two significant qualifications. First, alternative procedural routes to amendment permit space for other constitutional actors to change Union primary law, including the Union's political institutions and the Court. This shared prerogative flourishes due to the absence of any strong mechanisms for enforcing the procedural conditions of Article 48 TEU and through the flexibility the Court enjoys within the Union's primary law framework.

Second, the existence of informal (although not legal) limits condition the *capability* of the Member States when it comes to the exercise of their powers in practice. The Court generally upholds its self-imposed benchmark from *UPA* in terms of the 'substance' of primary law, in the sense that genuine amendments that have an effect on the substance of primary law are to be left to the Member States. Yet, this is tempered to an extent, in so far as the Court has a role in some circumstances to enforce its own understanding of Union primary law against the Member States through the process of 'interpretation.' Such understandings may ultimately become 'entrenched' within the framework, due to the difficulties of formulating a political response at the level of primary law.

Overall, the chapter reinforces the three key lessons of the thesis. First, although the text of the Treaty suggests that the Member States retain control over Treaty revision; in practice the Court subtly nuances the extent of the Member States' powers. Thus, there is no consistent evidence that Article 48 TEU is viewed as the 'highest hierarchical provision.' The Court therefore pays lip service to role of Article 48 TEU and the judicial management of the Union primary law framework affords it considerable discretion and flexibility in practice. Indeed, the Court chooses when it will enforce Article 48 TEU strictly and when it will delineate a clear boundary between interpretation and amendment. Second, as the expansion of the scope of Union primary law encompasses more value-laden norms it is fair to say the Union has become more akin to a 'constitutional' order with attendant inquiries about the

possible 'supra-constitutional' effects or 'unamendabiltiy' of certain provisions.[125] The expansion of Union primary law also affords the Court more control over its development from which it is possibly *subtly* to condition the Treaties' reservation of amendment powers to the Member States. Finally, it is clear that the Court, at times, has a strong influence – if not equal or even higher to Member States – on the amendment of Union primary law. This tells us interesting things about the self-imposed constitution-making power of the Court, in addition to its legislative-type power explored in chapter one. Again, this is problematic due to the Treaties' reservation of amendment powers to the Member States under Article 48 TEU.

[125] See for an extensive inquiry into the constitutional nature of the EU in this context, Tezcan, *Legal Constraints on EU Member States as primary law makers* (Meijers Research Institute, 2015)

Concluding Chapter

This thesis argued that there are pertinent and unexplored questions about the 'hierarchy of norms' within the Union's primary sources of law. Indeed, such questions are often elided in the literature, which either focuses almost exclusively on the relationship between Union primary law and Union secondary law, or explores specific interactions between the sources of Union primary law without taking an overall constitutional perspective over such issues. As a result, the thesis sought to provide an overarching constitutional perspective of the relationship between primary sources of Union law. The analysis offers a possible way to reconceptualise and reframe the prevailing debates in the literature about the relationship between different sources of Union law.

In order to assess whether a 'hierarchy of norms' is present within Union primary law, the thesis explored whether there are any principles or 'meta-norms' that function to guide the relationship between the Union's primary legal sources. The reason for so doing is related to similar hierarchical structures in domestic legal systems set out in the foundational constitutional documents (i.e. in Germany) or elaborated through judicial practice (i.e. in Italy.)[1] The thesis reviewed the practice of the Union's constitutional actors across three distinctive contexts and revealed that there is limited indication that the relations between the sources of Union primary law are subject to compliance with any external or internal benchmarks. Instead, the present legal framework addresses the challenges that interacting primary norms pose through the adoption of *ad hoc* judicial responses. On the whole, the management of the 'hierarchy of norms' in Union primary law is a matter of judicial politics. Thus, the Court often enjoys a dominant role in managing the relations between the Union's primary legal sources to the detriment of the roles of other constitutional actors explicitly recognised in the Treaties.

