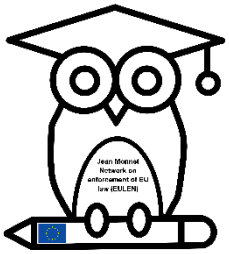

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Private actors and the limits of EU law enforcement: addressing conflicts with Member States' international commitments

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Abstract

While legal scholarship and the case-law of the European Court of Justice have extensively addressed private enforcement of EU law against domestic acts of the Member States, far less attention has been paid to private enforcement of EU law, when conflicts with EU law arise from the international commitments of the Member States. This paper attempts to shed light on this unexplored dimension of EU private enforcement, by examining to what extent private actors may invoke Union law before national courts to challenge international agreements concluded by the Member States, whether *inter se* or with third countries. It argues that the principle of primacy of Union law generally extends to such agreements, subject only to a narrowly construed derogation under Article 351(1) TFEU. Building on recent developments, in particular the Court of Justice's judgment in *HF*, the paper explores three key private enforcement mechanisms: consistent interpretation of international agreements in conformity with Union law, disapplication of conflicting provisions, and State liability for breaches arising from the treaty-making action of the Member States. It shows that while these mechanisms largely mirror the structural logic of private enforcement against internal national measures, they are subject to specific limits inherent in the international legal order, including respect for interpretative methods under the Vienna Convention on the Law of Treaties or the preservation of the balance of reciprocity in agreements with third countries.

Keywords: EU law enforcement; private enforcement; primacy; Member States' international agreements; consistent interpretation; disapplication; State liability; Article 351 TFEU

I. Introduction

The effective judicial enforcement of Union law against the EU Member States has long been recognised as a cornerstone of the transformation of the Union legal order from a paradigm rooted in public international law to one approaching a federal-type structure.[1] An important institutional foundation in this regard was already established by the Treaty of Rome, which entrusted the Commission – an independent supranational body – with the task of overseeing the application of Union law, including the power to initiate infringement proceedings before the European Court of Justice against Member States in breach of their obligations.[2] Yet, the 'constitutionalisation' of the Union's legal order could not be achieved without the recognition of a range of requirements incumbent on national courts, which enable private individuals to enforce Union law in their domestic legal orders.[3] These include the doctrines of consistent interpretation, disapplication and State liability. As a result, Union law has become not merely a set of international commitments, but an integral part of 'the law of the land', with the consequence that the Member States may no longer disregard their obligations arising under the EU Treaties.[4]

That said, the discussions on the private enforcement of Union law against the Member States have mainly focused on acts undertaken by the Member States in their internal sphere.[5] Yet, it must be emphasised that with the accession to the European Union, the Member States have not lost their capacity to make treaties with third countries or even other Member States, the powers that they have continued to exercise in various fields, such as taxation, investment or migration. Since the Union institutional system does not provide for an *a priori* compatibility assessment of envisaged agreements of the Member States with the EU Treaties,[6] whereas the infringement procedure operates only *ex post*, conflicts between their obligations arising under Union law and those resulting from their international commitments leave them with the discretion of a choice 'between the Scylla of liability under the [EU Treaties] and the Charybdis of international responsibility for breach of contract.'[7] Confining private enforcement of Union only to internal acts of the Member States would thus allow them to escape a great deal of Union obligations through an action pursued in the realm of international law.[8]

Yet, compared to the well-established and abundant case-law of the European Court of Justice concerning the duties that national courts have in case of conflicting national provisions, there has been hardly any jurisprudence on the application of these tools to the conflicting international commitments. It is only in the recently delivered judgment in *HF*, that the Court has for the first time explicitly instructed the national court to disapply conflicting provisions of an agreement concluded by a Member State with a third country without waiting for that Member State to renegotiate that agreement.[9]

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[1] Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 American Journal of International Law 1, 5–6; G Federico Mancini, 'The Making of a Constitution for Europe' [1989] CML Rev 595, 603.

[2] Andrew C Evans, 'The Enforcement Procedure of Article 169 EEC: Commission Discretion' (1979) 4 EL Rev 442, 443 (contrasting the infringement procedure with 'traditional international law', under which 'the enforcement of treaty obligations is a matter to be settled mongs the Contracting Parties themselves').

[3] Sacha Prechal, 'Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union', *The Fundamentals of EU Law Revisited. Assessing the Impact of the Constitutional Debate* (OUP 2007); Michael Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation*, vol 4 (Hart Publishing 2004).

[4] Joseph HH Weiler, 'The Transformation of Europe' [1991] The Yale Law Journal 2403, 2412–13 (famously referring to this evolution as 'the closure of selective Exit').

[5] Private enforcement is understood here as a model of enforcement, in which private parties bring actions before national courts in order to ensure the observance of Union law. For this understanding of private enforcement, see Folkert Wilman, 'Private Enforcement of EU Law before National Courts: The EU Legislative Framework', *Private Enforcement of EU Law Before National Courts* (Edward Elgar Publishing 2015) 4; Tobias Lock, 'Is Private Enforcement of EU Law through State Liability a Myth? An Assessment 20 Years after *Francovich*' (2012) 49 CML Rev 1675. For a narrower conceptualisation of private enforcement confined to the enforcement of EU private law, see Olha O. Cherednychenko, 'Private Enforcement of EU Law' in Miroslava Scholten (ed), *Research handbook on the enforcement of EU law* (Edward Elgar Publishing 2023).

