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## THE RELATIONSHIP BETWEEN PRIMARY AND SECONDARY LAW IN THE EU

PHIL SYRPIS\*

### Abstract

*This article is concerned with the relationship between primary and secondary law in the EU, as it emerges from the case law of the Court of Justice. It examines the broad spectrum of ways in which the Court deals with secondary law, considering in particular the extent to which the Court allows the passage of secondary legislation to affect its reading of primary law. The case law of the Court is difficult to predict, and difficult to evaluate. The “proper” relationship between primary and secondary law depends on one’s assessment of the “legal” or “political” nature of the EU’s constitutional settlement, and on one’s views about the relationship between, and legitimacy of, the judiciary and the legislature at EU level.*

### 1. Introduction

This article aims to provoke the reader into thinking about the relationship between primary and secondary law in the EU, as it emerges from the case law of the European Court of Justice. The main aim is to illustrate the effect which the passage of secondary legislation (regulations, directives, etc.) may have on the case law of the Court interpreting primary law (both the Treaties and general principles of EU law).<sup>1</sup> Most lawyers would, at first blush, assume that there is a simple hierarchical relationship between primary and secondary law, that primary law does and should take priority over secondary law, and that the adoption of secondary legislation should not affect the way in which primary law is interpreted. Political scientists on the other hand, might expect the passage of legislation to have a greater impact on the case law of the Court. The somewhat confused reality which this article exposes, illuminates the tensions between the judiciary and the legislature in the EU, and between what may be termed the “legal” or “political” nature of the EU’s constitutional

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1. See also Davies, “Legislative control of the European Court of Justice”, 51 *CML Rev.* (2014), 1579.

settlement. The hope is that this article will provoke further academic research into the “proper” relationship between primary and secondary law; and that, in time, the approach of the judiciary to legislative interventions of various sorts may become more consistent and easier to predict.

One of the main insights of this contribution is that the presence of secondary legislation is, in certain cases at least, prone to influence the case law of the Court of Justice relating to the interpretation of particular provisions of the Treaties. However, in other cases, it seems that the passage of legislation has no, or next to no, impact on the case law of the Court. There are huge inconsistencies in the Court’s approach, and these have important constitutional ramifications. Depending on one’s perspective as to the “proper” relationship between the judiciary and the legislature, one will be likely to have different views as to the extent to which the passage of legislation should be able to influence the Court’s reading of the primary law.

The potential subject matter of this article is vast. The article begins with an explanation of the context in which EU secondary legislation is adopted. Next, it illustrates the nature of the relationship between primary and secondary law by using a number of relatively high profile examples with which most readers will be familiar, each showing the relationship in a rather different light. It concludes with some more theoretical reflections on the nature of the relationship between primary and secondary law, and the respective roles of the judiciary and the legislature in the EU legal order.

## **2. Secondary law in the EU**

The Treaties, most recently amended by the Member States in 2009 at Lisbon, create the framework within which the EU legislature operates. The Treaty of Lisbon is the latest in a long line of Treaty amendments. It made substantial changes to the common provisions of the Treaties. Of particular note is the new Article 6 TEU, which affirms the Union’s commitment to human rights. It states for the first time that the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union “shall have the same legal value as the Treaties”. It also makes provision for the EU to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR);<sup>2</sup> and states, in much the same way as in previous Treaties, that fundamental rights “shall constitute general principles of the

2. In Opinion 2/13 of 18 Dec. 2014, EU:C:2014:2475, the Court of Justice ruled that the Draft accession agreement was not compatible with the Treaties; see further Editorial Comments, “The EU’s accession to the ECHR – A ‘no’ from the ECJ!”, 52 *CML Rev.* (2015), 1.

Union's law". It also organizes the functioning of the Union and determines the areas of, delimitation of, and arrangements for, the exercise of competence.<sup>3</sup> It designates particular competences as "exclusive", "shared", and "supporting", and introduces, and describes the effect of, the principles of conferral, subsidiarity and proportionality,<sup>4</sup> and outlines a range of different legislative procedures, and, in broad terms, the permissible objectives of EU action under each legal base.

The complexity of the EU legislative process is well known. The Commission, Council, European Parliament, and potentially a number of other institutional actors, combine in a variety of ways, to produce EU secondary law.<sup>5</sup> It is, in general, impossible to adopt EU level legislation without the agreement of at least a qualified majority of the Member States. There are a number of theories which seek to explain the structure of the EU law-making process, and the resulting institutional balance.<sup>6</sup> There are – and this is emphasized here because of the impact it may be thought to have on the relationship between the legislature and the judiciary – concerns about the transparency and accountability of the legislative process, which manifest themselves more generally as concerns about a "democratic deficit" within the EU.<sup>7</sup>

Much of the academic analysis has focused on the different legislative procedures involved – particularly on whether the Council may adopt measures via qualified majority, or only via unanimity. Legislative procedures of course have a big impact on how easily secondary legislation may be adopted, and on the form of such legislation – it is, for example, likely that legislation will be more flexible, and afford the Member States a greater range of options, where its adoption depends on the agreement of each and every Member State.

But, for the purposes of this piece, it is the objectives of EU level action that are more important. In particular, secondary law may, as we shall see, relate to primary law in a variety of different ways. Typically, where the legislature acts, it aims to afford greater clarity and specificity to the text of the Treaties. Its interventions should be read in the light of pre-existing judicial

3. Art. 1 TFEU. Categories and areas of Union competence are outlined in Arts. 2–6 TFEU.

4. Art. 5 TEU.

5. See Arts. 288–299 TFEU.

6. See e.g. Craig, "Institutions, power, and institutional balance", in Craig and De Búrca (Eds.), *The Evolution of EU Law*, 2<sup>nd</sup> ed. (OUP, 2011).

7. See e.g. Craig, "Democracy and rule-making within the EC: An empirical and normative assessment", 3 *ELJ* (1997), 105; Lord, "Assessing democracy in a contested polity", 39 *JCMS* (2001), 641; and for an illustration of the operation of the process in practice, Acosta, "The good, the bad and the ugly in EU migration law: Is the European Parliament becoming bad and ugly? (The adoption of Directive 2008/15: The returns Directive)", 11 *European Journal of Migration and Law* (2009), 19.

elaborations of the meaning of the text of the Treaties, and in the context of an ongoing constitutional dialogue between the legislature and the judiciary. The legislature may be aiming to depart, in some way, from the pre-existing understanding relating to the meaning and/or scope of particular provisions; or it may merely be aiming to make the case law of the Court more visible and accessible.

It is also important to distinguish between interventions which take the form of total harmonization measures, which pre-empt contrary national action; and situations in which it is intended that primary and secondary law will coexist.<sup>8</sup> In the first situation, secondary legislation effectively displaces primary law, with the result being that the legality of national provisions will be dependent solely on their compliance with secondary law.<sup>9</sup> Primary law does, nevertheless, bind the legislative institutions: it is still possible, as we shall see in more detail below, for secondary law to be annulled for breaching primary law, to be interpreted with reference to primary law, and/or to be rendered inapplicable as a result of a conflict with primary law.<sup>10</sup> In the second situation, the legality of any national action falls to be assessed with reference to both secondary law and primary law. Such is the case where, for example, there is a regime of minimum harmonization in place; and national provisions must comply with both the “floor” set by secondary legislation and the “ceiling” set by the Treaties.<sup>11</sup> The difference between the two situations may be the result of the limits of EU legislative competence, a simple failure to reach agreement on a regime of total harmonization, a clear statement by the legislature that something other than total harmonization is the objective, or even – and here the relationship between the legislature and the judiciary is

8. See also Mortelmans, “The relationship between the Treaty rules and Community measures for the establishment and functioning of the internal market – Towards a concordance rule”, 39 CML Rev. (2002), 1303.

9. See e.g. Case 148/78, *Ratti*, EU:C:1979:110. See further Schütze, *European Constitutional Law* (CUP, 2012), pp. 364–368, who distinguishes between “field”, “obstacle” and “rule” pre-emption. Of these, only “field” pre-emption is straightforward; the others depend on the way in which the EU legislation and national rules are interpreted.