The two framing questions of the thesis served as a useful benchmark to explore *how* the Union's primary legal sources relate to one another, and *what* the constitutional implications of such relationships are in practice. In terms of the *how* question, across

[1] E.g., Article 79(3) of the German Basic Law prohibits amendments to the constitution affecting the division of the Federation into Lander, human dignity, the constitutional order, or the basic institutional principles establishing Germany as a democratic and social federal state. Moreover, see Italian Constitutional Court, in its judgment 15-29 Dec. 1988 No. 1146 (Gazzetta Ufficiale No. 2 of 11 Jan. 1989, I Serie Spec., Corte Costituzionale, 11) stated that the fundamental principles of the system 'may not be subverted or modified in their essential content, not even by laws amending the Constitution or any other constitutional law.'

all three chapters there is limited evidence of any consistent hierarchies between the sources of Union primary law. In terms of the *what* question, in the absence of any identifiable orderings the Court has space to operate flexibly within the framework – and to a lesser extent the so do Member States and the Union's political institutions - in a way which significantly affects the balance of powers across the Union. Indeed, it means that there is limited space for *political* choices to be made by the Union's *political actors*: instead, many decisions about the operationalisation, enforcement and amendment of Union primary law are made by the Court. This is evident on both a vertical and horizontal level. As regards the horizontal relationship between the Union's institutions, chapter one exposed how the Court, at times, makes choices under the guise of the directly effective free movement provisions in the Treaty and substitutes them for legislative choices taken in the exercise of the regulatory competences set out in the Treaty. On a vertical level with the focus on the relationship between the Union and the Member States, the Court – rather than, or alongside, the Member States – sometimes makes clear choices about the enforcement of Union law (in chapter two) and the contents and construction of Union primary law (in chapters three and four.)

The thesis comprised of four chapters which each focused on a particular 'hierarchy of norms' issue within Union primary law. Chapter one focused on the *operationalization* of EU primary law. It revealed that as regards the relationship between the Union's directly effective obligations and the regulatory competence provisions, the directly effective provisions appear to be accorded great precedence by the Court. Indeed, the Court's elaboration (and recognition) of the directly effective provisions affords it a parallel policy-making platform to the one contained in the Treaties: the primary law framework of competence. Chapter two discussed the *enforcement* of EU primary law. The chapter examined two models which explain how the Court approaches the question of whether Union law may be enforced within the national legal order. Its recent tendency to 'centralise' the assessment of the interactions between the foundational obligations and the general principles of Union law provides the Court with a much greater role in determining questions about the enforcement of Union law, to the detriment of national procedural autonomy. Chapters three and four concerned the *formulation and amendment* of primary law by the Member States. The chapters did not reveal any formal 'hierarchy of norms' within

Union primary law such that certain sources of Union primary law cannot be amended by the Member States, due to their 'higher,' 'inviolable' status. Yet, the scope of the Member States' authority under Article 48 TEU is limited in practice in a procedural sense (chapter three) and in a substantive sense (chapter four). The exploration of these issues has helped in the identification of three key findings of the thesis.

The first finding is that across all *three key contexts* there is no evidence that there is a coherent idea about the 'hierarchy of Union primary norms.' There are certainly no 'meta-norms' in the Treaty or in the judicial practice that guide the relations between the primary sources of Union law. In fact, the majority of interactions are governed by *ad hoc* judicial interventions, to the extent that the Court makes its own judgments in the circumstances of each case on the priority to be accorded to Union primary norms and their relations. Such judgments are susceptible to change and there is no real consistency in the overall approach. Overall, whilst the thesis argues that the absence of a 'hierarchy of norms' within Union primary law is not inherently problematic of itself, in practice it appears to leave a significant amount of discretion to the Court: it is able to create and control a framework within which it develops and enforces its own understanding of Union primary law and the relationship between the different sources. This is all facilitated by the idea of a 'balancing' exercise between norms of a formally 'equal' status – which is inherently discretionary in practice. But, whilst the thesis reveals that the organising device of the 'hierarchy of norms' *per se* is not evident in the Union's primary legal framework, and the approach to organising Union primary norms is *ad hoc*, it has proven a useful device to explore some of the important interactions between the Union's primary sources of law. In turn, it has shed light on some important constitutional debates in the Union.