[6] Such a preventive institutional mechanism is established under Article 103 of the Euroatom Treaty.

[7] Robert Schütze, 'EC Law and International Agreements of the Member States—an Ambivalent Relationship?' (2007) 9 CYELS 387, 437.

[8] Bruno De Witte, 'An Undivided Union? Differentiated Integration in Post-Brexit Times' (2018) 55 CML Rev 227, 243.

[9] Case C-435/22 PPU *HF* [2022] EU:C:2022:852 para 110.

Against this background, the objective of this working paper is to examine how and to what extent private enforcement tools may apply to international commitments of the Member States. To that end, the paper will first look at the applicability of the principle of primacy of Union law over international agreements of the Member States, while distinguishing between agreements concluded by the Member States *inter se*, and those with third countries (section 2). The analysis will then proceed with the examination of the extent to which private individuals may enforce Union law in domestic legal orders against conflicting international commitments of the Member States through the doctrines of consistent interpretation (section 3), disapplication (section 4) and State liability (section 5). The final part will conclude (section 6). In so doing, this paper hopes to contribute to the vast literature on private enforcement of EU law, by looking at the less explored aspect of international commitments of the Member States.

II. Primacy of Union law and external actions of the Member States

A. Primacy over inter se *international agreements*

It is often assumed that the principle of primacy of Union law has been developed in *Costa v. Enel* delivered in 1964.[10] As is well known, the Court distinguished in this judgment the EEC Treaty from 'ordinary international treaties' and considered that its terms and spirit 'make it impossible' for the Member States 'to accord precedence to a unilateral and subsequent measure' over Union law.[11] Yet, a closer look at the body of Court's case-law reveals that certain developments of the principle of primacy occurred even before the delivery of that judgment.[12] In so far as the primacy of Union over Member States' international agreements is concerned, this notably includes the decision delivered two years earlier in *Geneva Agreements*. In that case, the Court of Justice found that 'in matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded by Member States before its entry into force', with the result that Italy could no longer introduce a new custom charge on intra-Union imports contrary to Article 12 EEC, even if that charge was arguably permitted under an agreement concluded within the framework of the GATT prior to the establishment of the EEC.[13] Similarly, in *Matteucci*, the Court of Justice indicated that the scholarship scheme established by the 1956 bilateral convention between Belgium and Germany, which reserved the award of scholarships to nationals of these two Member States, must have been extended to Union workers established in their territory in order to respect the free movement of workers under Article 45 TFEU, as given specific expression in Article 7 of Regulation No 1612/68.[14]

Although already in both of these judgements the Court appeared to place Union law as hierarchically superior to international agreements of the Member States, its reasoning could still be explained under the principle *lex posterior derogat legi priori* recognised under the law of treaties, according to which in a situation of successive treaties with identical parties, the later agreement in time prevails to the extent it contains a norm incompatible with the earlier treaty.[15] However, in its subsequent case-law, the Court has explained that the *lex posterior* principle could not apply in order to give precedence to international agreements concluded by the Member States *inter se after* the establishment of the EEC. On the contrary, in *Exportur*, the Court established that the intellectual property protection offered by the 1973 Franco-Spanish convention on designation of origin amounted to a *prima facie* restriction to the free movement of goods.[16] Similarly, in *de Groot*, the Court considered that certain double taxation conventions, which the Netherlands concluded with other Member States after the establishment of the EEC, were contrary to the free movement of workers under

[10] For this view, see eg Monica Claes, 'The Primacy of EU Law in European and National Law' in Anthony Arnull and Damian Chalmers, *The Oxford Handbook of European Union Law*, vol 178 (OUP 2015) 178.
[11] Case 6/64 *Costa v ENEL* [1964] EU:C:1964:66 593–594.
[12] See further Amadeo Arena, 'The Twin Doctrines of Primacy and Pre-Emption' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law*, vol I (OUP 2018) 302–303.
[13] Case 10/61 *Commission v Italy (Geneva Agreements)* [1962] EU:C:1968:51 10–11.
[14] Case 235/87 *Matteucci* [1988] EU:C:1988:460 para 16.
[15] For this view, see Jan Klabbers, *Treaty Conflict and the European Union* (CUP 2009) 123. This principle *lex posterior* is now codified in Article 30(3) and (4) VCLT, according to which as between States which are parties to both treaties, 'the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty'.
[16] Case C-3/91 *Exportur* [1992] EU:C:1992:420 para 20 (while eventually accepting that it could be justified on the ground of 'the protection of industrial and commercial property' under Article 36 TFEU).

Article 45 TFEU, since they did not ensure that all personal and family circumstances of taxpayers who had exercised their free movement rights would be duly taken into account.[17] In so holding, the Court of Justice distanced itself from the paradigm of public international law and signalled that Union law takes precedence over all agreements concluded by the Member States *inter se*.

