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Of birds and hedges: the role of primacy in invoking norms of EU law

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[Criminal Proceedings against Berlusconi \(C-387/02\) \[2005\] E.C.R. I-3565 \(ECJ\)](#)

[NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen \(26/62\) \[1963\] E.C.R. 1 \(ECJ\)](#)

[Criminal Proceedings against Pupino \(C-105/03\) \[2005\] E.C.R. I-5285 \(ECJ\)](#)

[Leon van Parys NV v Belgisch Interventie- en Restitutiebureau \(C377/02\) \[2005\] E.C.R. I-1465 \(ECJ\)](#)

**287 Over 40 years after Van Gend & Loos the doctrine about invoking norms of EU law is still not fully settled. In particular there is still a lively debate on the exact scope of the key concepts of primacy and direct effect. In the following article an attempt is made to further clarify these concepts and put them in a broader perspective that draws on both the rules for relying on EU law in national courts and the relationship between EU law and international law. It is argued that direct effect is a very powerful tool allowing individuals to enforce rights which are solely granted by EU law. It is submitted, however, that whenever the right sought is available in embryonic form in the legal order of the Member State there is usually no need to couch a claim in terms of direct effect. In particular, it is stressed that whenever the desired result can be obtained by setting aside the remaining obstacles in national law, this can be done on the basis of primacy, without there being need for the conditions for direct effect to be fulfilled and this irrespective of the nature of the procedure in the national court.*

Introduction

It may be surprising, but over 40 years after *Van Gend & Loos*¹ or *Costa v ENEL*² the debate on how and when individuals can invoke EU law has not abated. Quite to the contrary, in the last few years the ECJ has been presented with a string of cases exploring the limits of invocability of EU law. The apparent divergence in approach between the submissions of the parties, the Opinions of the Advocates General and the eventual judgments of the Court, in recent cases such as *Pfeiffer*,³ *Berlusconi*,⁴ *Pupino*⁵ or *Van Parys*,⁶ demonstrates that this area of the law has not yet come to rest. It appears that the Court is still torn between various models, each with its own advantages and drawbacks.

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In what follows we will use those recent cases to formulate an approach that strengthens the possibilities for invoking EU norms. Unsurprisingly, a lot of attention will be devoted *288 to Directives. However, this essay also aims to demonstrate how the rules applicable to Directives are but applications of broader concepts of primacy and direct effect that apply to all instruments of EU law. The stakes are high. The rules on invoking EU law are at the core of EU constitutional law. Creating further unity in this crucial field is important for at least two reasons. On the one hand, we are confronted with more legal norms than ever, as gradually lawyers start to discover the instruments of the third⁷ and even second pillar.⁸ If we are to avoid too much divergence in the impact of such instruments, a more uniform approach seems welcome. On the other hand, there is a second, albeit related reason, namely the effectiveness of EU law. Until now the ECJ could afford to be somewhat fuzzy about the meaning of the term direct effect, a term which after all does not appear in the EC Treaty.⁹ However, now that the ECJ starts to get confronted with questions as to the effect of framework decisions, of which it is expressly said in Art.34 TEU that they shall not entail direct effect, the debate takes a new turn. Any theory about invoking EU law which stresses the role of direct effect therefore has the major side-effect of simultaneously limiting the role of third pillar instruments such as framework decisions and decisions in the legal order of the Member States. This is not a neutral choice. One may of course argue that the third pillar, and a fortiori the second pillar, are the realm of intergovernmental politics and that a limited possibility for individuals to rely on EU instruments is warranted, but this is a fallacy. First, the bulk of international law is intergovernmental in nature. Yet, this alone has never been a reason to deny that those instruments may have important consequences in the legal order of the Member States and even the European Community,¹⁰ consequences which can be brought about by individuals relying on these norms. If terrorists can rely on ordinary international treaties dealing with human rights or extradition,¹¹ there is no sensible reason to deny them the right to invoke the binding norms adopted by an ever closer union venturing in those admittedly politically charged fields. Moreover, as the case law shows, not only the fates of criminals or terrorists are at stake, but that of their victims, too.¹² Secondly, a liberal approach towards invoking EU law can be grounded in a vision about the rule of law.¹³ One of the basic rules of a legal order governed by the rule of law is the fact that the government itself is bound by the laws. The most effective way to ensure this is allowing every ordinary citizen to rely on the norms created by the states--not only against the state, but often also against his or her fellow citizens. A legal order stuffed with legal norms which promise a reality the citizen cannot enjoy in practice, *289 eventually loses all credibility. In these times of uncertainty about the way forward for the European Union, a more effective and result-oriented application of EU law may well help to restore faith in the *raison d'être* of the Union. A more uniform approach towards invoking EU norms may thus be a welcome step in strengthening the output legitimacy¹⁴ of the Union.

Primacy and direct effect

In the following paragraphs the various ways of invoking EU law will be examined on the basis of recent cases with a view to drawing a more coherent picture of the ways to invoke EU law. As indicated above, we will underplay the role of direct effect in this respect, which seems justified not only for the policy reasons set out above, but also because of that other iconic feature of EU law: primacy.

Our starting point is simple. Since the beginning of the case law, the EC legal order has a basic conflict rule, ¹⁵ called primacy: whenever a national rule conflicts with a rule of Community law the rule of Community law is to trump national law, irrespective of the status of that rule of national law in the national legal order and irrespective of whether the Community rule is one of primary or secondary law. The same principle applies in the second and third pillar as well. When the Constitution was adopted the Intergovernmental Conference appended a Declaration¹⁶ to the Constitution explaining that Art.I-6, which confirms that the principle of "primacy" applies to all Union law, does not mean anything new. After all, how could it have? The same reasons that led the Court in *Costa v ENEL*¹⁷ to proclaim the primacy of EC law are easily transposed

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to the EU legal order.¹⁸ The EU is similarly established for an indefinite period, and provided with its own organs (actually the same organs as the EC), and, in a functional sense, legal personality.¹⁹ Furthermore, the Union has practical competences, transferred to it by the Member States, allowing the Union to do such diverse things as adopting a *²⁹⁰ common definition of terrorism,²⁰ imposing sanctions against third states,²¹ helping out victims of crime²² and sending troops and policemen on peacekeeping missions across the Globe after concluding international treaties solely in the name of the Union.²³ As a corollary, it can thus be argued that in those areas the sovereignty of the Member States has been limited. From there it does not take much imagination to submit that the Member States have thus created a legal order which is binding upon them, even if no enforcement mechanism similar to Arts 226 to 228 TEC is available. Moreover, in light of the duty to abstain laid down in Art.11(2) TEU and the presence of the preliminary reference procedure in Art.35 TEU one would be hard pressed to deny that the drafters of the Treaty shared the concern that the executive force of EU law

“cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty”.²⁴

In essence this resonates with the considerations of the ECJ which read into the idea of an ever closer Union laid down in Art.1 TEU a basis for the concept of *Unionstreue*.²⁵ And accordingly, it also holds true that

“it follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as [EU] law and without the legal basis of the [Union] itself being called into question”.²⁶

One could think that only provisions of EU law enjoying direct effect could be awarded this type of precedence. In this view, only those provisions that are intended to confer rights on individuals and which are sufficiently clear, precise and unconditional could result in blocking the application of national law. This is however not a necessity, even though primacy and direct effect are not entirely unrelated.²⁷ It appears from *Costa* that the real concern is consistency²⁸ : to the extent that a national measure is inconsistent with EC law, it cannot be allowed to apply over EC law. But if we take consistency seriously, there is no need for identifying whether a provision confers rights on individuals. The only *²⁹¹ thing that matters is that EC law, and by extension EU law, puts forward an identifiable result which cannot be thwarted by incompatible national measures. This result may often involve granting rights to individuals, but may also involve an obligation on a government to create the conditions under which rights are granted to individuals, as will almost always be the case with Directives. Likewise the requirements of clarity, precision and unconditionality prove to be highly relative. When it comes to precedence the only question is whether a conflict can be identified. In principle,²⁹ if that is the case the conflicting provision of national law has to yield. This also means, however, that the exclusion only applies to the extent of the conflict.

All this changes, however, when EU law itself grants rights to individuals, which would otherwise not exist in the national legal order. At that stage, we are not merely concerned with removing inconsistencies from the legal order, but with actively imposing a particular burden on an identifiable debtor for the benefit of an identifiable creditor that would otherwise not exist. It is only then that direct effect comes into play. Direct effect in this narrow approach therefore is the very particular way of invoking a higher norm in order to enforce rights that were conferred upon the applicant by that norm and which would not otherwise have existed in the internal legal order. In those circumstances, it does not suffice to stop the application of inconsistent national law, as EU law must be put in place to fill the gaps in the national legal order. Then it does matter whether the norm relied upon was intended to confer rights upon individuals and whether it is sufficiently clear, precise and unconditional because, on the one hand, the norm identifies the object of the benefit claimed and the person who must provide the benefit and, on the other hand, the norm indicates when and

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under what conditions this right can be deemed to be created in the legal order allowing for the right to be claimed.

Distinctions along these lines are not novel. Several authors have made pleas for a renewed attention to the primacy of EU law³⁰ and for analysing the problem of invoking Community rights in a Hohfeldian analytical framework,³¹ resulting in a distinction between invocability of exclusion and invocability of substitution.³² This theory is moreover increasingly popular among the Advocates General. Foremost, there is the Opinion of Advocate General Léger in *Linster* where he introduces the distinction *292 between “*invocabilité d’exclusion*” and “*invocabilité de substitution*”,³³ following the lead of Advocate General Saggio in *Océano Grupo Editorial*.³⁴ Since then the approach has inspired others including Advocate General Ruiz-Jarabo Colomer³⁵ and Advocate General Kokott.³⁶ Even if the ECJ has never fully embraced these theories, it is submitted that the recent cases discussed below demonstrate that a distinction between substitution and exclusion is not incompatible with the core of the Court's case law. We build further on these views and apply them also outside the context of Directives in order to develop a more consistent theory of invocability which can apply to any norm of EU law.

Before doing this, it is appropriate to make one final preliminary remark. Virtually all of what has been said above in respect of how EU law affects the legal order of the various Member States can be mirrored in respect of the Union itself in its relation towards norms of international law. This is hardly surprising since Art.300 TEC and Art.24 TEU suggest the existence of a European Union which accepts a monist view of international law.³⁷ If this equivalence is true, however, then it should also be possible to make analogies between the approach of the ECJ in respect of the position of international law in the EU legal order and the position of EU law in the national legal orders. Seen from this perspective, it would appear odd if an ever closer Union, which as we know since *Van Gend & Loos*³⁸ is an autonomous legal order going beyond the demands of ordinary international law, in practice gave less effect to its legal norms internally than it accords to norms of international law.