The second finding is that issues in relation to the 'hierarchy of norms' have become more prevalent, and potentially more problematic, due to the expansive scope and reach of what constitutes Union primary law. The sources of Union primary law have expanded both in quantitative and in qualitative terms: they are not merely greater in number; they also contain more substantive value choices and 'constitutional' precepts.[2] Most importantly, the key issues discussed in the thesis have a direct correlation to the amount of Union primary law created and elaborated upon by the

[2] See, particularly Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21 ELJ 460

Court. The Court is by no means the only constitutional actor that is responsible for expanding Union primary law. As the thesis demonstrates, both the Member States and the Union's political institutions have also played a role. But the Member States have not constructed any clear, formal guidelines in the Treaties about the relations between the different (and numerous) sources of Union primary law. As a result, the absence of a clear hierarchical ordering bestows on the Court a degree of flexibility and essentially decision-making powers regarding the relations between the Union's primary legal sources.

The third and most important finding of the thesis is that some of the most interesting consequences arising from the thesis concern the central role of the Court vis-à-vis the Union's political actors in the management of the Union primary law framework. The first and second findings are closely associated with, and ultimately contribute to, this broader finding. Indeed, the absence of any clear 'hierarchy of norms' means that the determination of the relations between the primary legal sources is governed through *ad hoc* judicial manoeuvres. The sheer amount of Union primary law offers a great degree of flexibility to the Court to exert substantial decision-making control within the framework. It is through the very process of judicial interpretation that the volume of Union primary law has become more difficult to manage over time and the distinction between rules for political decision-making contained in the Treaties and political decisions *themselves* has become blurred in practice. This can be directly linked to the judicial 'constitutionalisation' process in the Union legal order.[3] It is apparent that the Court has the space to make its own judgments on the priority to be accorded to certain norms: a priority which is susceptible to change. For instance, the thesis revealed that the Court limits the discretion of the Union's political institutions in relation to the operationalisation of Union law (e.g. free movement), whilst at other times it is open to acknowledging the political convenience of certain actions (e.g. in the EMU). Similarly, the Court sometimes lets the Member States exercise their political authority freely as regards Union amendment (e.g. standing for non-privileged applicants); whilst at other times it nuances the primary law trajectory as set by the Treaties (e.g. Accession to the ECHR.) The lack of consistency in the

[3] See, further, Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403 and Mancini, 'The Making of a Constitution for Europe' (1989) 26 CMLRev 595.

Court's overall approach raises specific constitutional problems, particularly as it is not a written structure created and controlled by the Member States.

Overall, it is clear that the Court thus enjoys a significant amount of space to determine what Union law looks like and how it applies in practice. For the most part, the Court ensures that its interpretations of the Union's primary norms are afforded priority in the framework overall. Thus, the nature and contents of Union primary law and the interactions between the different sources are centralised in the hands of the Court. This gives rise to familiar questions about the legitimacy of the Court's role regarding Union primary law and in EU integration more broadly, especially since its centrality encroaches upon (and sometimes even replaces) the choices of the Union's political institutions and the Member States.[4] The thesis argues that the Court often acts contrary to clear signals in the Treaties about where power lies to make decisions about the enforcement, operationalisation and amendment of Union primary law.

1) Broader reflections, debates and questions

1.1) The Court's centrality as the cause or the consequence of tensions between Union primary norms

There are outstanding questions arising from the thesis about whether the third finding - the central role of the Court in the Union's primary law framework - is the *cause* or the *consequence* of the tensions between the Union's primary legal sources. The thesis explored the extent to which the interactions between the sources of Union law (and the attendant problems with reconciling any tensions) are *caused* by the Court's behaviour.

The first key finding of the thesis - the absence of any clear hierarchical orderings in Union primary law - is not *caused* by the Court. After all, the Treaties are not always explicit about how Union primary norms relate to one another. But the second key finding as to the expansion of the nature, scope and contents of Union primary law is to a significant extent a result of the Court's influence in the framework. Indeed, in the *three main contexts* of the thesis the key issues have a direct correlation with judicial developments.