B. Primacy over international agreements with third countries

The principle of primacy of Union does also, in principle, extend to agreements concluded by the Member States with third countries. Yet, given the problems that this may produce for the international responsibility of the Member States, the Court of Justice has initially refrained from endorsing that view explicitly. Instead, in *ERTA*, it has held that 'to the extent to which [Union] rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of [Union] institutions, assume obligations which might affect those rules or alter their scope'.[18] It has been argued that the threshold for the satisfaction of *ERTA* exclusivity (as developed in subsequent jurisprudence and now codified under Article 3(2) TFEU) is lower than the classic legislative pre-emption.[19] In so doing, the Court opted for pre-emptively depriving the Member States from their external competence based on Union internal rules rather than applying a conflict resolution mechanism based on the principle of primacy, thereby avoiding triggering their international responsibility with respect to third parties for non-performance of their obligations.[20]

Nevertheless, in parallel to the development of *ERTA* exclusivity, the Court of Justice has begun to examine substantive compatibility of agreements that the Member States concluded with third countries with Union law, in particular when Union legislation was adopted *after* the Member State concluded that agreement. This was most clearly visible in the procedural setting of the infringement proceedings,[21] but some examples may be also found in judgments delivered in the context of preliminary references. For instance, in *Arbelaiz-Emazabel*, the Court dealt with enforceability against Spanish nationals of conservation measures laid down in Regulation No 2160/77 of 30 September 1977. While the General Agreement on Fishing concluded in 1967 between France and Spain (at that time third country) provided a permanent right to fish in the area between 6 and 12 miles off the Atlantic coast of France, Regulation No 2160/77 restricted the rights of Spanish fishing vessels, by fixing quotas and requiring licenses. This regulation was adopted pending the conclusion by the Union of the fishing agreements with third countries, including one with Spain that the Union eventually concluded in 1981 (with a provisional application from 15 April 1980). Although this agreement had not yet been applicable *ratione temporis* to the dispute in the main proceedings, the Court found that the 'relations' between the Union and Spain as developed by the conclusion of the Fisheries Agreement and the adoption of Regulation No 2160/77, 'replaced the prior international obligations existing between certain Member States, such as France, and Spain', with the result that 'Spanish fishermen may not rely on prior international agreements between France and Spain in order to prevent the application of the interim regulations adopted by the [Union] in the event of any incompatibility between the two categories of provisions'.[22]

While efforts have been made to read the Court's reasoning through the lens of international law of treaties (albeit, arguably, incorrectly applied in that case),[23] a better explanation seems to be that already in those early

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[17] Case C-385/00 *de Groot* [2002] EU:C:2002:750 paras 101–102.
[18] Case 22/70 *Commission v Council (ERTA)* [1971] EU:C:1971:32 para 22.
[19] Koen Lenaerts, 'Les Répercussions Des Compétences de La Communauté Européenne Sur Les Compétences Externes Des Etats Membres et La Question de "Preemption"' in Paul Demaret (ed), *Relations extérieures de la Communauté européenne et marché intérieur : aspects juridiques et fonctionnels* (Story Scientia 1988) 59 ('face à une action interne de la part de la Communauté, la compétence étatique externe se perd plus facilement que la compétence étatique interne ayant le même objet matériel'); Amadeo Arena, 'Exercise of EU Competences and Pre-Emption of Member States' Powers in the Internal and the External Sphere: Towards "Grand Unification"?' (2016) 35 YEL 28, 102 ('the analysis of the ECJ pre-emption jurisprudence seems to suggest that the pre-emptive effects of EU legislation are broader in the external sphere than in the internal one').
[20] Geert De Baere, *Constitutional Principles of EU External Relations* (OUP 2008) 43.
[21] See eg Case C-62/98 *Commission v Portugal* [2000] EU:C:2000:358; Case C-467/98 *Commission v Denmark (Open Skies)* [2002] EU:C:2002:625.
[22] Case 181/80 *Arbelaiz-Emazabel* [1981] EU:C:1981:295 paras 30–31.
[23] Robin Churchill and Nigel Foster, 'European Community Law and Prior Treaty Obligations of Member States: The Spanish Fishermen's Cases' (1987) 36 International and Comparative Law Quarterly 504, paras 514-518 (examining

years of the development of Union law, the Court appeared to implicitly endorse the view that Union secondary legislation takes precedence over an international agreement concluded by the Member State with a third country. This interpretation is corroborated by several subsequent judgments, where the Court proceeded to a *de facto* compatibility assessment between such an agreement and Union law, stemming from the Treaties,[24] secondary legislation[25] or an international agreement concluded by the Union.[26] In other words, rather than following the paradigm of public international law according to which the EU Treaties (concluded and ratified by the Member States) are in a horizontal relation to their *other* international agreements,[27] the Court of Justice appeared to subordinate these agreements vertically to the entirety of Union law. [28]

This was eventually univocally confirmed in *HF*. That case concerned the extradition of a Serbian national by the German authorities to the United States of America, pursuant to the 1978 Germany–USA Extradition Treaty. However, this third country national was already convicted by a final judgment in Slovenia for the same acts as those referred in the extradition request and had served its sentence. Although pursuant Article 8 of the German-USA Extradition Treaty the extradition to the US was not to be granted when the requested person had been tried and punished in Germany, the prohibition of double jeopardy did not extend to decisions handed down in the other Member States. Germany was thus obliged to extradite the person concerned pursuant to the extradition agreement notwithstanding the final conviction in Slovenia. However, from the perspective of Union law, such extradition would conflict with Article 54 of the Schengen Convention, read in conjunction with Article 50 of the Charter, according to which the principle *ne bis in idem* extends to final conviction handed down in *any* of the Member States, including Slovenia. In that context, the Court of Justice referred to the principle of primacy and held that an undertaking to extradite laid down in the Germany-USA treaty 'cannot take precedence over the obligations arising from … the provisions of EU law … from their entry into force'.[29]