10. See also Sorensen, “Reconciling secondary legislation with the Treaty rights of free movement”, 36 EL Rev. (2011), 344 and 359.

11. See e.g. Case C-203/96, *Dusseldorp*, EU:C:1998:316. See further Dougan, “Minimum harmonization and the internal market”, 37 CML Rev. (2000), 853; and Boeger, “Minimum harmonisation, free movement and proportionality”, in Syrpis (Ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press, 2012), Ch. 4. Along broadly similar lines, Horsley distinguishes between situations in which provisions of secondary legislation are read as “exhaustive statements on the scope of application of EU law in particular fields” and other areas in which the Court has “a broader competence to review, adjust and/or fill gaps in the legal framework established by specific EU directives, regulations and decisions”; Horsley, “Reflections on the role of the Court of Justice as the ‘motor’ of European integration: Legal limits to judicial lawmaking”, 50 CML Rev. (2013), 947.

rendered even more complicated – judicial interpretation of primary and/or secondary law. It is important to note that neither the distinction between regulations and directives, nor whether the measure in question was adopted under an internal market or other legal basis, can be determinative of the extent to which the national legislature retains autonomy. It is necessary in each case to interpret each Treaty provision, and each legislative intervention. One of the problems is that the language of the Treaties is open-textured; so that legal bases afford significant room for manoeuvre for the legislative institutions.<sup>12</sup> Also, the key actors in the legislative process will often disagree, with the result that legislation is itself unclear. The tensions between uniformity and diversity, and between the economic and the social, which are a feature of the Treaties, are often all too apparent in the preambles, and also the text, of secondary legislation.

### 3. A classification of the case law

This section classifies the case law of the Court. The examples have been arranged in a particular order. I begin with the cases in which it appears that primary law is hierarchically superior to secondary law; and move through a series of cases, ending with what may be thought of as the more constitutionally unorthodox case law, in which the existence of secondary law has a significant impact on the interpretation of the text of the Treaties and other forms of primary law. While it may well be possible to argue with the way in which particular cases have been classified, the central claim here is that the Court does not adopt a consistent approach to the relationship between primary and secondary law, and that the inconsistencies in its approach have important constitutional ramifications, in particular in relation to the power of the legislature to affect the Court's interpretation of the dictates of the text of the Treaties.

The first set of cases I examine are *judicial review* cases in which the legality or validity of secondary legislation is examined with reference to primary law. Where the Court annuls secondary legislation, or provisions within secondary legislation, it does so because it holds that such legal provisions infringe primary law. This is indicative of a constitutional arrangement in which secondary law is subservient to primary law, and in which a key task of the judiciary is to keep the legislature within the parameters established by primary law. And clearly, within the EU legal order, all secondary law is subject to judicial review. In cases in which secondary

12. See Pollack, "Creeping competence: The expanding agenda of the European Community", 14 *Journal of Public Policy* (1994), 95.

law is held to be unlawful or invalid, the Court decides that secondary legislation cannot be interpreted so as to comply with the dictates of primary law, and therefore takes the step of annulling the contribution of the legislature.

The bulk of the article deals not with cases which result in the illegality or invalidity of secondary law on the grounds that it is incompatible with primary law, but rather with cases in which it is held that it is possible to *interpret* secondary law in accordance with the dictates of primary law. There are, as we shall see, a variety of approaches which the Court has adopted in relation to the interpretation of legislation; either interpreting it literally, or interpreting it more teleologically, either in the light of the stated objectives of the legislation as perhaps expressed in the preamble, or in the light of the Treaties.<sup>13</sup> There are also, as we shall see, a number of approaches which the Court has adopted in relation to the interpretation of primary law. In classifying the interpretation cases, I begin with those cases in which secondary law is interpreted in the light of primary law. In these cases, it appears difficult, if not impossible, for the intervention of the legislature to have any meaningful impact on the case law of the Court relating to the interpretation of the Treaties. Rather like the cases in which secondary law is held to be unlawful, the outcome is that primary law (as interpreted by the judiciary) takes priority over secondary law. However, there are significant differences between the two strands of case law. In the cases in which secondary law is annulled or held to be invalid, there is held to be a direct conflict between primary and secondary law which is settled in favour of the provision of primary law; while in the interpretation cases the putative collision between primary and secondary law is interpreted away. Nevertheless, it is secondary law which is interpreted so as to make it fit within the dictates of primary law; and hence it is primary law which *de facto* takes priority over secondary law.

Next, I consider cases in which both primary law and secondary law are interpreted neutrally. Just like in the previous category of cases, the legality of secondary law is not at issue, but this time, the interpretation of primary and secondary law is neutral. In such cases, one sees the impact which the Treaties may have on the interpretation of secondary legislation, but one also sees the impact which secondary legislation may have on the interpretation of the Treaties.

Finally there are a number of cases in which it is clear that secondary legislation has had a significant impact on the Court's interpretation of

13. See more broadly Conway, *The Limits of Legal Reasoning and the European Court of Justice* (2012, Cambridge University Press); Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart, 2012); Micklitz and De Witte (Eds.), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012).

primary law – in such cases, the conventional understanding of the normative constitutional hierarchy is reversed, with the result that provisions in the Treaties either are interpreted, or appear to be interpreted, in the light of secondary legislation.<sup>14</sup>

There is no neat way to distinguish between cases which involve a literal, natural, or neutral interpretation of the words and aims of the Treaties and secondary legislation; and those which involve what may be described as a strained interpretation in which liberties are taken with the ordinary meaning of words, or ordinary understandings of the aims of particular provisions. Thus, there may well be disagreement about the way in which I have classified particular cases. However, there should be no scope to argue against the fundamental point; for better or worse, some pieces of secondary legislation appear to have little or no impact on the interpretation of primary law, whereas others appear to be capable of exerting a profound effect on the Court's reading of primary law. The nature of the relationship between primary and secondary law, and between the judiciary and the legislature, is very different in the two situations.

### 3.1. *In which primary law “trumps” secondary law*

Cases relating to the legality or validity of the acts of the EU institutions can come before the Court of Justice in one of two ways; either directly, under Article 263 TFEU, or indirectly, via Article 267 TFEU references from a national court, in cases in which issues relating to the validity of an act of the EU institutions are raised. The grounds of review are stated in Article 263 TFEU – “lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers”.

There are not many cases in which the Court chooses to annul EU legislation – but the existence of a strong-form judicial review power,<sup>15</sup> vested

14. The line of cases beginning with Case C-144/04, *Mangold*, EU:C:2005:709, and encompassing cases such as Case C-555/07, *Kükükdeveci*, EU:C:2010:21 and Case C-176/12, *AMS*, EU:C:2014:2, is not considered further here. In these cases, reference is made to primary law (specifically, to general principles of EU law), rather than to EU legislation (specifically, directives), in order to be able to impose EU law standards on private parties. This technique provides a way of circumventing the lack of horizontal direct effect of directives. It involves a degree of creative interpretation (in particular of general principles of law); and reaches its limit where general principles of law (as for example expressed in the Charter) cannot be interpreted so as to contain the same subjective rights as are provided in secondary law.