[4] See, particularly, Horsley, *The Court of Justice of the European Union as an Institutional Actor* (CUP, 2018)

In chapter one, it is the development of the directly effective free movement provisions – their creation and elaboration seemingly contrary to the allocation of political competence in the Treaty to facilitate the creation of the internal market – that has cut into the space left to Union's political institutions in the Treaties to operationalise Union law. After all, the tensions between directly effective provisions and competence provisions were not (as) pertinent at a time when the Union's political institutions assumed a less active role in policy-making, and when the directly effective provisions as interpreted by the Court were less prescriptive in their nature. But, since the internal market has expanded through judicial and political means over time, the relationship between directly effective provisions and the Union's regulatory competences is integral to the discussion of the relationship between Union primary norms. Indeed, Union primary law as it has evolved does not just contain the structures through which political decisions ought to be made (the provisions on regulatory competences), but the Treaties contain substantive objectives, such as the goal of facilitating the creation of an internal market. Whilst, of itself, this is not a major problem, the interpretation of directly effective provisions has led to a situation where the Court's understanding of the content of such goals and objectives almost becomes 'entrenched' in the Union framework. Recall the Court's treatment of the derogation from equal treatment in relation to 'social assistance' for jobseekers contained in Article 24(2) Directive 2004/38.[5] In *Vatsouras* the Court postulated that jobseekers' allowance fell outside of the scope of the concept of 'social assistance,' such that Union workseekers may access this support.[6] To this extent, the Court claimed definitional authority over the concept of 'social assistance' in order subtly to alter how the Union's political institutions may have anticipated the derogation from the equal treatment principle to be understood and applied in practice. Thus, the judicial interpretation of Union law often results in policy choices being clothed under the guise and authority of Union primary law, which ought to be followed (and complied with) by the Union's political actors. This reduces the space for the Union's political actors to alter, shape or reformulate such decisions through the exercise of their *primary law* regulatory competences. Such a position is ultimately contrary to the Treaty framework of competence.

[5] Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. 2004, L 158/77.
[6] Case C-22/08,*Vatsouras*, EU:C:2009:344 and see also Case C-138/02, *Collins*, EU:C:2004:172.

In chapter two, the Court's elaboration of the full consequences of the unwritten foundational principles of Union law order raises problems when they interact with the Court-defined unwritten general principles of Union law. For example, primacy comes into contact, and potential conflict, with the Union's own objectives evidenced in the Treaty, such as environmental protection, or the unwritten sources such as the need to secure legal certainty. Thus, whilst the traditional elaboration of primacy by the Court suggests that it is an 'absolute' principle straightforwardly to be applied so as to set aside conflicting national law,[7] the expansion of the scope of what constitutes Union primary law affords no easy answers to a clash between two Union primary law principles pointing in different directions: to give effect to primacy over conflicting national law on the one hand, or to tolerate breaches of primacy to avoid a legal vacuum to the detriment of legal certainty or in relation to environmental protection, on the other hand. This is illustrated by *Association France*.[8] The referring court asked whether it could limit in time certain effects of the annulment of a domestic provision which contravened obligations provided for under EU law. On the one hand, the annulment of the national measure could give rise to a 'gap' in environmental protection at the national level, which would run contrary to EU objectives recognised in the Treaty and concretised in secondary legislation.[9] On the other hand, upholding the national measure would allow the breach of EU law to persist and afford national courts an opportunity to derogate, for a period of time, from their duty to disapply a national measure that is contrary to Union law. The Court's conclusion that a national court may exceptionally be authorised to make use of a national provision enabling it to maintain certain effects of an annulled national measure suggests the full effects of the principle of primacy may be moderated in certain situations. This is a result of competing – largely unwritten – demands: to secure legal certainty and to ensure EU law is effectively enforced within the national legal order. It is the Court that assumes the task of reconciling such demands in practice, in view of its definitional control over the unwritten sources of Union primary law.

[7] See, for example, Case 106/770, *Simmenthal*, ECLI:EU:C:1978:49 and Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr*, EU:C:1970:114.
[8] Case C-379/15, *Association France Nature Environnement* v *Premier ministre and Ministre de l'Écologie, du Développement durable et de l'Énergie*.
[9] See in both primary law, Article 3(3) TEU, and Article 191(1) and (2) TFEU, and secondary legislation including Directive 2001/42/EC.