Ways to invoke norms of EU law

A. Interpretation of internal norms in conformity with higher EU law or higher international law

The easiest way to dispel the myth that individuals can only invoke directly effective norms before a national court is by raising the issue of interpretation in conformity with the higher norm. Any instrument adopted by the EU institutions can be invoked by any of the parties before a national judge--or the Community judge--in order to influence the reading that is given to a particular internal norm. The judge in turn, is under an obligation to interpret all internal norms, as far as possible, in accordance with the higher norm.³⁹ From *Grimaldi* it follows that the higher norm does not even have to be binding.⁴⁰ Accordingly, it can come as no surprise that recently two different Advocates *293 General have suggested that an obligation exists for national judges to interpret the whole of national law in accordance with Directives, which are deemed to produce legal effects from the very day of their entry into force, and thus even before the end of the transitional period.⁴¹ In one of those cases, *Mangold*,⁴² the Court has however largely managed to circumvent this difficult question by first reaffirming the principle of *Vorwirkung* of Directives as laid down in *Inter-Environnement Wallonie*,⁴³ but thereafter focusing mainly on the general principle of EC law of non-discrimination, which of course is fully part and parcel of the EC legal order and can thus without doubt be invoked before the national judge, also in horizontal relations. Thus the ECJ largely avoided insisting that norms of national law must systematically be interpreted in conformity with a Directive before the end of the transitional period.⁴⁴

The obligation of consistent interpretation is grounded by the Court in the duty to co-operate in good faith,

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laid down in Art.10 TEC, which rests upon all national bodies. By doing so, the Court in *Pupino*⁴⁵ arguably had therefore some difficulties to apply the same doctrine in the third pillar, where no provision equivalent to Art.10 TEC could be found.⁴⁶ The Court eventually found the solution in deriving an obligation to cooperate in good faith from Art.1 TEU.⁴⁷ As a result, national law must also be interpreted in light of framework decisions. Actually, the Court could have avoided this frantic search for a ground for an equivalent provision, if it had recognised that the duty of consistent interpretation is inherent in any hierarchy of norms and thus a simple corollary of the principle of primacy in that it is the easiest way to ensure that no inconsistent national laws are applied over EU law.⁴⁸ In this way, the Court would at the same time have given a uniform foundation for the otherwise uncontested duty to interpret the internal legal order of the Community, i.e. both national law and Community law, in line with international law.⁴⁹

The power of a rigorously applied duty of consistent interpretation should not be underestimated as is demonstrated by the case of *Pfeiffer*.⁵⁰ At issue was the wellintended implementation of a Working Time Directive in Germany, which was however flawed as it erroneously contained an exception for ambulance drivers. On the basis of this *²⁹⁴ exception the German Red Cross had forced excessive hours on some of its ambulance drivers, who were now seeking a limitation of their working hours for the future and compensation for the past. To the extent that the ambulance drivers apparently had to rely directly on the Directive to enforce their claim, their case had become rather problematic. However, all problems would be solved if national law could be construed as to already require what the applicants tried to obtain. Instead of merely instructing the national judge to interpret his national law as far as possible in conformity with the Directive, the Court gives some additional hints. The first one is the explicit obligation to look beyond the national implementing measures to find a norm that could be interpreted to obtain the desired result and thus to look at the entirety of national law. This is particularly useful in two situations. First in the case that no implementing measures have been taken a national judge must still try to get as close as possible to the prescribed result on the basis of what is available. But secondly, this is also useful in the exact opposite case where there is a very detailed national implementing law, but it is defective in one of its details because it introduces an unwarranted exception. That was precisely the issue in *Pfeiffer*. And thus the Court gave a second hint as to how this could work. In a somewhat cryptic paragraph⁵¹ the ECJ instructs the national court to take advantage of any interpretative tool or any organising principle the national legal order may have in order to undo the effect of the exception.⁵² As will be argued below, a more direct solution could have been to simply require the exception to be set aside on the basis of the primacy of Community law. Yet, in all practical terms the same result is required from the national judge⁵³ by applying national principles in respect of the hierarchy of norms or national interpretative rules allowing for the neutralisation of the exception.

The question arises, however, whether there are any limits to this approach. The answer is a qualified yes. The message after *Pfeiffer*⁵⁴ is definitely about urging boldness on the part of the national judge. Yet, three limitations come to mind. First, it may be that the idea that the whole of national law must be read in light of a Directive from the day of entry into force of the Directive⁵⁵ may need some qualification in practice.⁵⁶ In particular, the issue may arise as to what happens if a Member State has a set of transitional measures in mind, which may temporarily seem to go against the Directive, but which should ultimately result in better compliance once the transitional period is *²⁹⁵ over. Imagine, for instance, that national trade practice law prohibits in general terms the sale of goods that constitute a health risk and that a Directive aims to outlaw the use of a certain chemical in paint in three years time. A Member State may well want to allow all current producers and merchants to clear their stocks, which may result in a temporary surge in the supply of paint with the contested ingredient, but will ensure that by the end of the transitional period all stocks have been cleared and fully in line with the Directive no dangerous paint is being sold. If, however, the national trade practice law is to be interpreted in line with the Directive before the end of the transitional period, it could be used immediately to act against the sale of these types of paint. In such circumstances, there will not only be an unnecessary financial burden for the undertakings involved, there will also be a major unsold stock

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that risks ending up in a parallel circuit, where it may be sold, albeit illegally, well after the end of the transitional period.

Secondly, there is no obligation for the national judge to do the impossible. In *Pfeiffer*,⁵⁷ the ECJ somehow looked over the shoulder of the national judge to set out the path, but at the end of the day it is the national judge who decides where to draw the line and thus how much “as far as possible” really is. As such, there is no obligation to interpret national law *contra legem*,⁵⁸ as the Court confirmed in *Pupino*,⁵⁹ but the EU legal order has no interest in preventing a national judge from doing so.⁶⁰ However, if the national legal order has the interpretative tools to overcome seemingly contrary provisions of national law, then the national judge must make good use of them.⁶¹

Thirdly, there is a distinct problem of legal certainty, which is most pressing in the case of the interpretation of criminal norms. A few years ago, the ECJ formulated the limits of consistent interpretation rather rigidly in *Arcaro* where it was said that

“However, that obligation of the national court to refer to the content of the Directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a Directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the Directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that Directive’s provisions”.⁶²

This statement could have been read as considerably limiting the application of consistent interpretation in cases where that would have been to the detriment of individuals.⁶³ However, outside the context of the definition of crimes, an area deserving special treatment in light of the legality principle laid down in Art.7 of the European Convention on Human Rights, not much of this is supported by the case law.⁶⁴ Three recent cases *296 serve to illustrate the point. In *Centrosteeel*⁶⁵ it could still be argued that the outcome of that case, namely that the defendant company had to pay its agent after all, did not amount to imposing on a private party one of the obligations of the Directive. The obligation to pay was actually the result of the free will of the parties who had concluded the agency contract and did not flow directly from the Directive. All the new interpretation of Italian law did was to close the loophole that would have made the contract void under national law despite meeting the requirements of the Directive.⁶⁶ However, after *Pfeiffer*⁶⁷ it is clear that the net result may well be the imposition of a burden directly related to the Directive. If the national judge in *Pfeiffer* is successful, the German Red Cross will have to pay overtime, where no such obligation seemed to exist before. Likewise, in a string of pending cases the solution put forward by the Advocates General will invariably result in making the contract more burdensome for the employers.

Furthermore, even in the criminal sphere the principle of consistent interpretation has its role to play as is evidenced by the recent case of *Pupino*.⁶⁸ Formally no new burden is being imposed in that case: the definition of child abuse is not affected by the interpretation of Italian law in conformity with the framework decision and there is no risk that Maria Pupino will be convicted because she violated a behavioural norm she could not have known in advance, nor will a heavier sentence be imposed if she were to be found guilty. But it is to be doubted whether she would agree that the result of consistent interpretation is not burdensome at all. What was at stake was the following: Pupino was said to have hit some of the schoolchildren in her care and was prosecuted for that. If Italian law alone had applied those children would have been brought into court, subjected to cross-examination by Pupino’s lawyers, possibly resulting in the children being too overwhelmed to be reliable witnesses. That could have been the end of the case of the prosecution. But then the framework decision is introduced. Italy had not provided for a special procedure for vulnerable witnesses in general, but with a bit of analogous interpretation a similar procedure for sex cases could be used to obtain the result sought by the framework decision. Thus, the children would be interviewed in a non-

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confrontational setting, probably answering more confidently to the questions asked. Admittedly, no obligation derived from the framework decision is being imposed on Pupino, but the effect of the consistent interpretation on the conduct of this criminal procedure is quite real. This is not to say that the Court was not concerned with the rights of defendants in such procedures. The judgment itself points explicitly to the need to ensure that

“assuming use of the Special Inquiry and of the special arrangements for the hearing of testimony under Italian law is possible in this case, bearing in mind the obligation to interpret national law in conformity with [the Framework Decision]--the application of those measures is not likely to make the criminal proceedings against *297 Mrs Pupino, considered as a whole, unfair within the meaning of Article 6 of the Convention, as interpreted by the European Court of Human Rights”.⁶⁹

This, however, should not conceal the fact that the whole point of interpreting national law in conformity with EU law in this case is to create procedural tools that would otherwise not exist and may affect the outcome of the proceedings without therefore making them unfair.

B. Use of the higher norm in the context of validity control

1. Direct judicial review

As argued above, the principle of primacy is about avoiding inconsistencies between national norms and EU norms,⁷⁰ or between EU norms and norms of international law. Every legal order has procedures in place where the key question is the validity of a certain norm in light of the hierarchy of norms. Even the Community with its highly under-developed hierarchy of norms⁷¹ has such a *contentieux objectif*, which is hardly surprising for a legal order whose court system was inspired in part by French administrative law. Accordingly, in the recent case about the protection of the term feta,⁷² none of the parties felt the need to consider whether the basic regulation conferred rights on individuals,⁷³ the sole issues being whether the Commission regulation limiting the use of the designation feta⁷⁴ was adopted in accordance with correct procedures and whether the regulation contradicted the basic conditions a protected designation of origin must meet.

Nobody would claim that Germany and Denmark were precluded from relying on the basic regulation to obtain judicial review of the contested Commission act, until they convinced the Court that the provisions of the basic regulation⁷⁵ they relied on were sufficiently clear, precise and unconditional. However, once it is generally accepted that in case of judicial review at Community level there is no need for direct effect, it becomes very difficult to argue that legality control in similar Member State procedures for judicial review is precluded if the norm of reference has no direct effect in the classic sense of being intended to confer rights on individuals and being, to that effect, sufficiently clear, precise and unconditional. And similarly, it becomes untenable to require direct effect if international law is used as the yardstick for the validity of a Community act.⁷⁶

*298 Addressing the international law issue first may help to put things in perspective. In the recent biotechnology case,⁷⁷ the ECJ explicitly rejected the submission that judicial review in light of the Convention on Biological Diversity⁷⁸ was impossible as the provisions of that treaty have no direct effect “in the sense that they do not create rights which individuals can rely on directly before the courts”.⁷⁹ Indeed, the sole concern for the Court was to assess whether the Directive complied with the obligations of the Community under that Convention. As long as an obligation can be identified, as long as a behavioural norm for the Community can be derived from an international agreement, this agreement can serve as a norm for reference when the validity of EC law is at stake. As a result the ECJ can also, even in the interest of individuals, assess the validity of Community law in the light of international custom, without having to wonder whether

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those customary norms create rights which individuals can rely on directly before the courts.⁸⁰

Admittedly, there still is the seemingly conflicting case law about the bulk of the rules relating to the WTO.⁸¹ However, this has hardly anything to do with the absence of direct effect. There is another lower limit for invoking a norm in light whereof the validity of a lower norm can be assessed. The norms used as yardstick for judicial review must be,

“having regard to their nature and structure, among the rules in the light of which the Court is to review the lawfulness of measures adopted by the Community institutions”.⁸²