15. See, for a flavour of the US literature, Tushnet, “New Forms of judicial review and the persistence of rights-and democracy-based worries”, 38 *Wake Forest Law Review* (2003), 813, and Waldron, “The core of the case against judicial review”, 115 *Yale Law Journal* (2005–2006), 1346.



in the European Court of Justice, to annul secondary law on the grounds that it infringes primary law (i.e. the Treaties or any rule of law relating to their application), indicates the existence of a hierarchical relationship between primary and secondary law. It is also indicative of the fact that, at least in certain cases, the judiciary has the power to unmake legislative choices, on the ground that primary law has been infringed. However, it seems that the Court has “neither announced nor applied the standard of review consistently even when dealing with similar questions”.<sup>16</sup>

As we will see in the subsections which follow, the Court often chooses not to annul EU legislation, but instead finds a way of interpreting either secondary legislation or the Treaties in such a way as to avoid the conclusion that there is a direct collision between the two. And yet, there are a number of cases, both direct actions under Article 263 TFEU and references under Article 267 TFEU (involving an issue of validity), in which the Court does annul secondary law on the basis that it infringes the Treaties or any rule of law relating to their application.<sup>17</sup> One such case is *Digital Rights Ireland*, in which the Court held that the Data Retention Directive (2006/24)<sup>18</sup> was invalid on the ground that the EU legislature “exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter (of Fundamental Rights)”.<sup>19</sup> In the case, the Court, in line with the Opinion of Advocate General Cruz Villalón, held that the Data Retention Directive interfered with the rights protected by Articles 7 and 8 of the Charter (on the right to respect for private and family life; and on the right to protection of personal data); that it was in principle possible for such interference to be justified in the fight against serious crime; but that the EU measure was not proportionate. The Court held that the infringement with the Charter right was serious, and that the EU measure went further than necessary in order to be justifiable. The Court held that the EU measure was too general, that it did not provide for exceptions, and that it did not provide sufficient safeguards for individuals. As a result of the fact that secondary legislation did not comply with the primary law (in this case the Charter), it was annulled.

16. Fritzsche, “Discretion, scope of judicial review and institutional balance in European law”, 47 CML Rev. (2010), 380. Cf. e.g. Case 42/84, *Remia v. Commission*, EU:C:1985:327 and compare with Case C-225/91, *Matra SA v. Commission*, EU:C:1993:239.

17. Another famous example is Case C-236/09, *Test-Achats*, EU:C:2011:100, in which the Court held that Art. 5(2) of Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (O.J. 2004, L 373/37) was invalid from 21 Dec. 2012 (i.e. on the expiry of an “appropriate” transitional period) on the grounds that it infringed Arts. 21 and 23 of the Charter of Fundamental Rights.

18. O.J. 2006, L 105/54.

19. Joined Cases C-293 & 594/12, *Digital Rights Ireland*, EU:C:2014:238, para 69.

The result of a successful judicial review action is that EU secondary legislation is annulled by the Court. The legislature has to decide how to respond to the judgment of the Court. It may choose not to legislate again in the area in question. Alternatively it may attempt to legislate again, taking care this time not to infringe primary law (as interpreted by the Court). One well-known illustration is the *Tobacco Advertising* saga. First, the legislature adopted Directive 98/43,<sup>20</sup> one of a series of measures regulating tobacco production and advertising, which essentially sought to ban all forms of advertising of tobacco products away from the point of sale. Germany challenged the competence of the EU institutions to adopt the Directive on the basis of what is now Article 114 TFEU; and succeeded in its judicial review action against the European Parliament and Council.<sup>21</sup> This was on the basis that the Directive did not contribute to the establishment and functioning of the internal market as it failed to eliminate either barriers to free movement (the Court held that the emergence of such barriers had to be “likely” and that the measure in question had to be designed to prevent them) or distortions of competition (the Court held that these had to be “appreciable”).<sup>22</sup> The response of the legislature was to adopt Directive 2003/33,<sup>23</sup> which again sought to ban tobacco advertising but with a more tailored measure. The Preamble of the Directive was recast, and the danger that barriers to free movement and appreciable distortions of competition would emerge was highlighted. In addition, the new Directive included a clause which insisted that Member States should not prohibit or restrict the free movement of products complying with the Directive. Germany again challenged the legality of the Directive.<sup>24</sup> In their argumentation before the Court, the Parliament and Council responded to the *Tobacco Advertising I* judgment, and drew attention to the risks of barriers and distortions arising as a result of the accession of new Member States. This time, they persuaded the Court that the Directive was properly based on what is now Article 114 TFEU, and that it was therefore lawful. A sufficiently determined, united and well-advised legislature can, it seems, respond to judicial sanction;<sup>25</sup> though only if it is prepared to reorient

20. O.J. 1998, L 213/9.

21. Case C-376/98, *Germany v. European Parliament and Council*, EU:C:2000:544 (*Tobacco Advertising I*).

22. See Syrpis, “Smoke without fire: The social policy agenda and the internal market”, 30 *Industrial Law Journal* (2001), 273–277.

23. O.J. 2003, L 152/16.

24. Case C-380/03, *Germany v. European Parliament and Council*, EU:C:2006:772 (*Tobacco Advertising II*).

25. For the classic account of the difficulties facing the legislature, see Scharpf, “The joint-decision trap: Lessons from German federalism and European integration”, 66 *Public Administration* (1988), 239.

its actions so as to fit with the Court's interpretation of the dictates of the Treaties.<sup>26</sup>

### 3.2. *In which primary law "takes priority over" secondary law*

As hinted above, the Court often manages to find ways of avoiding the need to declare acts of the EU institutions unlawful, or invalid. This may be done by straining the interpretation of either secondary law – or, indeed, as we shall see below, primary law – so that any putative collision between the two is avoided. The more constitutionally orthodox position is to strain the interpretation of secondary law, so that it is brought into conformity with primary law. One such example, and there are many, is the case of *Sturgeon*, discussed below.<sup>27</sup> But there are also other techniques, discussed at the end of this subsection, which the Court is able to use to prioritize primary over secondary law – either as a result of a Court decision that secondary law is inapplicable in particular circumstances, or as a result of the application of the proportionality principle to national action apparently in conformity with the dictates of secondary law.<sup>28</sup>

In *Sturgeon*, the Court had the task of interpreting Regulation 261/2004,<sup>29</sup> a total harmonization measure establishing common rules on compensation and assistance to passengers, in the event of a) flight cancellations and b) delays. Articles 5 and 6 of the Regulation appeared to distinguish between situations in which the flight was cancelled, and those in which the flight was delayed, seeming to grant the Article 7 right to compensation only in the case of cancellation. The Court interpreted the legislation so that compensation would be granted to those whose flights were delayed as well as to those whose flights were cancelled. The first point to note, which links with the observation above that judicial review is unusual, is that the Court stated that, according to a general principle of interpretation, Union acts must be interpreted in such a way as not to affect their validity.<sup>30</sup> Thus, Union acts “must be interpreted in accordance with primary law as a whole, including the

26. The tobacco saga continues. The challenges to the latest Tobacco Directive (the Tobacco Products Directive 2014/40, O.J. 2014, L 127/1) are now pending before the ECJ; see Case C-358/14, *Poland v. Parliament and Council*, and Case C-547/14, *Philip Morris Brands and others*.

27. Joined Cases C-402 & 432/07, *Sturgeon*, EU:C:2009:716. See also, in the citizenship context, Case C-456/02, *Trojani*, EU:C:2004:488, and Joined Cases C-22 & 23/08, *Vatsouras*, EU:C:2009:344.

28. Davies distinguishes between “emasculatory interpretation” and “avoidance”, and illustrates these techniques with a range of examples; see Davies, op. cit. *supra* note 1.

29. O.J. 2004, L 46/1.

30. Joined Cases C-402 & 432/07, *Sturgeon*, para 47. See also Sorensen, op. cit. *supra* note 10, 346.

principle of equal treatment, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified”.<sup>31</sup> The Court then went to great lengths to compare the situation of passengers whose flights are delayed, and those whose flights are cancelled, concluding that they suffer similar damage, and that there are no objective grounds capable of justifying a difference in treatment.<sup>32</sup> Thus, the Regulation “must be interpreted as meaning that passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and they may thus rely on the right to compensation laid down in Article 7”.<sup>33</sup> There was some, to my mind unconvincing, reliance on the preamble to the Regulation, and indeed the “objective” of the Regulation, to support the reasoning of the Court,<sup>34</sup> but it is difficult to escape the conclusion that the Court interpreted the Regulation in the way that it did because it felt confident enough to hold that the distinction between cancellation and (long) delay, which appears in the text of the Regulation, was not compatible with the principle of equal treatment, which, as a general principle of EU law has the status of primary law.