And in chapter three, the interest in limits to amendment seems to stem from the Court's Opinion on the EEA agreement, and its development of fundamental and, to some, 'immutable' principles that are protected from the (potentially limiting) actions of all constitutional actors.[10] Indeed, there was no significant discussion about the existence of limits to amendment at a time when the Treaties were (almost solely) recognised as having an inter-governmental character, as a creation under international law.[11] This discussion is a direct consequence of the 'constitutionalised' nature of Union law, which for the most part has occurred on the initiative of the Court.[12] In the Union context the development (or recognition) of fundamental constitutional principles – aside from the aspirational constitutional values contained in Article 2 TEU - tends to fall to the Court; for example, in its statements in the EEA Opinion or in Opinion 2/13 on Accession to the ECHR.[13]

Taken together, these findings resonate with broader discussions in the literature. In particular, the literature identifies a commonality across constitutional frameworks regarding the 'over-constitutionalisation' of law which arises when there is a strong scheme of judicial interpretation, and where courts have the last word on the meaning and scope of constitutional provisions.[14] This is the case within the Union context, since the Court seems to have the final say on the interpretation of Union primary law, and on the constitutionality of Union secondary law.[15] Across all three chapters there is evidence that the Court has assumed a central role in the interpretation of Union primary law, in such a way that not only increases the opportunities for tensions between different sources of primary law, but also so as to ensure that its interpretations are afforded priority in the overall legal regime when it comes to decisions about the operationalisation, enforcement and amendment of Union primary law. This is the case even though one might expect judicial interpretations or

[10] See, e.g. Hillion, 'Negotiating Turkey's Membership of the European Union: Can the Member States do as they please?' (2007) 3 European Constitutional Law Review 269 and Tezcan, *Legal Constraints on EU Member States as primary law makers* (Meijers Research Institute, 2015).

[11] It is the international law origins and nature of the Union legal order that have influenced many commentators to suggest that there can be no procedural or substantive limits to the amendment of Union primary law. See, Hartley, 'The Constitutional Foundations of the EU' (2001) 117 LQR 236.

[12] See, e.g., Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 AJUL 1, Rosas, Levits and Bot (Eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (Springer, 2013).

[13] See, Opinion 1/91, EU:C:1991:490 and Opinion 2/13, on Draft ECHR Accession Agreement, EU:C:2014:2454.

[14] Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21 ELJ 460

[15] See, Article 267 TFEU and Article 263 TFEU.

developments to have a 'second-order' nature within the overall Union primary law framework.

1.2) Problems with the Court's centrality

Any reflections on whether the central role of the Court is the *cause* or the *consequence* of the 'hierarchy of norms' problems within Union primary law are obviously equivocal. Nevertheless, it is fair to say that, either way, the role of the Court raises clear constitutional problems, particularly in relation to the overall legitimacy of its elevated role in the Union primary legal framework. Indeed, the choices of the Court across the *three key contexts* have significant consequences for the balance of powers within the Union. On the one hand, it is inherently problematic for the Court to have control (be it direct or indirect) over decisions about the operationalisation, enforcement and amendment of Union law. In this sense then, the Court has ventured beyond its permissible role that is clearly articulated in the Treaties, and indeed the permissible role of any judicial actor within a constitutional framework. After all, there are examples of the Court reaching conclusions that are at times contrary to clear statements in the Treaty.[16] On the other hand, the inquiries conducted in the thesis could be used to suggest that the Court should have a greater role in defining the contents of Union primary law and for developing the framework so as to incorporate even stronger constitutional precepts.[17] At its most extreme this could include the identification and elaboration of 'supra-constitutional' values to be enforced *against* the Union's political actors in the very construction and amendment of Union primary law; the clearest exercise of public authority within the Union.

Overall, the thesis argues that there is something instinctively problematic about the role of the Court in the Union's primary law architecture vis-à-vis the Union's political actors. This is particularly the case in view of the resulting challenge to the Treaty framework which comes as a result. Indeed, the Court encroaches either explicitly or implicitly into areas left by the Treaties to other constitutional actors. Explicitly, the regulatory competence provisions in the Treaties exist so as to allocate decision-

[16] This is a key theme in much of the literature on the role of the Court within the Union. See, Horsley, *The Court of Justice of the European Union as an Institutional Actor* (CUP, 2018) and Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart, 2013).