However, the extension of the principle of primacy to agreements concluded with third countries does encounter a limit. According to Article 351(1) TFEU, agreements concluded by the Member States before their accession to the Union (or before 1 January 1958) 'shall not be affected by the provisions of the Treaties'. The Court has long held that the purpose of this provision is to make clear, in line with the principle *pacta tertiis nec nocent nec prosunt*, as currently codified under Article 30(4)(b) VCLT, that the application of the Treaties does not affect the duty of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations thereunder.[30] Consequently, to have recourse to that provision, a Member State must prove that the performance of a conflicting international commitment may still be required by a third country under international law.[31] By the same token, where a treaty allows a Member State to adopt a measure that may be incompatible with Union law, but does not require it to do so, the Member State ought to abstain from taking such a measure.[32] Lastly, although the Court has admitted that Article 351 TFEU provides for a 'derogation' from the principle of primacy of Union law,[33] the latter stemming from provisions

several theoretical possibilities under public international law for replacing the 1967 Franco-Spanish agreement and substituting it with the 1981 EC-Spain agreement before the latter was provisionally applied, while concluding that none of them seems convincing).

[24] Case C-55/00 *Gottardo* [2002] EU:C:2002:16 (concerning the compatibility of the 1962 Italo-Switzerland social security convention with the free movement of workers under Article 45 TFEU).

[25] Case C-533/08 *TNT Express* [2010] EU:C:2010:243 (concerning the compatibility of the 1956 Convention on the Contract for the International Carriage of Goods by Road (as amended in 1978) with the Bussels I Regulation).

[26] Case 241/14 *Bukovansky* [2015] EU:C:2015:766 (concerning the compatibility of the 1971 German-Swiss double taxation convention with the 1999 EC-Switzerland Agreement on the Free Movement of Persons).

[27] From that perspective, any conflict between the EU Treaties and other international agreements would need to be resolved on the basis of international law of treaties. See, in particular, VCLT, art 30 (governing treaty conflicts) and arts 39-41 (governing amendments and modifications to multilateral treaties).

[28] Klabbers (n 15) 176 (suggesting that a conflict between EC law and Member States' agreements should be viewed as a 'conflict between international law and something that come perilously close to domestic law', rather than a typical treaty conflict); Allan Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (2010) 34 Fordham International Law Journal 1304, 1310 (observing that 'all norms of EU law … have primacy of over the national laws of the Member States' and that '[a]greements concluded by EU Member States but not by the Union … form in principle, part of the national law of the Member States that have concluded them').

[29] *HF* (n 9) paras 108 and 111.

[30] *Commission v Portugal (Angola)* (n 21) para 44.

[31] Case C-216/01 *Budějovický Budvar I* [2003] EU:C:2003:618 para 146.

[32] Case C-277/10 *Luksan* [2012] EU:C:2012:65 para 62; Case C-227/23 *Kwantum* [2024] EU:C:2024:914 para 86.

[33] Case C-516/22 *Commission v UK (ICSID Convention)* [2024] EU:C:2024:231 para 79 (holding that Article 351 TFEU 'makes it possible … to derogate from the principle of primacy of EU law'). See also, already, Arena (n 12) 318

of either secondary or primary law, it has also urged that in no way may it permit an exception from 'the very foundations of [Union] legal order', including the protection of fundamental rights.[34] Nor may this provision be invoked by the Member States to justify their involvement in the renegotiation or termination of their prior agreements, if the Union has 'functionally' succeeded thereto.[35]

In *HF*, the Court of Justice had also put an end to a long-lasting debate on the scope *ratione temporis* of Article 351(1) TFEU.[36] As explained above, the contested international commitment at issue in that case was laid down in the Germany-USA extradition agreement, which entered into force in 1980, that is before the conclusion of the Schengen Agreement in 1985 and of the Schengen Convention in 1990, and, *a fortiori*, before the entry into force in 1999 of the Treaty of Amsterdam, which incorporated the Schengen acquis into the Union framework. Thus, given the fact that when concluding the Germany-USA Extradition Treaty, Germany could not have foreseen that judicial cooperation in criminal matters would be incorporated in the Union's fields of competence, AG Collins argued for the assimilation of this agreement to a Member State agreement concluded before its accession to the Union, as referred to in Article 351(1) TFEU.[37] Yet, the Court of Justice rejected this suggestion. It held that this provision must be interpreted strictly and may apply only – as its wording indicates – to agreements concluded before 1 January 1958 or, in the case of acceding States, before the date of their accession.[38] In so holding, the Court gave a narrow interpretation to this derogation from the principle of primacy.