Advocate General Sharpston’s Opinion in the case was more guarded. She drew attention to the fact that “save for a brief mention by the Polish Government, the Court has heard no argument as to the potential impact, on the questions referred, of the principle of equal treatment. The possibility that an examination of the distinction between delay and cancellation might lead to the conclusion that the way in which the Regulation treats these two concepts violates that fundamental principle of [EU] law has therefore not been dealt with in any adequate way”. She thus proposed that the oral proceedings be reopened, and that institutions and the Member States be given the opportunity “to put forward arguments relating to objective justification”.<sup>35</sup> Unlike the Court, the Advocate General did not think that “the underlying problem can be ‘fixed’ by interpretation, however constructive”, and so suggested “that the Court should reopen the oral procedure pursuant to Article 61 of the Rules of Procedure of the Court of Justice and invite submissions from the Member States, the Commission, the European Parliament, and the Council on whether Articles 5 and 7 of the Regulation and Article 6 of the Regulation,

31. *Ibid.*, para 48.

32. *Ibid.*, paras. 49–59.

33. *Ibid.*, paras. 69.

34. *Ibid.*, paras. 43 and 44. The A.G., on the other hand, draws attention to the Commission’s stated view that “in present circumstances operators should not be obliged to compensate delayed passengers”; *ibid.*, Opinion of A.G. Sharpston in Joined Cases C-402 & 432/07, *Sturgeon*, EU:C:2009:416, para 31.

35. *Ibid.*, Opinion of A.G. Sharpston, para 65.

and specifically the distinction they introduce between cancellation and delay, are invalid in the light of the principle of equal treatment”.<sup>36</sup> Thus, the Opinion and the judgment illustrate different views relating to the extent to which the judiciary should be prepared to interpret secondary law creatively, or perhaps to rewrite secondary law, so that it can be found to be compatible with primary law and so that its validity need not be brought into question.

*Commission v. Germany* illustrates another way in which the Court approaches the relationship between primary and secondary law, and another technique available to it for prioritizing the dictates of primary law.<sup>37</sup> The case concerned a potential German breach of the EU public procurement rules. The specific problem was that local authorities had awarded service contracts of above a certain threshold size, in respect of occupational old-age pensions, directly to bodies referred to in a collective agreement, without the call for tenders at the EU level demanded by Directives 92/50 and 2004/18.<sup>38</sup> The Court devoted a large section of its judgment to what it termed the “applicability” of the relevant directives. The Court would have held the Directives inapplicable in the circumstances of the case, had it found that compliance with the Directives was incompatible with the fundamental right to bargain collectively, protected in a range of international instruments, including the EU Charter of Fundamental Rights “an instrument to which Article 6 TEU accords the same legal value as the Treaties”.<sup>39</sup> It was only as a result of the fact that the Court concluded that it was possible to reconcile the “attainment of the social objective pursued by the signatories of the [agreement] in the exercise of their right to bargain collectively” with compliance with the Directives,<sup>40</sup> that EU secondary legislation was applied to the facts of the case, and that Germany was ultimately found to be in breach of EU law.

The final example given in this section is the case of *Baumbast*.<sup>41</sup> In *Baumbast*, arguments centred on whether EU citizens were able to enjoy rights of residence in a host Member State by virtue of what is now Article 21 TFEU.<sup>42</sup> That provision famously grants citizens “the right to move and reside

36. *Ibid.*, para 97.

37. Case C-271/08, *Commission v. Germany*, EU:C:2010:426. See further Syrpis and Novitz, “The EU internal market and domestic labour law – Looking beyond autonomy”, in Bogg, Costello, Davies and Prassl (Eds.), *The Autonomy of Labour Law* (Hart, 2015, forthcoming).

38. Directive 92/50/EEC, O.J. 1992, L 209/1. Directive 2004/18/EC, O.J. 2004, L 134/114.

39. Case C-271/08, *Commission v. Germany*, para 37.

40. *Ibid.*, para 66.

41. See Case C-413/99, *Baumbast*, EU:C:2002:493.

42. For a much fuller account of the interplay between the judiciary and the legislature in the citizenship context, see the chapters by Wollenschläger and Nic Shuibhne in Syrpis, op. cit. *supra* note 11.

freely within the territory of the Member State”, but states that the right is to be “subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect”. Thus, somewhat unusually,<sup>43</sup> a primary law right appears to be subject to the limitations and conditions in secondary law; a normative inversion sure to complicate the nature of the relationship between primary and secondary law. The relevant limitation in *Baumbast* was in Article 1 of Directive 90/364 (now incorporated within Directive 2004/38),<sup>44</sup> which provided that “Member States can require of the nationals of a Member State who wish to enjoy the right to reside within their territory that they themselves and the members of their families be covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence”.<sup>45</sup> It was accepted that Mr Baumbast had sufficient resources, and that he had comprehensive sickness insurance in his home State, Germany. However, he did not have sickness insurance in the host State, the UK. The Court held that the limitations and conditions in secondary legislation “must be applied in compliance with the limits imposed by [Union] law and in accordance with the general principles of that law, in particular the principle of proportionality”,<sup>46</sup> and concluded that “to refuse to allow Mr Baumbast to exercise the right of residence which is conferred on him by [Art. 21(1) TFEU] by virtue of the application of the provisions of Directive 90/364 on the ground that his sickness insurance does not cover the emergency treatment given in the host Member State would amount to a disproportionate interference with the exercise of that right”.<sup>47</sup> The result is “an appreciable decrease” in the “effective regulatory competence” of the EU legislature;<sup>48</sup> as a result of the intervention of the Court.

### 3.3. *In which primary and secondary law are interpreted neutrally*

This subsection is devoted to two recent cases in which total harmonization was involved. The relevant pieces of legislation were Directives 70/311/EEC

43. Note however that many of the rights in the EU Charter of Fundamental Rights are expressed granted only “in accordance with EU law and national laws and practices”.

44. Directive 90/364, O.J. 1990, L 180/26. Directive 2004/38/EC, O.J. 2004, L 158/77.

45. Case C-413/99, *Baumbast*, para 87.

46. *Ibid.*, para 91.

47. *Ibid.*, para 93.

48. Dougan, “The constitutional dimension to the case law on Union citizenship”, 31 *EL Rev.* (2006), 640. The continuing inconsistencies in the Court’s approach in the citizenship arena, in particular as regards the interpretation of Art. 24 of Directive 2004/38, are again obvious in the recent decisions of the Court in Case C-140/12, *Brey*, EU:C:2013:565, and Case C-333/13, *Dano*, EU:C:2014:2358.

and 2007/46/EC relating to the steering equipment of passenger vehicles.<sup>49</sup> These directives were considered by the Court of Justice in March 2014, in the context of enforcement actions against Poland and Lithuania.<sup>50</sup> These Member States obliged vehicle manufacturers to reposition the steering equipment of passenger vehicles to the left hand side, for reasons connected to ensuring road safety and protecting the health and lives of people.<sup>51</sup> This created problems for those seeking to register vehicles originating in the UK and Ireland. The Commission argued that the repositioning requirement was contrary to EU law. It should be noted at the outset that the legal framework appeared to be different in relation to *new passenger vehicles*, in respect of which the Directives apply; and in relation to *vehicles previously registered* in another Member State, in respect of which the Directives do not apply, leaving the legal assessment to be conducted with reference to primary law.<sup>52</sup>

I start with the way in which the Court dealt with the application of primary law – here Article 34 TFEU – to vehicles previously registered in another Member State. The Court was clear that the contested legislation constituted a measure having equivalent effect to a quantitative restriction, in so far as its effect was to hinder access to the Polish market for vehicles lawfully constructed and registered in other Member States.<sup>53</sup> The question was then whether the national legislation was justified, and whether it was proportionate. The Court had little difficulty in accepting that, in principle, the legislation at issue was appropriate for reducing the risk of accidents on Polish roads.<sup>54</sup> Attention then turned to proportionality. For a number of reasons, the Court felt able to conclude that the legislation was not proportionate, and that Poland had therefore failed to fulfil its obligations under EU law.