[17] See, Passchier and Stremler, 'Unconstitutional Constitutional Amendments in EU Law: Considering the Existence of Substantive Constraints on Treaty Revision' (2016) 5 Cambridge Journal of International and Comparative Law 337.

making power for the operationalisation of Union law to the Union's political institutions; Article 19 TEU provides that the Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law; and Article 48 TEU makes it clear that the construction and amendment of Union primary law is a political task, which is primarily under the control of the Member States. Implicitly the Court has also acknowledged the political dynamics within the three contexts explored in the thesis: the Court in *Cassis de Dijon* suggested that 'in absence of common rules' at the Union level detailed arrangements for the *operationalisation* of the free movement of goods could not be orchestrated through the case law;[18] similarly, in *Rewe* the Court asserted that 'in the absence of' remedial and procedural rules at the Union level, the Member States are responsible for making arrangements to ensure the effective *enforcement* of Union law;[19] and, the Court in *UPA* recognised that any (desirable) *amendments* to Union primary law must originate from the Member States via Article 48 TEU, who retain control over the formulation of Union primary law.[20]

The thesis therefore complements the existing literature on the role of the Court as a political actor within the Union; that is, as an actor that makes significant political choices apparently contrary to the written signals contained in the Treaties.[21] The result of the issues explored in the thesis is that such judicial policy choices are afforded the status of Union primary law, and thus come to be understood as 'constitutionally-mandated' by the Treaties, such that they are difficult, if not impossible, to change through the political process.

1.3) The nature of the Union legal order

The findings of the thesis raise broader questions about the nature of the Union's legal (or constitutional) order. In particular, they feed into two existing debates in Union constitutional law. First, the thesis tells us something about the balance between the 'legal' and the 'political' in the Union constitutional framework; a balance which, at present, is tipped (heavily) in favour of the 'legal' dimension.[22] This resonates most

[18] Case C-120/78, *Rewe v Bundesmonopolverwaltung für Branntwein*, EU:C:1979:42
[19] Case 33/76, *Rewe,* EU:C:1976:188
[20] Case C-50/00 P, *Unión de Pequeños Agricultores*, EU:C:2002:462
[21] See, Scharpf, 'Perpetual Momentum: Directed and Unconstrained? (2012) 19 JEPP 127.
[22] That is only 'one half' of any proper constitutional discourse, Weiler, *The Constitution of Europe* (Cambridge University Press, 1999)

clearly with the central role played in EU integration by the Court, as well as the idealist ambition on the part of some European scholars of constructing a transnational rule of law.[23] The issues explored in this thesis are thus associated with a more general phenomenon: the dominance of legal liberalism, whose aim is to constrain politics by legal and constitutional means, such that the outcomes of political deliberation are less significant, if they are understood as significant at all.[24] Within the Union context, the attempts to formulate a clearer 'constitutional' framework, such as with the intended introduction of the Constitutional Treaty, have been unsuccessful. One of the most pertinent examples of (or indeed reasons for) this is the absence of a clear European 'demos' and a constituent political power.[25] The development and constitutionalisation of the Union legal order by the Court exacerbates the concerns about the lack of popular control over decisions reached at the Union level.[26] There is therefore a marked imbalance between the 'legal' and 'political' aspects of constitution-building.

To some, the absence of a clear Union 'constitution' based on authorisation from the 'peoples' and a framework of political constitution-making has been substituted by, or supplemented with, judicial constitutionalism.[27] In other words, the option that was pursued in absence of a European political union was a community that was engineered to appear apolitical or even anti-political.[28] Indeed, some commentators have drawn parallels with the US constitutional context and the process of conflating fundamental constitutional law with ordinary law – a process orchestrated by judicial branches. In the US context, through the process of judicial constitutionalisation 'provisions of the constitution became positivised, de-politicised, individualised and legalised.'[29] And, although it is important to remain aware of the important contextual differences, the exploration of the Union Treaties and primary law more broadly in the

'Europe has a constitution, but without constitutionalism.' See, more broadly, Wilkinson, 'Political Constitutionalism and the European Union' (2013) 76 MLR 191.

[23] See, Mancini and Keeling, 'Democracy and the European Court of Justice' (1994) 57 MLR 175, Hirschl, 'The New Constitutionalism' (2006) 75 Fordham Law Review 721, and Kumm, 'How Does European Union Law Fit into the World of Public Law' in Neyer and
Weiner (eds), *Political Theory of the European Union* (OUP, 2010), at pg.125.

[24] See, for an extensive overview, Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart, 2000)

[25] See, Walker, Post-Constituent Constitutionalism? the case of the European Union' in Loughlin and Walker, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form,* (OUP, 2008)

[26] Follesdal and Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 JCMS 533.