It is only if all these conditions are fulfilled, that the operation of the principle of primacy may be 'suspended',[39] with the consequence that the Member States are allowed to 'set aside' its Union law obligations in favour of its prior international commitments,[40] without infringing the Treaties.[41] Still, however, this derogation is of a temporary nature in so far as Article 351(2) TFEU requires the Member States to take all appropriate steps to eliminate the incompatibilities established between their prior international agreements and Union law. When the renegotiation of a prior international agreement in order to bring it into conformity with Union law proves impossible, the appropriate steps for the elimination of an incompatibility may include denunciation of the agreement in question, if this is possible under international law.[42]

Having examined the extent to which the principle of primacy of Union law applies to international agreements of the Member States, the following sections will discuss how and to what extent individuals may enforce Union law against conflicting international commitments of the Member States in their domestic legal orders.

III. Consistent interpretation

According to the well-established case-law, national courts (and national administrative authorities) are placed under a duty to interpret national law as far as possible in conformity with Union law in order to avoid conflicts

(suggesting that 'the principle of primacy cannot, by definition, be regarded as "absolute"'); Mary Dobbs, 'Sovereignty, Article 4 (2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?' (2014) 33 YEL 298, 306 (pointing out to derogations that 'act as limitations on the application of primacy').

[34] Joined Cases C-402/05 P and C-415/05 P *Kadi I* [2008] EU:C:2008:461 paras 303–304.

[35] Opinion 2/15 *Singapore FTA* [2017] EU:C:2017:376 para 254.

[36] See further Luca Pantaleo, 'The Court of Justice Finally Rules on the Analogical Application of Art. 351 TFEU: End of the Story?' (2022) 7 European Papers 1005.

[37] Case C-435/22 PPU *HF* [2022] EU:C:2022:852, Opinion of AG Collins paras 73–74.

[38] *HF* (n 9) paras 120–122 and 126.

[39] Schütze (n 7) 391.

[40] Inge Govaere, 'Interconnecting Legal Systems and the Autonomous EU Legal Order: A Balloon Dynamic' in Inge Govaere and Sacha Garben (eds), *The interface between EU and international law: contemporary reflections*, vol 89 (Hart Publishing 2019) 37.

[41] Case C-124/95 *Centro-Com* [1997] EU:C:1997:8 para 59 (mentioning that as a result of the successful application of Article 351(1) TFEU, 'a [Union] rule may be deprived of effect by an earlier international agreement'); Case C-203/03 *Commission v Austria (ILO Convention No 45)* [1995] EU:C:2005:76 para 64 (holding that 'by maintaining in force national provisions [implementing the prior international agreement at issue], the Republic of Austria has not failed to fulfil its obligations under Community law.').

[42] *Commission v Portugal (Angola)* (n 21) para 49; *Commission v Austria (ILO Convention No 45)* (n 41) para 63 (considering that Austria did not fail to observe Article 351(2) TFEU by having regard to Article 7 of the ILO Convention No 45, which provides the opportunity to denounce that convention only every ten years).

between the two legal orders.[43] In so far as the consistent interpretation of Member States' international agreements is concerned, the Court has initially alluded to this obligation in the context of Article 351 TFEU. Since in accordance with the second paragraph of this provision, the Member States are required to take all appropriate steps to eliminate the incompatibility between their 'prior' agreements and the Treaty, national courts were put under an obligation to examine whether potential incompatibilities could be avoided by interpreting these agreements, to the extent possible and in compliance with international law, in such a way that it is compatible with Union law.[44] Although this holding concerned 'prior' international agreements, there is nothing to prevent the application of the obligation of consistent interpretation equally to Member States' agreements concluded after their accession to the Union, to which the Court also alluded recently in *HF*.[45] Importantly, it is an international agreement of the Member State that must be interpreted in light of Union law and not vice versa.[46]

It must be emphasised that the Court has consistently held that the interpretation of national law falls within the jurisdiction of the national court, which is under the duty to interpret national law in the light of Union law, only 'in so far as it is given discretion to do so under national law',[47] while limiting itself 'the application of interpretative methods recognised by national law'.[48] At times, however, the Court of Justice went a step further, by requiring national courts to change their established case-law[49] or even by prescribing the result that the national court should reach through the consistent interpretation of national law.[50]

In a similar vein, the international agreements of the Member States also fall within the jurisdiction of national courts, with the consequence that the Court of Justice has so far adopted a rather deferential approach, refraining from suggesting possible interpretations of those agreements in the framework of preliminary reference.[51] Moreover, rather than resorting to interpretative methods recognised by national law, these courts must follow interpretative methods recognised under international law, as now codified under Article 31(1) VCLT. According to this provision, '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. This may limit their ability to find an innovative reading of Member States' international agreements in order to avoid a conflict with Union law.