It is tempting to put this in the mould of the classic conditions of direct effect, and argue that the WTO agreements are not intended to confer rights on individuals or are not clear, precise and unconditional. The latter does of course not make much sense as most *299 of the provisions of, for instance, the GATT are as clear, precise and unconditional as those of other agreements concluded by the Community, such as the EEA Agreement, the provisions of which may have direct effect.⁸³ The problem is not that the provisions are not intended to confer rights on individuals⁸⁴; it rather is that the Community as well as its major trade partners have indicated that they wanted to remain at liberty to negotiate a political solution for violations of the norms of WTO law. Accordingly,

“to accept that the role of ensuring that Community law complies with those rules devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners”.⁸⁵

In this sense the case law of the Court on the WTO is not an anomaly, the WTO agreements are anomalous. No judicial review is possible in the light of norms that are not meant to be binding as such upon the EU institution adopting the contested act. Admittedly, there is something wicked about the idea that there may be international agreements that have as their object norms as to which at the end of the day the basic rule *pacta sunt servanda* does not apply in full. But then again, soft law is nothing exceptional. Even if international agreements are undoubtedly binding on the entire Community and all its institutions, they are only binding to the limits of their own terms. If the terms of the WTO agreements or any other agreement are such that they ultimately allow for the Community to see them as political rather than legal commitments, then such agreements do not belong to the “rules in the light of which the Court is to review the lawfulness of measures adopted by the Community institutions”.⁸⁶

At the national level the same issue arises. Here, too, a distinction is to be made between those norms that are meant to be binding on the Member States and those that are not. Accordingly, even if national law must be interpreted as far as possible in light of a recommendation, its validity cannot be affected by it.⁸⁷ The question whether the instrument is intended to confer rights on individuals, however, is irrelevant. Once it is determined that the norm is intended to be binding on the government, what counts is whether an objective line of conduct for the national government can be discerned from the EU norm. Judicial review is then nothing other than comparing the national norm and the EU norm and finding out whether a conflict exists, even after an attempt has been made to interpret the national law in light of the EU norm.⁸⁸ If there is a conflict *300 the national measure is invalid, with all the consequences for both the government and any of its legal subjects that national law attaches to that.

And thus if in *Wells*⁸⁹ Ms Wells challenges the validity of a government issued permit to engage in mining operations, it does not matter whether the Directive at stake confers rights on her or not. What matters is that the Directive is binding on the government, and thus to the extent that a conflict can be found between the behaviour of the government and the line of conduct prescribed by the Directive its administrative act has to go. And yes there is also the unfortunate company that actually would have benefited from the permit, but is

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now left with nothing. Yet, basically, that is not because of the Directive as such. This is inherent in the concept of legality control.⁹⁰ In this sense the annulment has indeed adverse repercussions on the situation of third parties but without there being an obligation imposed on them⁹¹ --after all the obligation to follow a correct procedure is not primarily imposed on the mining company but on the administrative body granting the licence. The same would have occurred if the issuing authority had violated a norm of national law it must respect. The fact that the norm the authority is bound by is a Directive changes nothing in this respect, as all that matters is its binding force. One could even take the argument one step further: a refusal to give to binding norms of Community law the same effect during judicial review proceedings as binding norms of national law would amount to a breach of the principle of procedural equivalence.⁹²

This of course helps us to outline some of the limits of judicial review. Foremost, the norm must be meant to be binding on the authority taking the decision. The ECJ is for instance correct when it states in the recent case of *Rieser* that during the transitional period

“the Member States were required to refrain from taking any measures liable gravely to jeopardise the attainment of the result prescribed by Directive 1999/62 but that individuals could not rely on that Directive against the Member States before national courts in order to have a pre-existing national rule incompatible with the Directive disapplied”.⁹³

The Directive is only, so to speak, among the rules in the light of which a national court is to review the lawfulness of measures adopted by the Member State at the time the outcome is binding upon that state, i.e. after the end of the transitional period.⁹⁴ It is no coincidence that we mirror here the language of the WTO cases discussed above, as the main characteristic of those agreements is that they are ultimately not considered by the ECJ to be meant to be legally binding. Similarly, one could wonder about the status of the second and third pillar instruments. As to the third pillar, the answer is quite ***301** straightforward. In light of the express wording of Art.34(2) TEU there can be no doubt as to the binding force of decisions and framework decisions, at least not after a possible transitional period has ended. Accordingly, the fact that they do not have direct effect cannot prevent them from being among the rules in the light of which the validity of a national measure can be reviewed. In respect of the second pillar, the issue is less clear-cut. But here, too, the idea is still that common positions and joint actions are legally binding. There is admittedly no obligation for there to be a common foreign policy as to a certain issue. However, once the Member States, moreover usually unanimously, have taken such a common position or a joint action, these are binding.⁹⁵ The same moreover must be the case for the so-called Status of Force Agreements (“SOFA”), which the EU concludes under Art.24 TEU. The effective judicial protection of military personnel on an EU-mission in a third state would be greatly undermined if soldiers would be unable to rely on the SOFA to block the application of national measures that would limit the protection otherwise offered by the agreement.⁹⁶

The requirement that the act must be binding ought to be qualified in one important respect. Occasionally it happens that binding instruments explicitly refer to instruments that are otherwise not binding or indicate that they are intended to implement them. In those instances the ECJ has accepted that individuals can invoke the norms to which reference is made⁹⁷ or which are being implemented,⁹⁸ even if otherwise they would not be part of the rules in the light of which the Court is to review the lawfulness of measures adopted by the Community institutions. This case law has so far mainly been developed in the context of international agreements. In this way the ECJ must sometimes review the validity of Community law in light of treaties to which the Community is not formally a party,⁹⁹ or which because of their specific nature are not strictly binding.¹⁰⁰ However, there may be room for a novel application of the doctrine. Until now the ECJ has never pronounced itself on the status of the Charter of Fundamental Rights of the EU. So long as the Constitution has not been adopted, it is likely that the European Union will not have a fully binding fundamental rights catalogue of its own, despite attempts to make the Charter binding through Art.6 TEU.¹⁰¹ Yet, the institutions have taken up the habit ***302** of making reference to the Charter whenever there may be doubts as

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to whether an EU measure may affect fundamental rights.¹⁰² In those circumstances there is a strong case that the provisions of the Charter can be relied upon when the validity of either the legislation that contains the reference or its implementing measures is at stake.¹⁰³

2. Indirect judicial review

In the foregoing paragraphs the situation was envisaged of reliance on a norm of EU law in a national court during proceedings designed directly to challenge the validity of a norm of national law, whatever the nature of these proceedings: a procedure in an administrative court such as the French Conseil d'Etat¹⁰⁴; a constitutional review procedure like before the Belgian Cour d'Arbitrage¹⁰⁵; an administrative review procedure before the English High Court¹⁰⁶; or an anticipatory review procedure such as that at stake in *Omega Air*.¹⁰⁷ However, most national systems occasionally allow the parties to a dispute to raise issues of the validity of norms of national law in the course of other types of proceedings. The aim of such an indirect challenge is to ensure that a certain norm will not be applied to the dispute, thus potentially changing its outcome. In the following paragraphs it is argued that the type of national proceedings in which the validity of a norm of national law is called into question should not determine whether a norm of EU law can be used as a yardstick for judicial review. Accordingly, a norm of EU law should be able to be relied upon to the same effect in national proceedings which allow for indirect judicial review, also called incidental review, as in national proceedings for direct judicial review.

The Court has in the past given contradictory signals as to whether Community law can be raised between parties so as to have a certain piece of national legislation disapplied. The strongest statement against such an approach can be found in *Arcaro*, where it was stated

“that there is no method of procedure in Community law allowing the national court to eliminate national provisions contrary to a provision of a Directive which has not been transposed where that provision may not be relied upon before the national court”.¹⁰⁸

***303** However, not much can be derived from this statement. The context of the case was a criminal proceeding, so basically the national court was trying to get around existing Italian law at the request of the prosecutor, thus at the request of the Italian State. This has little to do with incidental review. The problem is not that Community law does not know a technique to set aside contrary provisions, even between individuals, as will appear below, but that in the context of a criminal proceeding the effect of the principle of primacy needs to yield to the legality principle of Art.7 ECHR. In case the definition of the crime is the subject of debate because national law and the unimplemented or badly implemented Directive impose different behavioural norms it is undoubtedly true that the Directive cannot as such be relied upon before the national court and be used to clear up the controversy, as it is precisely the existence of the two conflicting norms that is problematic from the perspective of Art.7 ECHR. This was recently reaffirmed in the case of *Berlusconi*.¹⁰⁹ The Advocate General had argued in favour of the thesis of the Italian prosecutors who wanted to use the Directive to set aside the changes to the Italian accounting legislation, which was originally a correct implementation of the Directive, even at the time of the facts for which Berlusconi was prosecuted, but which was subsequently altered with the effect of protecting the defendant.¹¹⁰ The ECJ does not follow the Advocate General. However, this should not be seen as a rejection of the primacy of EC law. Actually, in [72] of the judgment the Court recognises in so many words that the ordinary course of affairs would indeed have been for the national legislation to be set aside:

“Admittedly, should the national courts which made the references conclude, on the basis of the replies to be given by the Court, that the new Articles 2621 and 2622 of the Italian Civil Code do not, by reason of certain of their provisions, satisfy the Community law requirement that penalties be appropriate, it would follow, according to the Court's well-established case-law, that the national courts which made the references

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would be required to set aside, under their own authority, those new articles without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure”.¹¹¹

However, the Court parts company with the Advocate General on the impact of Art.7 ECHR. Even if there is no problem in this case of an unclear rule at the time of the offence, as Italian law at that time was in full compliance with the Directive, the later changes had complicated matters because of the principle of the retroactivity of the milder penal law. In those circumstances Community law was to yield to the application of Art.7 ECHR. However, where Art.7 ECHR finds no application, there is no reason to exclude a priori that indirect judicial review could take place.

The first situation that may occur is a criminal proceeding against an individual during which the individual wishes to challenge the law against him. At first sight there is no reason why this should not be allowed. Basically, what we are faced with is a special form *304 of estoppel. All Member State bodies are bound by EU law. Allowing the prosecutor to win the case by relying on a national measure contrary to EU law, amounts to allowing the state to benefit from its own breach of EU law. However, there is a limit to this kind of estoppel. In our view, it should work to set aside government action which is contrary to the content of a Directive. However, in *Lemmens*¹¹² the defendant, accused of driving under influence, wanted to go further: he wanted to have the evidence against him ignored because the breath analysis apparatus which had been used to catch him had been tested on the basis of technical regulations which had not been notified to the Commission as required by Directive 83/189.¹¹³ The Court refused to accept this thesis as the duty of notification is simply irrelevant for the dispute. The latter duty of notification is introduced to improve the free movement of goods, but has as such nothing to do with the way a breath analysis takes place. However, imagine that the argument had been that the evidence was unreliable because the apparatus was not designed in accordance with EC minimum standards. In such a case, the defendant would have fallen in the zone of interest of EU law, and there is no reason why he should be precluded from relying on a Directive or any other norm of EU law to have the evidence against him suppressed.

The second situation involves instances of private enforcement actions. The prime example here is *CIA Security*.¹¹⁴ Belgian trade law allows competitors to sue each other in order to enforce the fair trade rules in virtually the same manner as the public prosecutor. In one such case a company specialised in installing alarm systems sued another for selling alarm systems that were not in accordance with the Belgian legislation, laid down in a Royal Decree. Fully in line with Belgian procedural law the defendant contested the validity of the Royal Decree, an administrative act, as being contrary to an EC Directive in that it imposed certain technical requirements, which had not been notified to the Commission under that same Directive 83/189. The ECJ allowed the challenge to go ahead, even if this meant that the “prosecuting” competitor, a private party, lost the case.