First, the Polish legislation tolerated the risk involved in tourists driving in Poland in vehicles equipped with a steering wheel on the right. According to the Court, the risk is “the same, particularly as the flow of visitors in Polish territory is continuous, and the risk cannot be considered to be less important on the ground that the visitors visiting Poland for a limited period with such a vehicle drive more carefully than those whose vehicle is registered in that

49. Directive 70/311/EEC, O.J. 1970, L 133/10. Directive 2007/46/EC, O.J. 2007, L 263/1.

50. See Case C-639/11, *Commission v. Poland*, EU:C:2014:173. Case 61/12, *Commission v. Lithuania*, EU:C:2014:172, is materially identical.

51. *Ibid.*, para 25.

52. *Ibid.*, para 28. This was also emphasized by A.G. Jääskinen who stated, at para 67 of his Opinion, that “it is clear from the first paragraph of Article 1 of Framework Directive 2007/46 that that directive harmonizes only ‘the administrative provisions and general technical requirements for approval of all *new* vehicles within its scope’”.

53. *Ibid.*, para 52.

54. *Ibid.*, paras. 54–57.

Member State”.<sup>55</sup> Second, the Court referred to the fact that “the legislation of 22 Member States, that is to say a large majority of the Member States, either allows explicitly the registration of vehicles which have their steering equipment on the same side as the direction of the traffic, or tolerates such”.<sup>56</sup> Third, the Court noted that “the statistical data relied on by the Polish Government do not prove to the requisite legal standard the relationship between the number of accidents put forward and the involvement of vehicles with the driver’s seat on the right”.<sup>57</sup> Fourth, the Court pointed out that “there exist means and measures less restrictive of free movement of goods than the measure at issue”, and capable of significantly reducing the risk of accidents; for example imposing other measures that would be capable of ensuring sufficient rear and forward visibility for the drivers of cars with the steering-wheel positioned on the same side as the direction of traffic.<sup>58</sup>

In relation to the argument here, a fifth reason given by the Court is particularly interesting.<sup>59</sup> The Court stated that “the risk arising from the use in the Polish territory of vehicles with the steering wheel on the right *is the same, whether those vehicles are new or previously registered in another Member State*” (emphasis added). As stated above, new vehicles are covered by the secondary law, and by this stage in its judgment, the Court had already concluded “that the legislature took account of the potential risks when it adopted Article 2a of Directive 70/311”.<sup>60</sup> We know that, taken together, the above reasons were enough to render the Polish rule disproportionate. However, we do not know whether one, or some, taken in isolation, would have the same effect. In particular, we do not know whether, given the Court’s assertion that new and previously registered vehicles represent the same risk, the legislature’s assessment of the risk in relation to new vehicles also automatically applies to previously registered vehicles; or whether it applies to previously registered vehicles only as a result of the coincidence of the various factors referred to in paragraphs 59 to 64 of the judgment. If the former is correct, the legislation on new vehicles effectively also applies to previously registered vehicles; a substantial increase in the scope of the legislation in question. If the latter is correct, then, notwithstanding the

55. Ibid., para 60.

56. Ibid., para 61. The A.G. makes the point, at para 93 of his Opinion, that the rules in force in Poland and Lithuania are “relatively isolated”.

57. Ibid., para 62.

58. Ibid., para 63.

59. It is perhaps worth noting that this was in fact the first reason given by the Court; though it is impossible to know whether to attach any significance to the order in which reasons were listed by the Court.

60. See Case C-639/11, *Commission v. Poland*, para 59. Interestingly, the A.G. did not make this connection in the parts of his Opinion which dealt with new cars and with those already registered in another Member State.



Court's analysis of the risk assessment, it must be the case that, as suggested by the scope of the secondary legislation, a different legal framework applies to new and previously registered vehicles. It is a matter of some frustration that the reasoning of the Court does not make this point clear.

I now turn to the first section of the judgment, in which the Court discussed the applicability of the two directives to new passenger vehicles. Directive 70/311/EEC was based on Article 100 EEC (now Art. 115 TFEU); and Directive 2007/46/EC was based on Article 95 EC (now Art. 114 TFEU). Thus, they are both internal market measures. They are both directives (and Directive 2007/46 is a "framework directive"). The Court pointed out that the Directives establish a "harmonized framework", creating "a uniform-type approval procedure for new vehicles, based on the principle of total harmonization".<sup>61</sup> The aim was "the establishment and functioning of the internal market, while seeking to ensure a high level of road safety".<sup>62</sup> The main point of disagreement between the Commission and the Polish Government related to whether the determination of the position of the driver's seat of a vehicle was within the scope of the Directives. The Court held that it was. "The European Union legislature granted in that regard a freedom to motor vehicle manufacturers that may not be cancelled or impeded by national legislation".<sup>63</sup> It reasoned that the legislature "took account of that potential risk" resulting from having steering equipment on the same side as the direction of the traffic when it added Article 2a to Directive 70/311 at the time of the accession of the UK to the EU without supplementing the list of requirements in the Annex to the Directive,<sup>64</sup> and that it was therefore clear that "the position of the driver's seat, an integral part of the steering equipment of a vehicle, comes within the harmonization established by [the] Directives".<sup>65</sup> Thus, once the Court had established that the position of the steering-wheel of new vehicles fell within scope of the Directives in question, and once it had characterized them as being based on the principle of total harmonization, it was able, with sole reference to the Directives in question, and without recourse to provisions of primary law, to conclude that national rules obliging vehicle manufacturers to reposition the steering equipment were contrary to EU law.

In these cases, the analysis of the legality of the Polish and Lithuanian rules as they apply to new passenger vehicles (a situation within the scope of directives based on the principle of total harmonization) was uncontroversial.

61. *Ibid.*, para 34.

62. *Ibid.*, para 35.

63. *Ibid.*, para 38.

64. *Ibid.*, para 42.

65. *Ibid.*, para 47.

The main interest lies in the fact that it seems possible to argue that the approach adopted by the legislature had an impact, perhaps even a decisive impact, on the Court's approach to proportionality in a cognate area (i.e. the legal regime for previously registered vehicles) governed by primary rather than secondary law.

#### 3.4. *In which secondary law "takes priority over" primary law*

The final subsection considers a number of cases in which secondary law takes priority over primary law. I begin with judicial interpretation of the Posted Workers Directive (PWD), and the changing judicial conception of the relationship between that Directive and the text of the Treaties. I then go on to consider other, rather more blatant, examples of the Court allowing secondary law to take priority over primary law; or at least to have a significant effect on its own pre-existing case law interpreting provisions of primary law. My aim is to complete the task of setting out the full spectrum of approaches which the Court adopts towards legislative interventions.

The Posted Workers Directive (PWD) is a measure with which the Court of Justice has had occasion to wrestle on many occasions. A root cause of the difficulties is that the objective of the Directive is far from clear – it was enacted under an internal market legal basis; but, appears, at least on its face, to make a much greater contribution to the protection of workers than to the free provision of services.<sup>66</sup> Article 3(1) of that Directive lays down “a nucleus of mandatory rules for minimum protection” to be observed in the host country by employers who post workers there. Article 3(7) provides that paragraphs 1 to 6 “are not to prevent application of terms and conditions of employment which are more favourable to workers”. Controversially, in *Laval*, Article 3(7) was interpreted in such a way that the result was that, under the Directive, “the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1)”.<sup>67</sup> A lot has already been written about that;<sup>68</sup> to

66. For an account of the history of the Directive, and its relationship with the case law of the Court, in particular Case C-113/89, *Rush Portuguesa*, EU:C:1990:142, see Davies, “Posted workers: Single Market or protection of national labour law systems?”, 34 CML Rev. (1997), 571.

67. Case C-341/05, *Laval*, EU:C:2007:809, para 81. The one exception is where workers already enjoy more favourable terms and conditions of employment pursuant to the law or collective agreements applicable in the “home” Member State.

68. See e.g. Kilpatrick, “Laval’s regulatory conundrum: Collective standard-setting and the Court’s new approach to posted workers”, 34 EL Rev. (2009), 844; Davies, “One step forward, two steps back? The *Viking* and *Laval* cases in the ECJ”, 37 *Industrial Law Journal* (2008), 126; Syrpis and Novitz, “Economic and social rights in conflict: Political and judicial approaches to their reconciliation”, 33 EL Rev. (2008), 411.

be fair to the Court, it did at least opt for an interpretation which accords with the internal market legal basis under which the Directive was enacted.