IV. Disapplication of conflicting provisions

If it is not possible to interpret national law in conformity with Union law, the national courts (and national administrative authorities) are obliged to give full effect to the requirements of that law, by disapplying, if necessary, of its own motion any national legislation contrary to a provision of Union law, without awaiting the prior setting aside of such national legislation by legislative or other constitutional means,[52] provided that

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[43] Case C-53/10 *Mücksch* [2011] EU:C:2011:585 para 29 (extending this duty to public local authorities).
[44] *Budějovický Budvar I* (n 31) para 169.
[45] *HF* (n 9) paras 107–108.
[46] Case C-395/23 *Anikovi* [2025] EU:C:2025:142 para 59.
[47] Case 14/83 *Von Colson* [1984] EU:C:1984:153 para 28.
[48] Joined Cases C-397/01 and C-403/01 *Pfeiffer* [2004] EU:C:2004:584 para 116. But see Sacha Prechal, *Directives in EC Law* (2nd edn, 2005) 203 (arguing that 'the doctrine of consistent interpretation may go in the direction of requiring national courts to stretch the boundaries of what is considered, under their national law, as a matter of judicial function').
[49] Case C-441/14 *Dansk Industri* [2016] EU:C:2016:278 para 33.
[50] Case C-109/89 *Marleasing* [1988] EU:C:1990:395 para 9 (holding that the requirement of the consistent interpretation 'precludes the interpretation of provisions of national law relating to public limited companies in such a manner that the nullity of a public limited company may be ordered on grounds other than those exhaustively listed in Article 11 of the directive in question'); Case 105/03 *Pupino* [2005] EU:C:2005:386 para 48 (suggesting that an interpretation of the national law in conformity with Union law seems possible).
[51] See eg *Centro-Com* (n 41) paras 58-59 (insisting that it is up to the referring court to examine whether the contested national decisions were necessary for the fulfilment of the UK's obligations under the Charter of the United Nations). But see *Budějovický Budvar I* (n 31) paras 149-167 (offering a detailed analysis of the theory of State succession in public international law, with an aim of determining whether the Check Republic could continue to require the performance of Austria's obligations assumed under the 1976 agreement concluded between Austria and Czechoslovakia, following the latter's dissolution in 1993).
[52] Case 106/77 *Simmenthal II* [1978] EU:C:1978:49 para 21; Case C-103/88 *Fratelli Costanzo* [1989] EU:C:1989:256 para 31 (extending the duty of disapplication to national administrative authorities).

the conflicting provision of Union law is directly effective.[53] Furthermore, in a specific case of observance of the principle of equality, national court must apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category.[54] In the context of international agreements, this means that the national courts must disapply provisions of Member States' international agreements contrary to Union law or extend the applicability of the benefits granted by these agreements to the disadvantaged group without awaiting this Member State to renegotiate that agreement. Illustrations of the obligations to extend the regime may be found in several early cases addressing the compatibility of the Member States' international agreements with the fundamental freedoms of movement in the EU international market. In *Matteucci* for instance, the Court held that Article 7 of Regulation No 1612/68 precluded the Belgian authorities from denying an Italian worker residing in Belgium a scholarship awarded under the Cultural Agreement between Belgium and Germany, solely on the ground that the worker did not hold the nationality of either contracting Member State.[55] Similarly, in *Gottardo*, the Court required the Italian social security authorities, 'pursuant to their [Union] obligations under [Article 45 TFEU]', to take into account periods of insurance completed by a French worker in Switzerland, in the same manner as they would for an Italian worker under the Italo-Swiss social security convention.[56]

Regarding the duty to disapply conflicting national provisions of an international agreement, the Court has for the first time explicitly referred to that obligation in *HF.* Having established a conflict the Germany-USA Extradition Treaty and the principle *ne bis in idem*, as enshrined in Article 54 of the CISA and Article 50 of the Charter, it held:

> it is for the referring court to ensure the full effect of Article 54 of the CISA and Article 50 of the Charter in the main proceedings, *by disapplying*, of its own motion, any provision of the Germany-USA Extradition Treaty which proves to be incompatible with the principle *ne bis in idem* enshrined in those articles, *without having to wait for the Federal Republic of Germany to renegotiate that treaty*.[57]

While this generally mirrors the obligations of national courts in situations of conflicting provisions of national (internal) law, in the context of international agreements, in its previous case-law, the Court had nonetheless recognised that the duty to give full effect to the requirements of Union law may have certain limits when applied to international agreements of the Member States. In particular, in the context of conflicts with the fundamental freedoms of movement, the Court accepted that the national court is not obliged to multilateralise the benefits that an agreement reserves to nationals of a Member State, if this extension would disturb 'the balance and reciprocity' of an international agreement, by affecting the rights of third countries parties to that agreement or imposing new obligations on them.[58] While some scholars have seen this as a recognition of a 'mandatory requirement' capable of justifying restrictions to the fundamental freedoms of movement,[59] a view suggested here is that this may be better understood as a limitation to private enforcement of Union law before national courts. It may be recalled that also in the internal sphere, on several occasions already, the Court has recognised that the national court is relieved from the duty of disapplication, where the disapplication would undermine some other competing values,[60] such as legal certainty,[61] environmental protection[62] or respect for fundamental rights guaranteed by Union law.[63] Yet, although a national court may be relieved from this obligation in certain circumstances, this does not liberate the national legislature from repealing conflicting