The real problem lies of course in purely private disputes, where one of the parties would be able to get *on the basis of national law* the advantage the Directive promises from the other, if only the former party could get rid of a specific obstacle existing in national law. These cases involve unwarranted exceptions or requirements laid down in national law that stand between, on the one hand, the right promised by the Directive that finds some normative support in national law as well and, on the other hand, the materialising of that right in the national legal order. It is in this context that the line between setting aside norms of national law and deriving rights directly from a Directive becomes very thin indeed. Yet that line exists, and in several cases the ECJ has been willing to go down this road.

Two variants may occur. The first scenario involves the setting aside of a norm that has little to do with the obligation that is about to be imposed on one of the parties. In *Unilever Italia*¹¹⁵ the parties had agreed on a sales contract for barrels of olive oil, with the ordinary obligations under basic contract law for the seller to deliver the goods and *305 the buyer to pay the price. By the time the goods were delivered the buyer had

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changed his mind and rejected the goods because the barrels were labelled in violation of Italian law, so that they could not legally be sold on in Italy. The seller rebutted the claim that the delivery was inadequate on the ground that the Italian legislation itself was in breach of Council Directive 83/189¹¹⁶ as that legislation had not been notified. The Court indeed accepted that the seller could rely on the Directive to have the Italian rules set aside. As a result, the buyer had to fulfil his obligation under the contract and pay for the goods, which he was now able to sell on. The obligation to pay, however, does not flow from the Directive, but from the contract and national contract law. The only thing reliance on the Directive has done is to clear the field for the application of the basic *pacta sunt servanda* rule of Italian contract law, by turning a delivery of non-conforming goods for which the buyer would not have had to pay, into a delivery of conforming goods. Unlike what is sometimes argued,¹¹⁷ in our view it does not therefore matter whether the conflict between the national law and the Directive concerns a procedural requirement to notify or a substantive provision. If in *Unilever Italia* the problem had been that Italian law had imposed more stringent quality norms for the olive oil than the harmonised standard laid down in a Directive, there would have been a similar problem of delivery of non-conforming goods, which could likewise be solved by setting aside the contested rules of national law without any effect on the “substantive scope of the legal rule on the basis of which the national court must decide the case before it”.¹¹⁸ Indeed, also in this application the Directive would have been neutral as to the rights and obligations of the private parties as they are essentially flowing from the Italian law of sales, which is not affected by the Directive.

The second scenario, however, is most controversial and involves cases where the national legal order provides for the right promised by the Directive, but where the national legislator has either adopted an exception or made the right subject to an additional requirement. In those cases, our thesis is that invoking the Directive results in striking out the exception or removing this additional requirement. As a result, the applicant falls within the general terms of the national legislation and is thus entitled to what he or she is claiming. This, too, has been done before. In *Ruiz Bernaldéz*¹¹⁹ the Spanish legislation imposed in general on car insurers the obligation to compensate the victims of car crashes caused by a driver insured by that company, but the legislation contained an exception, contrary to the relevant Directive,¹²⁰ that an insurer could refuse to pay compensation where the driver was intoxicated. The ECJ simply stated that the Directive did not allow for national legislation with this exception thus suggesting to the national judge that the exception should be simply set aside. There is less and less reason for not making this the general rule. *Pfeiffer*¹²¹ has made clear that the national judge must *306 use every interpretational tool he has in order to do just this: overcome an unfortunate exception and apply the remainder of the national law to the extent that this forms a correct implementation of EC law. It has not gone unnoticed in legal literature¹²² that the ECJ may ensure the same result by emphasising the effect of primacy, also in the relationship between individuals. In our view, the main advantage of such an approach is a more uniform, effective and transparent enforcement of EC law.

The most convincing reason not to give effect to the principle of primacy to the detriment of individuals seems to be legal certainty. And indeed, as argued above, in the context of criminal proceedings against an individual, primacy should not be used to have a Directive all by itself make something a punishable offence which otherwise would not be.¹²³ But in most instances there is no reason to make a distinction between the possibility to invoke Directives between proceedings for direct judicial review, such as in the case of *Wells*.¹²⁴ and proceedings between private parties where the validity of the national legislation is incidentally called into question because this legislation contains either an additional obstacle to the exercise of a right that is taken over in principle in national law, as was the case in *Bellone*¹²⁵ or an exception to such right, as was the case in *Ruiz Bernaldéz*.¹²⁶

Against this it could in fairness be argued that Directives are binding, but only to a limited extent in that they require the government to change national laws which may impose obligations on individuals, but they

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cannot impose these obligations themselves. Allowing individuals to use the Directive to set aside national law would then be equal to enabling individuals to alter the content of national law and create in the national legal order rights which the Directive promises, but which private parties only have in so far as the national authorities have taken the necessary steps to bring national law in line with the Directive. Accordingly, if German law gives everyone else the right to a shorter working week provided for in the Directive, but makes an exception for ambulance drivers, then no such right is available for German ambulance drivers. Setting aside the exception is seen as the imposition of an obligation on their employer and the creation of a corresponding right for the ambulance drivers, which previously did not exist. In such a view the setting aside of exceptions equals the creation of rights which national law does not provide for and thus amounts to direct effect, which for better or for worse is prohibited when Directives are invoked in horizontal situations.

However, in *Wells* the Court accepted that “mere adverse repercussions on the rights of third parties”¹²⁷ would not prevent a norm of national law from being set aside because of a conflict with a Directive. Yet, the “adverse repercussions” on the rights of individuals^{*307} when a Directive is used to set aside the national legislation do not fundamentally differ if this occurs in proceedings for direct judicial review or in proceedings allowing for incidental review. In neither type of proceedings is the *behaviour of private parties* reviewed in light of the Directive; all that is done is an assessment of the validity of national law because of the *behaviour of the legislator*, which may have breached a formal requirement imposed by a Directive, such as an obligation to notify,¹²⁸ or a substantive requirement, such as the prohibition to add an obstacle to the exercise of a right provided for in a Directive that finds its echo in national law.¹²⁹ There is no reason why the adverse repercussions of this assessment of the behaviour of the legislator should only be borne by private parties in proceedings for direct judicial review, and not in proceedings between private parties during which parties have the right to call into question the validity of national law.¹³⁰ Whether or not the validity of a national act is challenged directly or not will often depend on the way the various Member States have organised their judicial system.¹³¹ Allowing for legally binding norms of EU law to be used during proceedings for direct judicial review of a national act, despite the adverse repercussions the annulment of such an act may have on the rights of private parties, but at the same time preventing such norms of EU law from being used during proceedings between private parties where the validity of the same national act is at stake and the adverse repercussions are not fundamentally different, only creates inconsistencies and discriminatory distinctions, purely on the basis of the enforcement mechanism provided for by national law.

The following example illustrates the last point. Belgian law provides for two procedural routes under which someone can bring proceedings against construction works for which the authorities have granted a permit in breach of a Directive. In the first scenario she can sue the government before the Conseil d’Etat, where national law requires her to limit her arguments to contesting the legality of the permit. The second option would be to sue her neighbour to enjoin him from violating her property rights by building with an invalid permit. In the former case, the applicant is, as a matter of national law, in principle prevented from making reference to any subjective rights and yet she can^{*308} rely on the Directive to challenge the validity of the permit in line with *Kraaijeveld*,¹³² *Linster*¹³³ and *Wells*¹³⁴ even if the outcome will be that the neighbour can no longer validly go ahead with the construction works. In the second case, a different procedural route is chosen to obtain essentially the same result: the validity of the permit in light of the Directive will be at issue as well, but only in response to the argument by the neighbour that he has a valid permit. Yet, in this situation the applicant is relying on her property rights under national law, which the Directive may be protecting indirectly by imposing certain procedural rules for the granting of such permits. It may well be that, for instance, her right to an open view, or a right to the protection of certain trees does not go as far as creating a tangible right to have the view or the trees preserved, but is limited to the requirement that the view cannot be blocked or the trees felled unless the need for this is attested through a correct legal procedure. In such a context, the indirect judicial review of the validity of a building permit in light of a Directive imposing such procedural requirements, and thus an assessment of the way the government has behaved in the

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dossier, is only a preliminary step to assessing whether a right under national law is violated. Allowing for indirect judicial review in such a case has not the effect of imposing obligations on private parties, but only facilitates the enforcement of pre-existing rights under national law. It is submitted that this situation therefore does not differ fundamentally from the instances where the Court has approved of incidental review to facilitate the application of national trade practice law¹³⁵ or of the obligation to pay the contract party the agreed sum for his efforts.¹³⁶

Similarly, a case like *Pfeiffer*¹³⁷ can be couched in those terms. The ambulance workers in that case had not sought direct judicial review of the German implementing legislation. Actually, it may well have been impossible under German law for them to do so. However, if they had been able to do so, arguably, the exception for ambulance drivers should have been annulled, even if this had entailed “adverse repercussions” on the rights of their employer. Instead, they sued their employer to obtain a declaration on the maximum number of hours they had to work and compensation for the overtime. Essentially they were seeking the right under national law to work only the limited number of hours a week as validly determined by national law. Accordingly, they were entitled to the benefit of, and their employers had to respect, whatever working hours the German authorities had validly laid down. As Germany has adopted both a general rule, which is fully in line with the Directive, and a specific rule for ambulance drivers in breach of the Directive, *prima facie*, a conflict of norms exists. Yet, as the German authorities could not validly adopt the specific rules for ambulance drivers, since they were precluded from doing so by the Directive, the only valid rules were rules applicable to employees and employers in general. As a matter of German law they were therefore entitled to the more limited set of working hours. Again, in such an approach no new rights are created solely by the Directive. The incidental judicial review of the German legislation in light of the Directive is but a step along the way to determine the content and *309 scope of the rights and obligations that exist under German law. It is not the behaviour of the German Red Cross that is being assessed in light of the Directive, but the conduct of the German law-makers who had violated a behavioural norm binding on the Member State in adopting the disputed exception. The behaviour of the Red Cross is only assessed in a second move, not in light of the Directive, but in light of those rules of national law the Member State had validly adopted.

National procedural autonomy may explain why parties will or even must choose one procedural route or another.¹³⁸ However, the binding force of EU law as such should not be made dependent on this as well. There is a fundamental difference between the national procedural autonomy to provide adequate remedies, which may indeed result in differences in *enforcement* of EU law and the prior question whether a certain EU norm can be *invoked* before the national judge. The former is as a matter of subsidiarity usually left to the Member States and rightly so.¹³⁹ The latter should be a matter of EU law, applying equally across all the Member States, thus giving everyone as much or as little chance to rely on EU law using whatever procedural format the Member State provides for this.