[27] See, e.g. Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 2000)

[28] Walker, 'The Anti-Political Polity' (2010) 73 MLR 141.

[29] Loughlin, cited supra n.24, pg.293

thesis follows a similar trajectory, most notably due to the judicial architecture of the Union and the legal doctrines developed by the Court. Indeed, the third finding of the thesis demonstrates how the Court's formative role in the 'transformation' of the Union legal order has *caused* problems for managing the relations between Union primary norms and allowed it to assume a central role vis-à-vis the Union's political actors.

To trace these ideas to the specific chapters of the thesis, it is clear that in chapter one the Court - through the development of directly effective free movement provisions - reduces the need for legislative intervention, and thus the role of the Union's political institutions under Union law. Further, in chapter two, outwith the traditional national procedural autonomy framework, the Court's centralised assessment of the interactions between the obligations underpinning the enforcement of Union law and the general principles of Union law sees it making choices about how Union law should be enforced within the national legal order. Again, this encroaches upon the space left to the Member States, or the Union's political institutions, to make the detailed arrangements for the enforcement of Union law at the national level. And, in chapter three, the Court assumes a 'power of suggestion' over how to amend Union primary law. The chapter revealed that due to the difficulties of formulating a positive political consensus across the Member States and in the Treaties, the Court's suggestions may ultimately be passively accepted by the Member States. To this effect, the Court's understanding of the contents of Union primary law may then become entrenched within the overall constitutional framework, as the Union's highest source of law.

Moreover, the findings of the thesis tell us something about the different (and to some extent idealised) conceptions of legal systems: between those conceptualised as under majoritarian democratic control on the one hand, and those falling under the auspices of a 'constitutional democracy' on the other hand.[30] The three key contexts explored in the thesis demonstrate regular incursions by the Court into areas of political authority (as set out in the Treaties) and provide evidence of an emerging desire - in the literature and in some of the Court's statements - to protect 'fundamental,'

[30] For general discussions to this effect, see, Waldron, *Law and Disagreement* (Oxford, Clarendon Press, 1999) and Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, 1996).

'constitutional' values from the actions of political actors.[31] This suggests that although in formal terms the Treaties allocate political decision-making powers to the Member States and the Union's political institutions, the nature and scope of the Court's control over and within the Union primary law framework implies a move towards a 'results-driven' approach: that is, reaching the 'correct' decision on the relationship between the sources of Union primary law for the Union, as determined by the Court.[32] Ultimately, the Court is able to assume a role that limits the outcomes that may be reached through the political process (whether implicitly or explicitly) as regards the *opertionalisation, enforcement and amendment* of Union primary law. This is true in the context of the operationalisation of Union law, whereby the Court seeks to protect its own conception of directly effective free movement provisions as against any attempts of the Union's political actors – in the exercise of their regulatory competences - to limit their content and scope as determined in the case law. Similarly, at times the Court has taken it upon itself to determine how Union law should be enforced within the national legal order, when the foundational obligations enter into potential conflict with other principles including legal certainty. This is a task which appears to be reserved to the Union's political institutions under the Treaty framework of competence and by default to the Member States in the absence of Union legislation. Finally, whilst the Court has not demarcated any explicit limits to the amendment of Union primary law as such, it has carved out for itself a path upon which is can nuance the sentiments expressed in the Treaty so as to ensure convergence with its understanding of generally abstractly-defined principles, such as the autonomy of the Union legal order. Thus, there is a clear pattern of legal and constitutional constraints operating on the exercise of political power within the Union.

Taken together, these issues raise future questions about the 'constitutionalisation' of the Union legal order and how the various constitutional actors can, or indeed should, grapple with central constitutional ideas such as the 'hierarchy of norms' in a transnational legal order. Indeed, a whole line of inquiry arises from the thesis in particular about the role of the Court in performing important constitutional tasks, such as constructing or managing a 'hierarchy of norms.'

[31] This is not to say that such 'political authority' is necessarily the epitome of democratic decision-making, however. See more broadly Gordon, *Parliamentary Sovereignty in the UK Constitution* (Hart, 2015).

[32] LIBERALISM ANDY/BEN?

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