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[53] Case C-573/17 *Popławski II* [2019] EU:C:2019:530 paras 61–62.
[54] Case C-406/15 *Milkova* [2017] EU:C:2017:198 paras 66–67.
[55] *Matteucci* (n 14) para 23.
[56] *Gottardo* (n 24) para 39. See also Case C-307/97 *Saint-Gobain* [1999] EU:C:1999:438 paras 58-59 (holding that the principle of national treatment under the freedom of establishment requires 'an unilateral extension' of the advantages provided under the German-Switzerland double taxation convention to permanent establishments in Germany of non-resident companies having their seat in another Member State).
[57] ibid para 110 (emphasis added).
[58] *Saint-Gobain* (n 56) para 59; *Gottardo* (n 24) para 36.
[59] Schütze (n 7) 429; Marise Cremona, 'Defining the Community Interest: The Duties of Cooperation and Compliance' in Marise Cremona and Bruno de Witte (eds), *EU foreign relations law: Constitutional fundamentals* (Hart Publishing 2008) 137.
[60] On this problem, see further Michael Dougan, 'Primacy and the Remedy of Disapplication' (2019) 56 CML Rev 1459.
[61] Case C-409/06 *Winner Wetten* [2010] EU:C:2010:503 para 67.
[62] Case C-41/11 *Inter-Environnement Wallonie* [2012] EU:C:2012:103 para 58; Case C-379/15 *Association France Nature Environnement* [2016] EU:C:2016:603 para 34.
[63] Case C-752/18 *Deutsche Umwelthilfe* [2019] EU:C:2019:1114 para 43.

national provisions.[64] By analogy, even if a judicial extension of benefits provided in an agreement with a third country was not required due to its undesirable consequence of disrupting the balance and reciprocity of an agreement, this should not exempt the Member State from its duty to renegotiate the agreement in question in order to bring it in conformity with Union law. A failure to do so may still give rise to the infringement proceedings.[65]

As has been mentioned, the duty to give full effect to the requirements of Union law arises only in situations where a provision of Union law, with which an international agreement comes into a conflict, is directly effective. To be recognised as such, a provision must be 'clear and unconditional and not contingent on any discretionary implementing measure'.[66] Although the conditions for the recognition of the direct effect has been subject to abundant case-law of the Court, a controversy has still remained as to whether the recognition of a direct effect in Union law is limited to its narrower, subjective dimension (requiring the conferral of individual rights),[67] or it follows a broader, objective conceptualisation (encompassing all norms that are justiciable).[68]

This question is of vital importance for the enforcement of Union law provisions governing the division of external competences between the Union and its Member States, which clearly do not aim to confer individual rights, but that are nonetheless capable of being adjudicated by national courts. While clearer case-law is still awaited on that matter, some of the existing Court's decisions suggest that national courts must disapply provisions of international agreements concluded in disregard of Union exclusive competence. For instance, in a few old judgments concerning the *a priori* exclusive competence in the area of the conservation of marine biological resources, the Court considered that where criminal proceedings were brought by virtue of a national conservation measures adopted in violation of Union exclusive competence, a Member State may no longer ensure compliance with such national provisions.[69] Similarly, in *Green Network*, the Court of Justice alluded to the duty of disapplication of national provisions providing for the possibility of the conclusion of an international agreement in disregard of *ERTA* exclusivity under Article 3(2) TFEU.[70]

Conversely, when questioned on whether the duty of sincere cooperation under Article 4(3) TEU may produce a direct effect, the Court seemed to favour a narrower approach, by holding that while this provision obliges to comply with the strategies and action decided by the Union 'such an obligation is too imprecise to be capable of creating rights for individuals'.[71] When making this finding the Court referred to its judgment in *PFOS*, in which it declared that Sweden failed to observe obligations under the duty of loyal cooperation by dissociating itself from the Union strategy not to act, at least for the time being, within the framework of the Stockholm Convention.[72] This holding may have an unwarranted consequence of dispensing the national courts from the

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[64] Case C-42/17 *Taricco II* [2017] EU:C:2017:936 para 60 (holding that, although the national court may be relieved of the obligation to disapply conflicting national provisions where such disapplication would infringe the principle of legality, it nonetheless remains incumbent upon the national legislature to take the necessary steps to bring national law into conformity with Union law).

[65] *Commission v Denmark (Open Skies)* (n 21) para 134 (finding – in the framework of the infringement procedure – 'irrelevant that [clauses on the ownership and control of airlines] are intended to preserve the right of a non-member country to grant traffic rights in its airspace only on the basis of reciprocity').

[66] Case 44/84 *Hurd* [1986] EU:C:1986:2 para 47.

[67] For this view, see Koen Lenaerts and Tim Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 EL Rev 287, 310 (defining direct effect as 'the technique which allows individuals to enforce a subjective right').

[68] For this view, see Prechal, *Directives in EC Law* (n 48) 99 (observing that 'to equate the concept of direct effect with the creation of rights does not do justice to the diversity of the effects which directly effective provisions may produce'); Robert Schütze, *European Union Law* (OUP 2021) 161(noting that 'direct effect does not depend on a European norm granting a subjective right, but to the contrary, the subjective right is a result of a directly effective norm'); Daniele Gallo, 'Rethinking Direct Effect and Its Evolution: A Proposal' (2022) 1 European Law Open 576, 581 (arguing that 'direct effect … also reveals the capacity of an EU law provision to serve as a parameter of legality of national law, with exclusionary effects, regardless of the creation of a right stemming directly from the EU legal order).