But, it is not only the interpretation of the Directive, but also the nature of the relationship between the Directive and the Treaties which is controversial. In *Laval*, the Court took pains to point out that “since the purpose of Directive 96/71 is not to harmonize systems for establishing terms and conditions of employment in the Member States, the latter are free to choose a system at the national level which is not expressly mentioned among those provided for in that Directive, provided that it does not hinder the provision of services between the Member States”.<sup>69</sup> Later in the judgment, “the collective action at issue” in the case was assessed “from the point of view of [Art. 56 TFEU]”. The clear implication is that a national system going beyond the terms of the PWD might nevertheless be compatible with the Treaties, and therefore be lawful, provided that it does not infringe, or lead to infringements of, Article 56 TFEU.<sup>70</sup> This conceptualization of the relationship between the PWD and Article 56 TFEU is not apparent in all cases. In *Rüffert*, the issue was whether Article 56 TFEU precluded an authority of a Member State from requiring a contracting authority to designate as contractors only those which agree in writing to pay employees at least the wage provided for in the collective agreement in force at the place where those services are performed. The Court began by stating that “in order to give a useful answer to the national court, it is necessary to take into consideration the provisions of Directive 96/71”.<sup>71</sup> It then proceeded to analyse the Directive, and was able, following the approach it had adopted in *Laval*, to conclude, at paragraph 35, that the national rules at issue were not compatible with (its interpretation of) the Directive. The following paragraph is intriguing. The Court stated that “that interpretation of Directive 96/71 is confirmed by reading it in the light of [Art. 56 TFEU], since that Directive seeks in particular to bring about the freedom to provide services, which is one of the fundamental freedoms guaranteed by the Treaty”.<sup>72</sup> The burden of the paragraphs which follow seems to be to show that the measure in question “is capable of constituting a restriction” and that

69. Case C-341/05, *Laval*, para 68. See also Case C-522/12, *Isbir*, EU:C:2013:711, para 35.

70. But note that, even in *Laval*, the PWD is given centre stage in the assessment of the proportionality of the restrictions imposed by the trade unions. Azoulai’s comment on the reasoning in *Laval* (in particular at para 108) is as follows: “In its judgment, the Court indicates that the provisions of the Directive must be interpreted in the light of [Art. 56 TFEU]. But, at the end of the day, it does exactly the opposite: it sticks to a strict interpretation of the Directive and brings the interpretation of [Art. 56 TFEU] back to this interpretation of the Directive”; Azoulai, “The Court of Justice and the Social market economy: The emergence of an ideal and the conditions for its realisation”, 45 CML Rev. (2008), 1353.

71. Case C-346/06, *Rüffert v. Land Niedersachsen*, EU:C:2008:189, para 18.

72. *Ibid.*, para 36. This approach – considering the Directive “interpreted in the light of the Article 49 EC” – is repeated at para 43, and in the Court’s conclusion.

“it cannot be considered to be justified”, but it is significant that this is stated to amount to an interpretation of the Directive in the light of Article 56 TFEU, rather than an independent analysis of the Treaty provisions. The strong suggestion in *Rüffert* is that the limits of national autonomy are set by the Court’s controversial interpretation of the PWD (read in the light of the Treaties); rather than by the Treaties themselves.<sup>73</sup> Thus, the Court’s interpretation of secondary law is capable of having a decisive impact on the extent to which there is freedom to act under the Treaties.

The Commission’s proposed “Monti II” Regulation can be seen as the legislature’s attempt to respond to *Viking* and *Laval*.<sup>74</sup> The proposed Regulation sought to do little more than to reiterate the constitutional equivalence between the freedom of establishment and the freedom to provide services on the one hand, and the fundamental right to take collective action on the other;<sup>75</sup> but it faced strong opposition (from both left and right), and failed to be adopted by the European Parliament and the Council.<sup>76</sup> The demise of the proposed Regulation illustrates the difficulty of achieving a broad enough political consensus within the European institutions for the adoption of legislation to temper, or correct, judicial decisions. But, even if the Regulation had been adopted, there is reason to be sceptical about its potential effect. Fundamental rights and fundamental freedoms often clash. The idea that the exercise of one has to respect the other is not a new one; it is recognized in the case law of the Court,<sup>77</sup> and even referred to in *Viking* and *Laval* themselves.<sup>78</sup> The key questions are about the way in which the Court chooses to navigate the tension between rights and freedoms in specific factual circumstances; and it is not clear that the “Monti II” Regulation would necessarily have had any impact on the case law of the Court. It is also important, and this is

73. See also Barnard, “More posting”, 43 *Industrial Law Journal* (2014), 194.

74. COM(2012)130. The proposed regulation was accompanied a Commission proposal for better enforcement of the Posted Workers Directive; COM(2012)131. Directive 2014/67 on the enforcement of Directive 96/71 was adopted in May 2014; O.J. 2014, L 159/11.

75. The key provision, Art. 2, reads as follows: “The exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms”. See, for critical comment, Ewing, *The Draft Monti II Regulation: An Inadequate Response to Viking and Laval* (Institute of Employment Rights, 2012,) available at: <[www.ier.org.uk/sites/ier.org.uk/files/The%20Draft%20Monti%2011%20Regulation%20by%20Keith%20Ewing%20March%202012.pdf](http://www.ier.org.uk/sites/ier.org.uk/files/The%20Draft%20Monti%2011%20Regulation%20by%20Keith%20Ewing%20March%202012.pdf)>.

76. See for the rejection by 19 national parliaments under the so-called “yellow card” procedure: <[www.europolitics.info/social/commission-withdraws-monti-ii-proposal-art3428-21-25.html](http://www.europolitics.info/social/commission-withdraws-monti-ii-proposal-art3428-21-25.html)>.

77. See e.g. Case C-112/00, *Schmidberger v. Austria*, EU:C:2003:333; and Case C-271/08, *Commission v. Germany*, EU:C:2010:426, in particular in the Opinion of A.G. Trstenjak.

78. Case C-438/05, *Viking*, para 79; Case C-341/05, *Laval*, para 105.

especially relevant for the argument in this article, to recognize that the Regulation would itself be subject to judicial interpretation. It could very easily be interpreted, in line with the examples provided in section 2 above, in the light of the Court's understanding of the dictates of the Treaties.<sup>79</sup>

The final examples given here represent two of the clearest instances in which the passage of legislation appears to have had a decisive impact on the case law of the Court, and on its interpretation of the text of primary law.

The first is the citizenship case of *Förster*,<sup>80</sup> in which the Court “issued a clear signal of deference to the legislature” in its judgment.<sup>81</sup> In the case, a German national had resided in the Netherlands for three years as a student, and claimed a maintenance grant. The Court held that the Dutch residence requirement of five years “does not go beyond what is necessary to attain the objective of ensuring that students from other Member States are to a certain degree integrated into the society of the host Member State”.<sup>82</sup> The result was that the subjective integration test laid out in *Bidar*,<sup>83</sup> was “without any reasoning or discussion, manipulated into an objective five-year condition – crucially, mirroring the wording of Article 24(2) of Directive 2004/38” (albeit that the Directive was not itself applicable to the facts of *Förster*).<sup>84</sup> The Court decided *Förster*, in line with the stance adopted by the legislature, but against the advice of Advocate General Masák. He suggested that the Directive “cannot detract from the requirement flowing from Article [18 TFEU] and the general principle of proportionality”, and suggested that the refusal of a claim where a student had been resident (and integrated) for three years “would seem disproportionate”.<sup>85</sup> It is clear that, in the citizenship context, there are divisions within the Court. While there are some cases, like *Förster* and *Dano*,<sup>86</sup> in which secondary legislation appears to have a significant impact

79. Along similar lines, see Davies’ “thought experiment” considering “what might have happened if pre-*Keck* a regulation had been adopted to the effect that selling arrangements were not to be seen as obstacles to movement unless unequal in law or in fact”; see Davies, op. cit. *supra* note 1, 1596.