C. Direct effect

One can argue that there is little difference between, on the one hand, setting aside the exception for drunken drivers thus leaving on the national statute book an unconditional obligation for insurance companies to pay and, on the other, the direct enforcement of such an unconditional obligation on the basis of the Directive. This is true, and frankly that is of course the point. Ever since *Foster*¹⁴⁰ and *Marshall*¹⁴¹ the ECJ has devised ways around the limits put on the invocability of Directives. However, there *is* a difference. Let us compare the situation in *Centrosteeel*¹⁴² or *Bellone*¹⁴³ with a problem under the same *310 Directive in the Belgian legal order.¹⁴⁴ In *Bellone*¹⁴⁵ the Italian legal order did provide for the necessary compensation for agents, however it made enforcement of this right dependent on registration in a special register, contrary to the Directive. All that it took was striking out the additional condition in order to cut free the right that was already contained in the national legal order. Let us now turn to the problem the Belgian courts were confronted with.¹⁴⁶ The same Directive also introduces special compensation for departing successful agents to

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reward them for the new clients they had attracted for their principal. This right was completely foreign to the Belgian legal order. Attempts were made to somehow interpret Belgian contract law as already containing this right,¹⁴⁷ but ultimately the highest court in civil matters had to admit that simply no such right existed in the Belgian legal order.¹⁴⁸ No matter how many rules of national law were set aside the right would not have been attained. And thus the only way the right could be created is by relying directly on the Directive in order to enforce a new right exclusively created by the Directive against another private party. This cannot be done under the current case law and thus the compensation could not be awarded. It is like sawing through the spikes of a bird cage in order to set free the bird when the little door is jammed: it only makes sense if there is actually a bird in the cage. This is thus the essential difference: in the former case a right that at the very least was available in the national legal order in embryonic form is being given room to fully materialise, in the latter case the right needs to be taken directly from the higher norm and transplanted into the national legal order.

This essay thus is not a plea against direct effect, nor is it a plea in favour of horizontal direct effect. Rather it is an attempt to reduce the importance of direct effect to its true proportions: it is the technique which allows individuals to enforce a subjective right, which is only available in the internal legal order in an instrument that comes from outside that order, against another (state or private) actor. It is a highly powerful tool, too. So powerful that both the Court's case law, most notably in respect of Directives, and the EU Treaty in respect of third pillar instruments put limits as to whether or when it can be used. However, there is no need to transpose the restrictions on the use of this powerful tool onto other tools which may help to achieve the same result. It is not because a city council decides to severely restrict the use of electric hedge trimmers in certain residential areas in light of their enormous impact on the calm and peace of the neighbourhood that this also means that the use of a simple pair of shears is prohibited as well, even if both can be used to obtain the same neatly trimmed hedge. And thus while restrictions may be put on enforcing a right which only exists in a norm foreign to the internal legal order, that is no reason yet to require that if the same right can be obtained using other tools, such as consistent interpretation or primacy which do not require that a gap in the national legal order be filled by a norm coming from outside the legal order, this route is made subject to the same severe restrictions. Just as electric trimmers make too much noise, the impact of direct effect on the internal legal order *311 may at times be too much to bear. However, like shears, the principle of primacy may silently cut its way through the internal legal order and thus be less disturbing.

Direct effect has a role to play and the restrictions placed on its use help to shape the various legal instruments. Basically, there are two sets of restrictions. The *internal* restrictions define whether a certain norm is apt to be directly effective. These are the classic criteria that the norm must be intended to confer rights on individuals and must, to that effect, be sufficiently clear, precise and unconditional. These are criteria that apply irrespective of the legal instrument in which the right sought can be found. There are examples of provisions in Regulations which do not meet the test,¹⁴⁹ just like there are Directives which contain norms that do meet this test.¹⁵⁰ In the same vein some provisions of the founding Treaties enjoy direct effect, while others do not.

By contrast, the *external* restrictions depend on the type of legal instrument used. Both the case law of the Court and the drafters of the Treaties have limited or fully excluded the use of the tool for certain legal instruments. Accordingly, there is a difference depending on whether the same provision is included in the Treaties, a Regulation, a Directive or a framework decision. For the sake of argument let us assume that the rule "every worker is entitled to receive the same pay for the same job, irrespective of the gender of the worker" is sufficiently clear, precise and unconditional to allow for direct effect and could be laid down in any of the various legal instruments. The rule is actually laid down in Art.141 TEC and we know from the case law of the Court that the provision has direct effect¹⁵¹ and can be relied upon against both public and private employers. If the rule were laid down in a Regulation again it would be possible, irrespective of what

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national law provided, to invoke the provisions directly against any employer. *Marshall*¹⁵² on the other hand has taught us that if the same rule is laid down in a Directive, it can only be relied upon against public bodies, even if this can be a rather broad category, until the moment the Member State has adopted correct implementing measures. Finally,¹⁵³ if the rule were to be laid down in a framework decision, the explicit exclusion of direct effect would make it impossible to rely upon the provision, even against a public body. This is why it is so important that under the new Constitution framework decisions and Directives would be merged into one category of framework laws with the characteristics of Directives. To give but one example: Art.7 of Framework Decision 2001/220 JHA provides for reimbursement by the state of the costs of victims that are called to testify *312 during criminal proceedings.¹⁵⁴ If a Member State has not provided for such a right, no such reimbursement can be obtained if this rule is included in a framework decision. All this changes if this rule is included in a European framework law, as such an instrument, like Directives, can be relied upon against a public body.

Thus it becomes clear why a plea for so-called horizontal direct effect of Directives will not solve everything: important rights are more and more laid down in framework decisions, which cannot be given direct effect. Moreover, the same concerns that put limits on the application of the principle of primacy and the duty of consistent interpretation of national law would require there to be an exception for cases involving so-called inverse direct effect in criminal cases. This has become quite important in the light of the recent judgment about the Community competence for the definition of environmental crimes.¹⁵⁵ The direct impact on individual defendants of this ruling will be rather limited: even if the crimes are being defined in a Directive, in view of *Berlusconi*¹⁵⁶ such defendants will not be convicted unless proper implementation has taken place.

D. State liability

From the very beginning in *Francovich*,¹⁵⁷ state liability has been considered an alternative to direct effect. It may be recalled that *Francovich* was relying on a Directive against the Italian state to obtain the compensation promised by the Directive. However, the provisions in the Directive were not sufficiently clear, precise and unconditional to be invoked directly, even against the state, as it was unclear who was liable to pay the compensation given that the Directive envisaged the establishment of a fund, which could well have been set up without the involvement of the Italian state.¹⁵⁸ It is therefore impossible to see direct effect and state liability as mere mirror images as was seemingly done by the House of Lords in the *Three Rivers* case.¹⁵⁹ In that case the House of Lords recognised that state liability and direct effect are two different routes to enforce the Directive, but then treated them together as if they were one because the conditions for liability under both “are so closely analogous that they can be taken to...be the same”.¹⁶⁰

However, the confusion is understandable to the extent that the first requirement, namely that the rule breached is intended to confer rights on individuals,¹⁶¹ has of course something in common with the conditions for direct effect. Indeed, whenever the internal conditions for direct effect are satisfied, in that a rule exists which is intended to confer rights on individuals and which is sufficiently clear, precise and unconditional, the first *313 condition for state liability is automatically fulfilled as well. However, even if the norm is not sufficiently clear, precise and unconditional as was the case in *Francovich* itself, or when the external restrictions on direct effect, i.e. the instrument-specific restrictions, are not fulfilled there still may be ground for liability.¹⁶² Accordingly, state liability, which is both rooted in international law¹⁶³ and in the duty to co-operate in good faith,¹⁶⁴ which as we know from the recent case of *Pupino* applies both in the EC and EU Treaty,¹⁶⁵ can occur whenever an EU instrument can be said to confer a right on an individual, even if not all aspects, such as the exact debtor, or the precise scope, of that right are fully defined. The rights language thus covers a far broader reality than well-defined subjective rights.¹⁶⁶ In practice it boils down to whatever norm that seems to be intended to require someone to do something to improve the situation of the applicant. Therefore it comes as little surprise that the Court often finds rights in seemingly ab-

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strict provisions. To give but one example, the ECJ derived some minimal right to environmental protection from a Directive dealing with procedures for water management,¹⁶⁷ based on the understanding that if those procedures are followed, individuals should be able to ensure that at least no deterioration of the environment is to occur.

As a counterweight for such a magnanimous approach there are the second and third conditions requiring a causal link and above all a sufficiently serious breach.¹⁶⁸ If the right conferred proves to be rather minimalist then there is a fair chance that the Member State has not breached it; if the right is rather fuzzy, as even rules that are not sufficiently clear, precise and unconditional to allow for direct effect can be invoked, then chances are that the margin of appreciation of the Member State is equally extensive--and the wider the discretion of the Member State, the more difficult it gets to prove a sufficiently serious breach. Similarly, if the conduct that was ultimately required from the state turns ***314** out to be rather insignificant then it is not unlikely that no causal link exists between its omission or misconduct and the damage claimed.

The same reasoning moreover applies to the liability of the Community. Since *Brasserie* there was meant to be a parallelism between the conditions for state liability and the conditions for Community liability¹⁶⁹ resulting in uniform criteria for both situations laid down in *Bergaderm*.¹⁷⁰ This may well be the best reason against Member State liability in the second and third pillar: the absence of a clear ground for EU liability. On the other hand, it may well be that in light of the requirements of effective judicial protection as laid down in Art.6 ECHR and Art.47 of the Charter of Fundamental Rights the absence of Member State liability may only aggravate the problems of ensuring effective access to justice in the second and third pillar. It is true that the ECtHR in *Posti and Rahko* rightly observed that not all can be cured through state liability,¹⁷¹ but it is definitely one way of ensuring effective judicial protection in a field where the ECJ has only a limited role to play. Obviously, under the new Constitution, this discussion would become more or less obsolete with the disappearance of the pillar structure--even if for CFSP matters still no adequate procedure before an EU court to seek damages is available.¹⁷²

In exceptional cases the restrictions on invocability of EU norms in the context of an action for damages or, arguably, a *Francovich* action, could be done away with entirely to the extent that damages are sought in the absence of unlawful conduct on the part of the Community or the national authorities. In such circumstances the issue of invocability simply does not arise, as the legality of the Community or Member State action is no longer at stake, so there is also no need to rely on EU law as a yardstick for review. In the opinion of the CFI what is needed in such a context is the existence of actual and certain damage, a causal link and damage of an unusual and special nature.¹⁷³ The last condition suggests, however, that liability in the absence of unlawful conduct on the part of the Community, perhaps, or even the national authorities, will rarely be established.¹⁷⁴

Conclusion

In this essay an attempt was made to reduce the concept of direct effect to its true proportions: a powerful tool to invoke EU law, allowing individuals to enforce rights which are only available in the national legal order because of EU law. This powerful tool has its own area of application and its own conditions for use. However, it is also but one tool in the toolbox for invoking EU law and its conditions and limitations should not spill over to limit the application of alternative forms of invoking EU law: consistent interpretation, state liability and above all primacy of EU law. The proposed approach has ***315** the ambition to be both uniform, in that it even applies *mutatis mutandis* to the relation between the EU legal order and international law, and ruthlessly effective, despite the constraints the case law up to this day and the Treaties themselves impose. We submit that whenever the right sought is available in the national legal order in embryonic form, it appears possible to further develop the right through interpretation and primacy. In particular we argue that there is no need to examine whether the conditions for direct effect are fulfilled whenever the validity of a

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norm of national law is assessed in the light of a higher norm of EU law, irrespective of whether judicial review takes place during direct or indirect review proceedings. We make, however, no plea to introduce horizontal direct effect or to ignore the clear statement that framework decisions do not enjoy direct effect, but try to give the contours of a uniform model allowing both the ECJ and national courts--and ultimately the millions of legal subjects of the Union (or at least their lawyers)--to discern more easily to what avail a particular norm of EU law can be invoked.