[69] Case 269/80 *Tymen* [1981] EU:C:1981:303 para 16; Case 21/81 *Bout* [1982] EU:C:1982:47 para 11. See also Case 269/80 *Tymen* [1981] EU:C:1981:303, Opinion of AG Reischl 3102-3103 (referring to the national court's duty to disapply conflicting national provisions and arguing that 'it is irrelevant, contrary to the views of the United Kingdom, in the context of criminal proceedings whether the appropriate provision of [Union] law is capable of providing rights for individuals').

[70] Case C-66/13 *Green Network* [2014] EU:C:2014:2399 para 73.

[71] Case C-15/22 *Finanzamt G* [2023] EU:C:2023:636 para 58.

[72] Case C-246/07 *Commission v Sweden (PFOS)* [2010] EU:C:2010:203 paras 89–91.

duty of disapplication of those international agreements of the Member States, which they concluded with third countries notwithstanding the Council's mandate for the Commission to negotiate an agreement on behalf of the Union with the same countries and on the same subject-matter.[73]

V. State liability

Alongside the duties of consistent interpretation and disapplication, Union law also requires Member States to incur liability for damage caused to individuals as a result of breaches of Union law. In this regard, the Court has long held that 't[h]e full effectiveness of [Union] rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of [Union] law for which a Member State can be held responsible'.[74] Further case-law has clarified that the right to reparation arises upon the fulfilment of three cumulative conditions, namely that the rule of Union law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach and the loss sustained by an individual.[75] It is not necessary that the infringed provision of Union law is directly effective.[76] Drawing on the principles of international law, the Court has consistently held that the principle of State liability applies irrespective of the authority of the Member State whose act or omission was responsible for the breach, including individual officials[77] or courts of last instance.[78] In the light of this broad understanding of the concept of the 'State',[79] there is little doubt that the right to reparation is equally guaranteed in cases the breach of Union law results from the (non-)exercise by the Member States of their treaty-making powers. It must be noted nevertheless that the action for damages is only compensatory in nature, without guaranteeing that individual rights derived from Union law will be actually enforced.[80]

VI. Conclusions

The shift from a purely international to a constitutionalised Union legal order has entailed not only a transformation in the internal application of Union law, but also a profound reconfiguration of its relationship with the international commitments of the Member States. That transformation is underpinned by the principle of primacy, which now clearly extends beyond national internal measures to encompass international agreements concluded by the Member States. While Article 351(1) TFEU provides a derogation thereto, the case-law of the Court of Justice suggests that this derogation is of highly limited material and temporal scope.

Equally significant in this respect is the system of enforcement that transforms the material restraints imposed by Union law on the treaty-making powers of Member States from mere normative aspirations into binding legal obligations subject to effective judicial protection. Admittedly, public enforcement operates predominantly *ex post* through the infringement procedure, thereby offering

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[73] Case C-266/03 *Commission v Luxembourg (Inland Waterways)* [2005] EU:C:2005:341 (declaring that by concluding agreements with Czechoslovakia Romania and Poland despite the Council's decision authorising the Commission to negotiate a multilateral agreement with these countries on behalf of the Union, Luxembourg failed to fulfil its obligations under Article 4(3) TEU). See also Case C-433/03 *Commission v Germany (Inland Waterways)* [2005] EU:C:2005:462.

[74] Joined Cases C-6/90 and 9/90 *Francovich* [1991] EU:C:1991:428 para 33.

[75] Joined Cases C-46/93 and 48/93 *Brasserie du Pêcheur* [1996] EU:C:1996:79 para 51.

[76] For the comparison of conditions for the recognition of a direct effect and those giving right to a reparation, see Sacha Prechal, 'Member State Liability and Direct Effect: What's the Different after All' (2006) 17 European Business Law Review 299.

[77] *Deutsche Umwelthilfe* (n 63) para 55.

[78] Case C-224/01 *Köbler* [2003] EU:C:2003:513 para 34.

[79] See further Roy W Davis, 'Liability in Damages for a Breach of Community Law: Some Reflections on the Question of Who to Sue and the Concept of "the State"' (2006) 31 EL Rev 69.

[80] Michael Dougan, 'The Francovich Right to Reparation: Reshaping the Contours of Community Remedial Competence' (2000) 6 EPL 124.

Member States a certain political discretion in choosing between complying with Union law obligations or honouring their conflicting international commitments. However, this discretion is substantially curtailed by private enforcement, which enables individuals to invoke Union law before national courts, thereby impeding the application of incompatible international commitments undertaken by the Member States directly in their domestic legal orders. As demonstrated in this paper, private enforcement generally mirrors the structural logic of enforcement against internal national measures, offering remedies such as consistent interpretation, disapplication of conflicting provisions and State liability.

Yet, given the international legal order in which these commitments are situated, private enforcement of Union law against such conflicting commitments may encounter certain limits. In particular, consistent interpretation of Member States' international commitments in light of Union law must be carried out in accordance with interpretive methods recognised under public international law, which may curtail the powers of the national court to find an innovative reading of Member States' international agreements in order to avoid a conflict with Union law. Next, it has been argued that the duty of disapplication of international commitments does not arise when it would lead to the disturbance of the balance of reciprocity in an agreement between a Member State and a third country. Finally, it remains unclear whether provisions of Union law which govern the division of competences between the Union and its Member State may produce a direct effect, this being a condition for the duty of disapplication of contrary international commitments.

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