80. Case C-158/07, *Förster*, EU:C:2008:630.

81. Nic Shuibhne, “The third age of citizenship”, in Syrpis, op. cit. *supra* note 11, 350.

82. Case C-158/07, *Förster*, para 58.

83. Case C-209/03, *Bidar*, EU:C:2005:169. In *Bidar*, a French national resident in the UK was denied a student maintenance grant as he did not fulfil the eligibility criteria in UK law. He won his case on the basis that he was able to demonstrate a “genuine link”, and a “degree of integration”, with UK society. A.G. Geelhoed speculated in relation to the terms of Directive 2004/38 (which were not applicable to the case at hand), Art. 24(2) of which laid down a five-year residence condition. He argued, at para 64 that it was necessary to ensure that the requirement adopted by the Union legislature was “applied in conformity with the fundamental provisions of the [EU Treaties]”.

84. Nic Shuibhne, op. cit. *supra* note 81, 351.

85. Case C-158/07, *Förster*, Opinion of A.G. Masák, EU:C:2008:399, at paras. 131–133.

86. Case C-333/13, *Dano*, EU:C:2014:2358.

on the interpretation of primary law, there are also cases in which the Court finds ways of enabling primary law to take priority over secondary law, either by side-stepping the restrictions in the citizenship Directive,<sup>87</sup> or by finding that particular situations fall outside the scope of the Directive, thus enabling the Court to apply its pre-existing case law on Article 21 TFEU.<sup>88</sup>

The final example is *Pringle*.<sup>89</sup> The case concerned the legality of the European Stability Mechanism, established by Decision 2011/199 and by the European Stability Mechanism Treaty concluded on 2 February 2012. Decision 2011/199 added a third paragraph to Article 136 TFEU, enabling a stability mechanism to be created. The Decision was adopted under Article 48(6) TEU, the simplified revision procedure, which only applies to Treaty amendments which do not increase the competences conferred on the Union. Mr Pringle argued that the Decision did entail an alteration of the Union's competences, and further argued that the Decision was inconsistent with Treaty provisions on EMU, in particular the "no-bail out" principle in Article 125 TFEU.<sup>90</sup> He also claimed that the ESM Treaty would confer new competences and tasks on the Union institutions which would be incompatible with the existing EU Treaties. The Court of Justice dismissed Pringle's challenge and confirmed the legality of the European Stability Mechanism. The decision was widely anticipated, and has received strong academic support.<sup>91</sup> However, the Court's cumulative approach to interpretation, blending literal, systemic, purposive and consequentialist interpretative criteria has also been the subject of strong criticism, with Gunnar Beck, for example, finding that the law "no longer appears to constrain political choices".<sup>92</sup> His view is that the Court's approach to legal interpretation "leaves the judiciary free to construct a normative justification for a political position jointly favoured by the EU institutions and national governments, almost irrespective of, and often entirely unconstrained by, what the Treaties say".<sup>93</sup>

It should be noted that the legality of the European Stability Mechanism was also questioned in an action before the German Federal Constitutional

87. See e.g. Joined Cases C-22 & 23/08, *Vatsouras*.

88. See e.g. Case C-127/08, *Metock*, EU:C:2008:449.

89. Case C-370/12, *Pringle*, EU:C:2012:756.

90. *Ibid.*, paras. 137–139. Beck comments that the Court's approach here amounts to "an extreme literal interpretation [of Art. 125 TFEU] that effectively reduces a central Treaty provision to absurdity"; Beck, "The Court of Justice, legal reasoning, and the *Pringle* case: Law as continuation of politics by other means", 39 *EL Rev* (2014), 244.

91. See e.g. Koutrakos, "Political choices and Europe's judges", 38 *ELJ* (2013), 291; De Witte and Beukers, "The Court of Justice approves the creation of the European Stability Mechanism", 50 *CML Rev.* (2013), 805.

92. Beck, *op. cit.* *supra* note 90, 236.

93. *Ibid.*, 238.

Court (FCC) some two months before *Pringle* reached the Court of Justice. The German Court also approved the legality of the ESM, providing, in Beck's words, "a singularly ill-reasoned justification for government policy".<sup>94</sup> For Joerges and Everson, the "converging attitudes of both courts in the assessment of the *praxis* of Europe's crisis management is disquieting because it accepts the primacy of discretionary politics in the management of the crisis and fails to develop any criteria against which the legitimacy of these practices might be assessed".<sup>95</sup> The 2014 decision of the German FCC on the legality of the ECB's Outright Monetary Transactions (OMT) programme, in which the FCC for the first time referred a question to the Court of Justice, may herald a change in direction on the part of the FCC (and also, in time, on the part of the Court of Justice); though it is source of regret for many commentators that the FCC continues to have the interests of Germany, and the German Constitution, at the forefront of its mind.<sup>96</sup>

#### 4. Towards a critical analysis of the "proper" relationship between primary and secondary law

It is clear that the EU possesses a "legal", rather than a "political" constitution,<sup>97</sup> in which the Court of Justice is afforded a strong-form judicial review power to annul the interventions of the legislature with reference to primary law, and a relatively free rein to interpret secondary legislation in creative ways. And yet, parts of the case law of the Court are unpredictable. The Court has been trenchantly criticized on the one hand (see the reactions to, for example, *Baumbast*) for denying the legislature the capacity to exercise its legislative competence effectively; and on the other (see the reactions to, for example *Pringle*) for failing to constrain political choices. Clearly, these criticisms of the Court are motivated by very different concerns, and by very different visions of the "proper" relationship between primary and secondary law in the EU.

94. *Ibid.*, 249.

95. Joerges and Everson, "Who is the guardian for constitutionalism in Europe after the financial crisis?", 63 *LEQS Paper* (2013), 23.

96. See 15 *German Law Journal* (2014). Special Issue; and Wilkinson, "Economic messianism and constitutional power in a 'German Europe': All courts are equal, but some courts are more equal than others", LSE Law, 26 *Society and Economy Working Papers* (2014).

97. See e.g. Gee and Webber, "What is a political constitution?", 30 *Oxford Journal of Legal Studies* (2010), 273. The EU Treaties create a legal, rather than a political, constitution; with the result that it falls to the courts to determine the extent to which the political institutions are able to play their part in the elaboration of the dictates of the constitution.

It is not at all obvious how to conceptualize the debate on what may be termed the “proper role” of the Court.<sup>98</sup> If one chooses to focus on the fact that the Court has been explicitly authorized to interpret the Treaties and to annul legislation which is contrary to the Treaties,<sup>99</sup> one ends up with a frame of reference which privileges the position of primary law over secondary law, and the position of the judiciary over that of the legislature. If one adopts this approach, it is easy to conclude that the Court’s interpretation of the Treaties should not be influenced by the passage of legislation and the vagaries of politics. In its interpretation of EU legislation, the Court should use the Treaties as its touchstone, and be prepared (within the limits of judicial propriety,<sup>100</sup> however defined) to strain the meaning of legislation so that it most closely corresponds with, and indeed furthers, the Court’s conception of the dictates of the Treaties. According to these accounts, it is not at all exceptional, or surprising, to find that primary law may either trump, or take priority over, secondary law; instead, it is alarming to see cases in which the Court allows the passage of secondary legislation to influence its reading of the Treaties.

However, this approach can be criticized. Alternative, and less hierarchical, accounts emphasize the fact that the influence of the political institutions on the meaning of the key concepts introduced in the Treaties cannot sensibly be limited to their role in Treaty revision, frequent though that revision is. According to these accounts, it is not only the judiciary, but also the legislature which has a role in defining the meaning of the EU’s constitutional text.<sup>101</sup> Thus, in line with more “political” accounts of the constitution, and with “departmentalism” in the United States, “the constitution should be the property of all those with a stake in its outcomes, and this philosophical starting point should express itself legally in a situation which may be described in terms of institutional pluralism, or non-dominance, with neither courts nor legislatures able to make their view of the constitution the only one that counts”.<sup>102</sup>

98. See further Syrpis, *op. cit. supra* note 11, p. 1.

99. Art. 19 TEU states that the Court “shall ensure that in the interpretation and application of the Treaties, the law is observed”.