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1. Case 26/62, *Van Gend & Loos* [1963] E.C.R. I-1789; Case 70/87, *Fediol* [1989] E.C.R. I-1789; Case C-69/89, *Nakajima*, cited above fn.98.

2. Case 6/64, *Costa v ENEL* [1964] E.C.R. 1203; Case T-54/99, *max.mobil Telekomunikation Service v Commission* [2002] E.C.R. II-313, at [47]; Case T-177/01, *Jégo-Quéré* [2002] E.C.R. II-2365, at [41]-[42]. Both judgments have been annulled on appeal, but not on the particular issue. See, however, also Joined Cases T 377/00, 379/00, 380/00, 260/01 & 272/01, *Philip Morris International v Commission* [2003] E.C.R. II-1, at [122].

3. Joined Cases C 397/01-403/01, *Pfeiffer* [2004] E.C.R. I-8835. See, for instance, Consideration 25 of Directive 2005/29 of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450, Directives 97/7, 98/27 and 2002/65 of the European Parliament and of the Council and Regulation 2006/2004 of the European Parliament and of the Council, [2005] O.J. L149/22 (first pillar); Consideration 10 of Council Framework Decision 2002/475/JHA combating terrorism, [2002] O.J. L164/3 (third pillar).

4. Joined Cases C 387/02, 391/02 & 403/02, *Berlusconi* [2005] E.C.R. I-3565. See for an implied application in this sense the Opinion of A.G. Kokott of September 8, 2005 in Case C-540/03, *European Parliament v Council*, not yet reported, at [7] and [61].

5. Case C-105/03, *Pupino* [2005] E.C.R. I-5285. See, for instance, the direct action against a French Ministerial Decree giving rise to Case C-182/02, *Ligue pour la protection des oiseaux* [2003] E.C.R. I-12105.

6. Case C-377/02, *Van Parys* [2005] E.C.R. I-1465. See, for instance, the direct action against legislative acts of the Flemish and French Communities, giving rise to Case C-93/97, *Fédération Belge des Chambres Syndicales de Médecins* [1998] E.C.R. I-4837.

7. Case C-105/03, *Pupino*, cited above fn.5. See, for instance, the application before the High Court of Justice of England and Wales, Queen's Bench Division, resulting in Case C-201/02, *Wells*, cited above fn.89.

8. See the action for damages in Case T-333/02, *Gestoras Pro Amnistía v Council*, rejected by an unpublished order of the CFI of June 7, 2004, notified in [2004] O.J. C228/40 and currently under appeal, see Case C-354/04 P, *Gestoras Pro Amnistía v Council* [2004] O.J. C251/9. Joined Cases C 27/00 & 122/00, *Omega Air*, cited above fn.99.

9. Admittedly, the term does actually appear in Art.72 TEC, but in a wholly unrelated context. Case C-168/95, *Arcaro*, cited above fn.62, at [43].

10. There is a whole series of cases where individuals were given a chance to rely on international treaties concluded by the Community, see for a recent example Case C-265/03, *Simuntenkov* [2005] E.C.R. I-2579; for an overview see K. Lenaerts and P. Van Nuffel, R. Bray (eds), *Constitutional Law of the European Union* (Sweet & Maxwell, London, 2005), pp.742-743. Joined Cases C 387/02, 391/02 & 403/02, *Berlusconi*, cited above fn.4 1st ser.

11. See, for instance, the negative opinion of the Procureur-Generaal of the Ghent Court of Appeals rejecting extradition in the *Erdal* Case, (2000) 1 *Tijdschrift voor Strafrecht* 230. Opinion of A.G. Kokott of Octo-

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ber 14, 2004 in Joined Cases C 387/02, 391/02 & 403/02, *Berlusconi*, cited above fn.4 1st ser.

12. Cited above fn.7. Joined Cases C 387/02, 391/02 & 403/02, *Berlusconi*, cited above fn.4 1st ser., at [72]. Arguably, “the Community law requirement that penalties be appropriate” goes beyond the Directive as such. However, the debate in the case was solely centred on the Directive.

13. On the use of the rule of law as a foundation for strengthening the rules on invocability through the concept of “effective judicial protection”, see S. Drake, “Twenty years after *Von Colson* : the impact of ‘indirect effect’ on the protection of the individual’s Community rights” (2005) 30 E.L.Rev. 329 at pp.332-334. Case C-226/97, *Lemmens* [1998] E.C.R. I-3711.

14. On the importance of output legitimacy for the EU, see B. Kohler-Koch, “The Commission White Paper and the Improvement of European Governance”, in J. Weiler, Jean Monnet Working Paper 6/01, “Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance”, available at www.jeanmonnetprogram.org/papers/01/012101.rtf, pp.5-6. See also K. Lenaerts and M. Desomer, “New Models of Constitution-making in Europe: the Quest for Legitimacy” (2002) 39 C.M.L.Rev. 1217-1253. Council Directive 83/189 laying down a procedure for the provision of information in the field of technical standards and regulations, [1983] O.J. L109/8.

15. P. Van Nuffel, “De doorwerking van het Europees gemeenschapsrecht in de Belgische rechtsorde” (2005) 53 S.E.W. 3-4. Case C-194/94, *CIA Security* [1996] E.C.R. I-2201.

16. Declaration on Art.I-6 [2004] O.J. C310/440. Case C-443/98, *Unilever Italia* [2000] E.C.R. I-7535.

17. *Costa v ENEL*, cited above fn.2. Council Directive 83/189 laying down a procedure for the provision of information in the field of technical standards and regulations, [1983] O.J. L109/8, as amended by Directive 94/10 of the European Parliament and the Council materially amending for the second time Directive 83/189, [1994] O.J. L100/30.

18. For extensive argumentation in this sense, see T. Corthaut, “Doorwerking van het tweede pijlerrecht van de EU in de Belgische rechtsorde--de Belgische rechter als doe-het-zelver in GBVB-aangelegenheden?” in J. Wouters and D. Van Eeckhoutte (eds.), *Doorwerking van het internationaal recht in de Belgische rechtsorde. Recente ontwikkelingen in een rechtstakoverschrijdend perspectief* (Intersentia, Antwerpen, forthcoming), paras 10-21. See also the Opinion of A.G. Kokott of November 11, 2004 in *Pupino*, cited above fn.7. For a more cautious approach, see T. Fetzer and T. Groß, “Die Pupino-Entscheidung des EuGH--Abkehr vom intergouvernementalen Charakter der EU?--Erwiderung auf Herrmann, EuZW 2005, 436” (2005) Eu.Z.W. 550-551. S. Prechal, case note under Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3 1st ser.; (2005) 42 C.M.L.Rev. 1445 at p.1447.

19. For more on the legal personality of the EU, see Lenaerts and Van Nuffel, cited above fn.10, pp.816-817; see also I. Österdahl, “The EU and its Member States, Other States and International Organizations--The Common European Security and Defence Policy after Nice” (2001) 341 Nordic J.I.L. 350; R. A. Wessel, “De Europese Unie in de internationale rechtsorde” (2001) *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* 11-37. Case C-443/98, *Unilever Italia*, fn.16 2nd ser., at [51].

20. Council Framework Decision 2002/475/JHA of June 13, 2002 on combating terrorism, [2002] O.J. L164/3. Case C-129/94, *Ruiz Bernaldéz* [1996] E.C.R. I-1829.

21. See, for instance, Council Common Position 2003/297/CFSP of April 28, 2003 on Burma/Myanmar, [2003] O.J. L106/36. Council Directive 72/166 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, [1972] O.J. Spec. Ed. 360.

22. Council Framework Decision 2001/220/JHA of March 15, 2001 on the standing of victims in criminal proceedings, [2001] O.J. L82/1. Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3 1st ser.

23. For a recent example, see Council Decision 2005/680/CFSP of August 12, 2005, concerning the conclusion of the Agreement between the European Union and the Democratic Republic of the Congo on the status and activities of the European Union Police Mission in the Democratic Republic of the Congo (EUPOL Kinshasa), [2005] O.J. L256/57. S. Prechal, case note under Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3 1st ser.; (2005) 42 C.M.L.Rev. 1445 at pp.1446-1447.

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24. Compare *Costa v ENEL*, cited above fn.2. Case C-168/95, *Arcaro*, cited above fn.62; Joined Cases C 387/02, 391/02 & 403/02, *Berlusconi*, cited above fn.4 1st ser.
25. *Pupino*, cited above fn.7, at [41]-[43]. Case C-201/02, *Wells*, cited above fn.89, at [54]-[58].
26. Again, compare *Costa v ENEL*, cited above fn.2. Case C-215/97, *Bellone*, cited above fn.66. As explained more extensively below, in *Bellone* the ECJ suggested to set aside the requirement of Italian law that made the validity of an agency contract dependent on the prior registration of the commercial agent. As a result, the principal of Bellone had to pay the contractually agreed compensation, which he had sought to avoid by relying on the nullity of the contract.
27. J. Prinssen, *Doorwerking van Europees recht: de verhouding tussen directe werking, conforme interpretatie en overheidsaansprakelijkheid* (Kluwer, Deventer, 2004), p.11. Case C-129/94, *Ruiz Bernaldéz*, cited above fn.20, 2nd ser.
28. “The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be *inconsistent* with that legal system.” See *Costa v ENEL*, cited above fn.2, emphasis added. Case C-201/02, *Wells*, cited above fn.89, at [57].
29. Even though a rather rigorous application of primacy is advocated in this paper, it is to be acknowledged that the case law demonstrates that even a principle as fundamental as the primacy of EC law cannot always apply without qualification; see, for instance, the limitations flowing from fundamental rights in Joined Cases C 387/02, 391/02 & 403/02, *Berlusconi*, cited above fn.4. Case C-194/94, *CIA Security*, cited above fn.15 2nd ser.; Case C-443/98, *Unilever Italia* [2000] E.C.R. I-7535.
30. M. Lenz, D. Sif Tynes and L. Young, “Horizontal What? Back to basics” (2000) 25 E.L.Rev. 509-522. Case C-215/97, *Bellone*, cited above fn.66.
31. C. Hilson and T. Downes, “Making Sense of Rights: Community Rights in EC Law” (1999) 24 E.L.Rev. 121-139. It could be argued that having to put up with the adverse repercussions in a procedure such as in *Wells* is even worse. Though national law will usually allow the private party whose rights will be affected to intervene, that party is not necessarily present before the national judge to argue on the compatibility of national law with EU law, as that party is formally a third party to the direct judicial review proceedings, which are between the applicant and the state. By contrast, in instances of incidental review, the party on whom the setting aside of national law will have adverse repercussions, will at least be a party to the case and thus in a position to make its views on the validity of the national act known.
32. P.V. Figuereroa Regueiro, “Invocability of Substitution and Invocability of Exclusion: Bringing Legal Realism to the Current Development of the Case-Law of ‘Horizontal’ Direct Effect of Directives”, Jean Monnet Working Paper 7/02, available at www.jeanmonnetprogram.org/papers/02/020701.pdf; see also T. Eilmansberger, “The Relationship Between Rights and Remedies in EC Law: in Search of the Missing Link” (2004) 41 C.M.L.Rev. 1199, at pp.1213-1216. The distinction goes back on earlier, mainly French legal writing often inspired by French administrative law, see in particular Y. Galmot and J.-C. Bonichot, “La Cour de justice des Communautés européennes et la transposition des Directives en droit national” (1988) *Revue française de droit administratif* 16; G. Isaac, *Droit communautaire général* (Masson, Paris, 1994); T. Dal Farra, “L’invocabilité des Directives communautaires devant le juge national de la légalité” (1992) 28 R.T.D.E. 631; P. Manin, “De l’utilisation des Directives communautaires par les personnes physiques ou morales” (1994) 50 A.J.D.A. 259; D. Simon, *La Directive européenne* (Daloz, Paris, 1997); *Le système juridique communautaire* (2nd edn, PUF, Paris, 1998). In this respect a parallel can be drawn between the limited possibilities for private parties to bring an action for annulment under Art.230(4) TEC, which are, in order to ensure that the Community is a Community based on the rule of law, compensated for because of the more extensive possibilities for private parties to obtain indirect judicial review through a preliminary reference made during proceedings before the national court under Art.234 TEC, see Case 294/83, *Parti écologiste “Les Verts” v European Parliament* [1986] E.C.R. 1339, at [23]. In order to ensure the coherence of the system, in both procedures the validity of Community law can be reviewed in light of the same higher

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norms. Arguably, in order to ensure that the legal orders of the Member States are just as strongly based on the rule of law, as required by Art.6(1) TEU, it is necessary that the types of norms of EU law that can be invoked to assess the validity of a norm of national law do not depend on whether review of the norm of national law takes place during proceedings allowing for direct or indirect judicial review.