100. There is, of course, a lively debate here; see e.g. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policy-Making* (Nijhoff, 1986); and Alter, *The European Court’s Political Power: Selected Essays* (OUP, 2009).

101. See e.g. Armstrong and Bulmer, *The Governance of the Single European Market* (Manchester University Press, 1998).

102. See Davies, *op. cit. supra* note 1, 1585; referring to Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (OUP, 2004). See further Post and Siegel, “Popular constitutionalism, departmentalism, and judicial supremacy”, 92 *California Law Review* (2004), 1027, who claim (at 1043) that “Kramer’s fundamental indictment is that as federal courts have expanded and bureaucratized, and as the articulation of constitutional law



These accounts appear particularly attractive in the EU context. The EU's constitutional text is unusually substantive, detailed and concrete. Within it, there are unresolved tensions between uniformity and diversity, between the economic and the social, and between human rights and fundamental freedoms, whose resolution is seen by many to belong as much in the political, as in the legal, realm. These alternative accounts accept that there are limits on the freedom of action of the legislature imposed by the Treaties (and policed by the Court); but they call on the Court, where possible, to strive to reflect the (democratic) will expressed by the political institutions. This has implications for the way in which the judiciary should approach its tasks. For example, the Court should only exercise its power to review the acts of the Union institutions in extreme circumstances, where for example, the legislature has "manifestly", or "manifestly and gravely", exceeded the limits of its powers. It should, as far as possible, try to read secondary legislation literally. It should also be prepared to adjust its own interpretation of Treaty texts in the light of the stance adopted by the legislature.

Those who subscribe to this approach would agree with Paul Craig, who has argued that "where the [Union] legislature has given considered thought to the more particular meaning to be accorded to a right laid down in a Treaty article and expressed this through [Union] legislation, the [Union] courts should treat this with respect".<sup>103</sup> They would also agree with those writers who call for deference, or self-restraint, on the part of the courts, so as to "avoid intrusion on the perceived proper domain of political judgement".<sup>104</sup> Where the Court is filling in gaps left by the legislature, it is accepted that it should try to behave as a good legislator behaves. Where, however, the legislature has spoken, the question for the Court is whether to unmake, or respect, the legislature's choice; and in that situation the Court should be sensitive to the institutional balance and the discretionary powers of the legislative institutions.<sup>105</sup> Under these alternative accounts, cases in which primary law straightforwardly, or automatically, trumps or takes priority over secondary law ring alarm bells. The judiciary is, however, in general terms at least,<sup>106</sup> seen as deserving praise

has become pervasive and routinized, the participation of the American people in the formation of their Constitution has become correspondingly enervated and attenuated".

103. Craig, *EU Administrative Law* (OUP, 2006), p. 520.

104. Weatherill, "Supply of and demand for internal market regulation: Strategies, preferences and interpretation", in Nic Shuibhne (Ed.), *Regulating the Internal Market* (Edward Elgar, 2006), p. 38.

105. See Ely, *Democracy and Distrust* (Harvard University Press, 1980), p. 68.

106. There is of course scope to criticize individual judgments; even though they may correspond with one's overall philosophy relating to the relationship between primary and secondary law.

for allowing the passage of secondary legislation to influence its reading of the Treaties.

To the extent that the alternative accounts described above have some normative attraction, and in the light of the case law analysed in section 3 above, there are lessons for both the legislature and the judiciary.

A first set of lessons concerns the role of the legislature. The EU legislature is a complex entity, with less of an obvious claim to democratic legitimacy than the legislative bodies of many nation States. Its competence is bounded, and the limits of that competence are policed not only by the Court of Justice, but also by a range of other actors – most notably national governments (within and outside the Council of Ministers), national Parliaments (in particular in relation to the principles of subsidiarity and proportionality), national constitutional courts,<sup>107</sup> and other international bodies. It is afforded the competence to intervene in a variety of different ways under various legal bases. It may, via its legislative interventions, seek to make the case law of the Court of Justice more visible, typically by embedding concepts and approaches used by the Court into secondary legislation; or it may seek to depart from the case law of the Court. It may adopt measures of the total harmonization variety, which displace the Treaty rules, and which pre-empt the exercise of national competence; or it may intervene in a range of other ways which leave primary and secondary law coexisting with each other, operating so as to create what will inevitably be a murky legal picture. It is an unhappy feature of EU legislation that the intentions of the legislature are all too often unclear. Greater clarity – which may well be unattainable given the divergence of views among the legislature – would make the task of the Court much more straightforward.

There are also lessons for the Court. The examples provided in section 3 above seem to illustrate that the Court has yet to develop a clear conception of its “proper role” where the Treaty framework is supplemented with secondary legislation of various kinds. The Court rarely, if ever, gives an overt rationalization for its decision to treat interventions of the legislature with greater or lesser amounts of respect. Indeed, one can go further, and point out first that the Court does not appear to distinguish systematically between Treaty revisions and the “mere” adoption of secondary legislation;<sup>108</sup> and second, that it is capable of drawing a wide variety of inferences from the

107. The Court is acutely aware of how its judgments are received in national courts, which are, of course, part of the same legal epistemic community from which the judges of the Court are themselves drawn. See Stone Sweet, “The European Court of Justice”, in Craig and de Búrca, *op. cit. supra* note 6, p. 146.

108. See further Syrpis, *op. cit. supra* note 11, ch. 1, p. 23.

absence (as well as from the presence) of secondary legislation.<sup>109</sup> Some of the reasons for the inconsistent approach of the judiciary can fairly and appropriately be attributed to the legislature. Where legislation is unclear, and/or poorly drafted, and where the relationship between primary and secondary law is not fully specified, the Court cannot be said to have been afforded a meaningful steer by the legislature, and can do little other than seek to make the best of a bad job. However, the inconsistencies in the Court's approach are not confined to those areas in which legislation is unclear. The "methodological pluralism and attendant flexibility of the Court's cumulative approach [to interpretation] afford the Court of Justice the freedom to favour almost any conclusion, assuming it can be justified by some argument or other".<sup>110</sup>

It is difficult to envisage a more sophisticated approach to the relationship between primary and secondary law without a more intensive, and transparent, constitutional dialogue between the legislature and the judiciary. To the extent that it is possible to reach agreement, the legislature can and should send clearer signals to the Court about the intended effects of particular legislation, in particular as regards the relationship between secondary and primary law. If legislative interventions are intended to necessitate a shift in the case law of the Court, the competence to effect such a shift should be asserted, and the effect on the pre-existing case law on the interpretation of primary law should be highlighted as clearly and precisely as possible. In turn, the Court should make a more concerted effort to send clear signals to the legislature about the potential effects of legislation of various kinds adopted under various legal bases; and should strive to maintain clearer standards as regards not only the intensity of judicial review, but also the way in which its arsenal of interpretative strategies are deployed and combined.<sup>111</sup>

109. 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".

110. Beck, *op. cit. supra* note 90, 237.

111. One feature of the EU Treaty framework is that the ECJ "operates in an unusually permissive strategic environment. When it interprets the treaties, for instance, its zone of discretion is virtually unlimited"; Stone Sweet, *op. cit. supra* note 107, 127. See also Lord

The current situation is one in which it is almost impossible to predict with any certainty what effect the passage of secondary legislation will have on the pre-existing case law of the Court on the interpretation of primary law. Attempts to isolate factors which might determine the reaction of the Court to particular legislative interventions also seem doomed to fail. Different configurations of the Court and different Advocates General seem to view the landscape in which they operate very differently. The Court does not operate in a political vacuum, and it is not at all surprising that the attitude of (particular) Member State governments, (particular) national courts, (particular) international courts and supervisory bodies, not to mention the likely reaction of the financial markets, will all, at least on occasion, have an effect on the direction of its case law. However, it is important that the parameters within which, and the mechanisms through which, the legislature is able to affect the case law of the Court are more clearly defined; not only from the perspective of legal certainty, but also in order for it to be possible to develop a clearer account of the legal and political legitimacy of the European project.

Mance, "The interface between national and European law", 38 *EL Rev.* (2013), 450: "free-ranging interpretive activity involves courts in decisions which ought to be taken by the legislature".