33. Opinion of A.G. Léger of January 11, 2000 in Case C-287/98, *Linster* [2000] E.C.R. I-6917, at [57] *et seq.* Case C-72/95, *Kraaijeveld* [1996] E.C.R. I-5403.

34. Opinion of A.G. Saggio of December 16, 1999 in Joined Cases C 240/98-244/98, *Océano Grupo Editorial* [2000] E.C.R. I-4941, at [30]. However, doubts have been expressed whether the claimed “exclusion” made by Saggio really sufficed to explain the result in that case, see in this sense the annotation by T. Corthaut (2002) 8 *Columbia Journal of European Law* 293-310. Case C-287/98, *Linster*, cited above fn.33 1st ser.

35. Opinion of A.G. Ruiz-Jarabo Colomer of May 6, 2004 in Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3. Case C-201/02, *Wells*, cited above fn.89.

36. Opinion of A.G. Kokott of October 14, 2004 in Joined Cases C 387/02, 391/02 & 403/02, *Berlusconi*, cited above fn.4. Case C-194/94, *CIA Security*, cited above fn.15 2nd ser.

37. **Lenaerts** and Van Nuffel, cited above fn.10, p.740. Case C-215/97, *Bellone*, cited above fn.66; Case C-443/98, *Unilever Italia*, cited above fn.20 2nd ser.

38. Case 26/62, *Van Gend & Loos* [1963] E.C.R. 1. Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3 1st ser.

39. Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3. National procedural law may make it even hardly possible to distinguish between purely private disputes and objective review procedures. A nice example is offered by a recent case of the Belgian constitutional court (Cour d'Arbitrage, judgment No.41/2005 of February 16, 2005, available on www.arbitrage.be). The dispute had started before a civil court as a conflict between a sales agent and his principal about the fees that were due. The Belgian legislation implementing Council Directive 86/653 on the co-ordination of the laws of the Member States relating to self-employed commercial agents had excluded commercial agents in the insurance sector from the legislation. During the proceedings before the Ghent Court of Appeal the agent challenged the validity of the national implementing act, claiming that the exclusion of the insurance sector is discriminatory and thus contrary to Belgian constitutional law. However, as a civil court is precluded from setting aside legislation the Court of Appeal referred the case to the constitutional court. We now have a preliminary reference proceeding, quite similar to the one before the ECJ under Art.234 TEC, solely concerned with the validity of the national implementing measure and which now results in the Belgian Government being a party to the dispute. Of course, even if the validity control primarily takes place against the background of the non-discrimination principle of Arts 10 and 11 of the Belgian Constitution, the Directive is being invoked as well. Accordingly the validity of the national legislation is reviewed in a separate procedure using both Belgian constitutional law and the Directive as yardstick. The Constitutional Court, unsurprisingly, comes to the conclusion that the legislation is indeed invalid and sends this answer back to the Civil Court which must now apply this outcome between the original private parties, presumably resulting in imposing obligations on the principal where none seemed to exist before.

40. Case C-322/88, *Grimaldi* [1989] E.C.R. 4407, at [13] and [16]. For a defence of national procedural autonomy and a critique of certain unwelcome inroads to it in the context of validity control, see K. **Lenaerts** and T. Corthaut, “Judicial Review as a Contribution to the Development of European Constitutionalism” (2003) 23 *Yearbook of European Law* 16-17.

41. Opinion of A.G. Tizzano of June 30, 2005 in Case C-144/04, *Mangold* [2006] All E.R. (EC) 383, at [115]-[120]; Opinion of A.G. Kokott of October 27, 2005 in Case C-212/04, *Adeneler*, not yet reported, at [42]-[54]. Case C-188/89, *Foster* [1990] E.C.R. I-3313.

42. Case C-144/04, *Mangold*, cited above fn.41. Case C-271/91, *Marshall* [1993] E.C.R. I-4367.

43. Case C-129/96, *Inter-Environnement Wallonie* [1997] E.C.R. I-7411. Case C-456/98, *Centrosteeel*, cited above fn.65.

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44. Case C-144/04, *Mangold*, cited above fn.41, at [67]-[78]. Case C-215/97, *Bellone*, cited above fn.66.
45. Case C-105/03, *Pupino*, cited above fn.7, at [41]-[43]. Belgian Cour de Cassation, September 28, 2001, C.00.0066.F and *idem*, January 24, 2003, C.00.0483.N.
46. Arguably, the task for the Court would have been easier if it had to deal with second pillar law, in light of provisions such as Art.11(2) TEU. See in this sense, T. Corthaut, "Doorwerking van het tweede pijlerrecht van de EU in de Belgische rechtsorde--de Belgische rechter als doe-het-zelver in GBVB-aangelegenheden?" in J. Wouters and D. Van Eeckhoutte (eds.), *Doorwerking van het internationaal recht in de Belgische rechtsorde. Recente ontwikkelingen in een rechtstakoverschrijdend perspectief* (Intersentia, Antwerpen), forthcoming, paras 31-32. Case C-215/97, *Bellone*, cited above fn.66.
47. Case C-105/03, *Pupino*, cited above fn.7, at [41]-[43]. For more about this example, see P. Van Nuffel, "De doorwerking van het Europees gemeenschapsrecht in de Belgische rechtsorde" (2005) 53 S.E.W. 12-13.
48. On the other hand, in this way the ECJ managed, wholly in line moreover with the approach taken by A.G. Kokott, to steer away from making any positive comment about the primacy of EU law. However, as argued above, the latter should not be that controversial. Brussels Court of Appeals, judgment of January 5, 2000.
49. See Case C-286/90, *Poulsen and Diva Navigation* [1992] E.C.R. I-6019; Joined Cases C 300/98 & 392/98, *Parfums Christian Dior* [2000] E.C.R. I-11307. Belgian Cour de Cassation, January 24, 2003, C.00.0483.N.
50. Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3. This confirms that there is a major difference between direct effect and direct applicability. See for an example Case C-403/98, *Azienda Agricola Monte Arcosu* [2001] E.C.R. I-103. Remarkably, the ECJ omitted to include in its answer to the national judge the task of interpreting his national law, as far as possible, in line with the regulation, see in this respect Kronenberger, note under Case C-403/98, *Azienda Agricola Monte Arcosu* [2001] E.C.R. I-103 in (2001) 38 C.M.L.Rev. 1545-1556.
51. Joined Cases C 397/01-403/01 *Pfeiffer*, *ibid.*, at [116], which reads "In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the Directive." Case C-271/91, *Marshall*, cited above fn.42 2nd ser.
52. For an analysis of the interpretative tools known in the German legal order and available to the national court in *Pfeiffer*, see K. Riesenhuber and R. Domröse, "Richtlinienkonforme Rechtsfindung und nationale Methodenlehre" (2005) 47 R.I.W. 51 and pp.52-53. Case 43/75, *Defrenne* [1976] E.C.R. I-455.
53. See in this sense also S. Prechal, case note under Joined Cases C 397/01-403/01, *Pfeiffer* (2005) 42 C.M.L.Rev. 1445 at p.1459. Case C-271/91, *Marshall*, cited above fn.42 2nd ser.
54. Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3. One could of course also wonder about the instruments of the second pillar. At least no explicit prohibition of direct effect can be found. In the absence of guidance by the ECJ it is for every Member State to determine what the consequences may be. For an application in the Belgian legal order in line with the approach taken in this essay, see T. Corthaut, "Doorwerking van het tweede pijlerrecht van de EU in de Belgische rechtsorde--de Belgische rechter als doe-het-zelver in GBVB-aangelegenheden?" in J. Wouters and D. Van Eeckhoutte (eds.), *Doorwerking van het internationaal recht in de Belgische rechtsorde. Recente ontwikkelingen in een rechtstakoverschrijdend perspectief* (Intersentia, Antwerpen, forthcoming), in particular paras 48-55.
55. See in this sense Opinion of A.G. Tizzano of June 30, 2005 in Case C-144/04, *Mangold*, cited above fn.41, at [115]-[120]; Opinion of A.G. Kokott of October 27, 2005 in Case C-212/04, *Adeneler*, not yet reported, at [42]-[54]. Art.7 of Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings, [2001] O.J. L82/1.
56. See in this respect also M. H. Wissink, *Richtlijnconforme interpretatie van burgerlijk recht* (Kluwer, Deventer, 2001), pp.78-79, making a useful distinction between norms adopted after the Directive in order to

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implement it, pre-existing norms which are later seen as meant to implement the Directive and pre-existing norms without the objective of implementing the Directive. Case C-176/03, *Commission v Council* [2005] E.C.R. I-0000.

57. Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3. Joined Cases C 387/02, 391/02 & 403/02, *Berlusconi*, cited above fn.4 1st ser.

58. M. H. Wissink, *Richtlijnconforme interpretatie van burgerlijk recht* (Kluwer, Deventer, 2001), pp.204-205. Joined Cases C 6/90 & 9/90, *Francovich* [1991] E.C.R. I-5357.

59. Case C-105/03, *Pupino*, cited above fn.7, at [47]. If the national legislation has made that choice, for instance by designating the state as the guarantor for the claims that arise under the Directive, then the Directive can be invoked against the government without there being further barriers to the vertical direct effect of the Directive, see Case C-441/99, *Gharehveran* [2001] E.C.R. I-7687.

60. M. H. Wissink, *Richtlijnconforme interpretatie van burgerlijk recht* (Kluwer, Deventer, 2001), p.205. *Three Rivers District Council v Bank of England* [2000] 3 C.M.L.R. 205, HL.

61. Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3, at [114]-[119]. See also Case C-105/03, *Pupino*, cited above fn.7, at [47]. For more on this case and the need to make the distinction, see S. Prechal, *Directives in EC Law* (OUP, Oxford, 2005), pp.126-127.

62. Case C-168/95, *Arcaro* [1996] E.C.R. I-4705, at [42]. Joined Cases C 46/93 & 48/93, *Brasserie du Pêcheur* [1996] E.C.R. I-1029, at [51].

63. J. Prinssen, *Doorwerking van Europees recht: de verhouding tussen directe werking, conforme interpretatie en overheidsaansprakelijkheid* (Kluwer, Deventer, 2004), p.171. See also M. H. Wissink, *Richtlijnconforme interpretatie van burgerlijk recht* (Kluwer, Deventer, 2001), pp.204-205. A contrario, it follows from the fact that the norms breached “do not in principle form part of the rules by which the Court of Justice and the Court of First Instance review the legality of acts adopted by Community institutions under the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC), that individuals cannot rely on them before the courts and that any infringement of them will not give rise to non-contractual liability on the part of the Community”, see Case T-210/00, *Biret v Council* [2002] E.C.R. II-47, at [71]. This implies, of course, that must be examined whether the specific norm relied upon meets *in concreto* this criterion, see Case C-94/02 P, *Biret v Council* [2003] E.C.R. I-10565, at [60]. The application made by the ECJ in that case in respect of the implementation of a DSB decision before the end of the reasonable period is but one application of this broader principle. In the same vein it can be explained why a Member State is in principle not liable for non-implementation of a Directive before the end of the transitional period, with the possible exception of the situation where a Member State has breached its duty to abstain under Case C-129/96, *Inter-Environnement Wallonie* [1997] E.C.R. I-7411, see in this sense J. Prinssen, *Doorwerking van Europees recht: de verhouding tussen directe werking, conforme interpretatie en overheidsaansprakelijkheid* (Kluwer, Deventer, 2004). For more on the possibilities for Community liability in the context of the WTO, see A. Thies, “Biret and beyond: the status of WTO rulings in EC law” (2004) 41 C.M.L.Rev. 1661-1682; A. von Bogdandy, “Legal Effects of World Trade Organization Decisions Within European Union Law: A Contribution to the Theory of the Legal Acts of International Organizations and the Action for Damages Under Article 288(2) EC” (2005) 39(1) *Journal of World Trade* 45-66.

64. In this sense, S. Prechal, case note under Joined Cases C 397/01-403/01, *Pfeiffer* cited above fn.3. Case C-224/01, *Köbler* [2003] E.C.R. I-10239, at [32].

65. Case C-456/98, *Centrosteel* [2000] E.C.R. I-6007. Joined Cases C 6/90 & 9/90, *Francovich*, cited above fn.58 2nd ser., at [36].

66. In this sense, see T. Corthaut, case note under ECJ, June 27, 2000, Joined Cases C 240/98-244/98, *Océano Grupo Editorial SA*, January 29, 1998; Case C-215/97, *Bellone* [1998] E.C.R. I-2191; Case C-456/98, *Centrosteel*, cited above fn.65; (2002) 8 *Columbia Journal of European Law* 293-310. Case C-105/03, *Pupino*, cited above fn.7 1st ser., at [41]-[43].

67. Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3. On the issue of when a Directive confers rights on individuals to fulfill the criteria for liability, see S. Prechal, *Directives in EC Law* (OUP, Oxford, 2005),

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pp.106-108.

68. Case C-105/03, *Pupino*, cited above fn.7. Case C-5/89, *Commission v Germany* [1991] E.C.R. I-4983, at [14].

69. *ibid.*, at [60]. Joined Cases C 46/93 & 48/93, *Brasserie du Pêcheur* [1996] E.C.R. I-1029, at [51].

70. P. Van Nuffel, “De doorwerking van het Europees gemeenschapsrecht in de Belgische rechtsorde” (2005) 53 S.E.W. 3-4. *ibid.*, at [41]-[44].

71. On this K. **Lenaerts** and M. Desomer, “Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures” (2005) 11 *European Law Journal* 744. Case C-352/98 P, *Bergaderm and Goupil v Commission* [2000] E.C.R. I-5291, at [41]-[42].

72. Joined Cases C 465/02 & 466/02, *Germany and Denmark v Commission* [2005] E.C.R. I-0000. Judgment of the European Court of Human Rights of Sept. 24, 2002, App.No.27824/95, *Posti and Rahko v Finland*.

73. Admittedly, the parties to the dispute were not individuals, but Member States. However, it follows from Case C-149/96, *Portugal v Council* [1999] E.C.R. I-8395 that the rules for invocability are as strict for Member States as they are for individuals. On the limited judicial protection in CFSP affairs under the European Constitution, see T. Corthaut, “An Effective Remedy for All? Paradoxes and Controversies in Respect of Judicial Protection in the Field of the CFSP under the European Constitution” (2005) 12 *Tilburg Foreign Law Review* 110-144.

74. Commission Regulation 1829/2002 amending the Annex to Regulation 1107/96 with regard to the name ‘Feta’, [2002] O.J. L277/10. Case T-383/00, *Beamglow v European Parliament, Council and Commission*, judgment of December 14, 2005, at [169]-[216].

75. Council Regulation 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, [1992] O.J. L208/1. Effectively, neither in Case T-383/00, *Beamglow v European Parliament, Council and Commission*, both cited above fn74 2nd ser., nor in any of its companion cases was liability accepted.

76. Compare in this respect the validity control, at the request of a private party, of Regulation 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation 295/91, [2004] O.J. L46/1, in light of the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, which had been signed by the Community, but only entered into force on June 28, 2004, which was some months after the adoption of the contested Regulation. According to the Advocate General, “The question is therefore whether the scope and object of the Convention are the same as the contested (provisions in) Regulation No 261/2004 and whether there is a conflict between the two.” See Opinion of A.G. Geelhoed of September 8, 2005 in Case C-344/04, *IATA* [2006] E.C.R. I-0000, at [33].

77. Case C-377/98, *Netherlands v European Parliament and Council* [2001] E.C.R. I-7079.

78. Convention on Biological Diversity signed on June 5, 1992 in Rio de Janeiro (hereinafter the “CBD”), approved by the European Community by Council Decision 93/626, [1993] O.J. L309/1.

79. *Netherlands v European Parliament and Council*, cited above fn.77, at [54].

80. See in this respect Case C-162/96, *Racke* [1998] E.C.R. I-3655. Other readings of that case could be developed in order to explain this case without having to rely on customary law directly, see J. Wouters and D. Van Eeckhoutte, “Giving effect to customary international law through EC law” in J. Prinssen and A. Schrauwen (eds), *Direct effect: rethinking a classic of EC legal doctrine* (Europa Law Publishing, Groningen, 2002), pp.201-208. However, the reference to *Racke* in Case C-377/98, *Netherlands v European Parliament and Council*, cited above fn.77, at [54] removes most doubt as to the possibility to invoke customary law. See in this sense D. Van Eeckhoutte, note under Case C-377/98, *Netherlands v European Parliament and Council*, cited above fn.77; (2002) 8 *Columbia Journal of European Law* 520-522; however, this author makes a potentially unwarranted distinction between *fundamental* norms of customary international law and other norms of customary international law.

81. See, inter alia, Case C-149/96, *Portugal v Council*, cited above fn.73 (GATT); Joined Cases C 300/98 & 392/98, *Parfums Christian Dior* [2000] E.C.R. I-11307 (TRIPS); Case C-377/02, *Van Parys* [2005] E.C.R.

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I-1465 (recommendations and decisions of the WTO dispute settlement body).

82. Case C-377/98, *Netherlands v European Parliament and Council*, cited above fn.77, at [52]. This requirement applies to all international norms that are being invoked as a yardstick for judicial review, also outside the WTO context, see Case C-344/04, *IATA*, cited above fn.76, at [39].

83. Case C-149/96, *Portugal v Council*, cited above fn.73, at [42]; more specifically as to the EEA Agreement, see Case T-115/94, *Opel Austria* [1997] E.C.R. II-39.

84. Indeed, as demonstrated by an example outside the WTO context, the question whether an international agreement confers rights on individuals is simply not at issue when assessing whether its relevant provisions are among the rules in the light of which the Court reviews the legality of acts of the Community institutions. See Case C-344/04, *IATA*, cited above fn.76, at [39]. Admittedly, the invoked articles need to be unconditional and sufficiently precise, but only to the extent that they must be apt to serve as yardstick for review, not in the sense that they confer rights on individuals as is required in cases involving direct effect.

85. Case C-149/96, *Portugal v Council*, cited above fn.73, at [46].

86. Case C-377/98, *Netherlands v European Parliament and Council*, cited above fn.77, at [52].

87. Case C-322/88, *Grimaldi*, cited above fn.40, at [13] and [16].

88. On the question whether interpretation must always be given priority, see J. Prinssen, *Doorwerking van Europees recht: de verhouding tussen directe werking, conforme interpretatie en overheidsaansprakelijkheid* (Kluwer, Deventer, 2004), Ch.7. See also M. H. Wissink, *Richtlijnconforme interpretatie van burgerlijk recht* (Kluwer, Deventer, 2001), pp.121-133.

89. Case C-201/02, *Wells* [2004] E.C.R. I-723.

90. This occurs not infrequently at the Community level as well, whenever the appointment or promotion of a civil servant is annulled following an action brought by another interested individual.

91. Case C-201/02, *Wells*, cited above fn.89, at [56]-[58].

92. For more on procedural equivalence, see K. Lenaerts, D. Arts and I. Maselis, R. Bray (eds), *Procedural Law of the European Union* (Sweet & Maxwell, London, 2006), para.3-011.

93. Case C-157/02, *Rieser Internationale Transporte* [2004] E.C.R. I-1477, at [69].

94. There is one qualification of this rule. As Member States are under an obligation not to take any measures which are liable to seriously compromise the result to be achieved by the end of the transitional period, the validity of national law can be checked against this standard, see Case C-316/04, *Stichting Zuid-Hollandse Milieufederatie*, judgment of November 10, 2005, at [43].

95. One could argue, however, that since the enforcement of this rule is only political through the Council (see Art.11(2) last paragraph) the CFSP common positions are more like the WTO rules, which ultimately can be violated as well. It is to be remarked, though, that even at the height of the Iraq crisis, the Council agreed that the Member States that were playing *cavalier seul* were actually in violation of legally binding norms, see in this sense the remarks by Johan Verbeke, at the time the *chef de cabinet* of the Belgian Minister of Foreign Affairs, as quoted in T. Corthaut, "Doorwerking van het tweede pijlerrecht van de EU in de Belgische rechtsorde--de Belgische rechter als doe-het-zelver in GBVB-aangelegenheden?" in J. Wouters and D. Van Eeckhoutte (eds.), *Doorwerking van het internationaal recht in de Belgische rechtsorde. Recente ontwikkelingen in een rechtstakoverschrijdend perspectief* (Intersentia, Antwerpen, forthcoming), para.7.

96. A striking example may be the following hypothetical case. Imagine that a Member State is confronted with reports that several of its soldiers have been misbehaving during an EU-mission and decides under public pressure to allow their soldiers to be tried in the host country. In such circumstances it ought to be possible to challenge this unilateral decision in the light of the SOFA, as the SOFA is binding on the EU and its Member States through Art.24 TEU. It may well be that the immunities are granted to the benefit of the mission and not to the benefit of the individual soldiers. However, even then a unilateral waiver by one of the Member States could be problematic for the whole of the EU-mission.

97. Case 70/87, *Fediol* [1989] E.C.R. I-1789, at [20].

98. Case C-69/89, *Nakajima* [1991] E.C.R. I-2069, at [26]-[32].

(Cite as:)

99. Joined Cases C 27/00 & 122/00, *Omega Air* [2002] E.C.R. I-2569.
100. Case 26/62, *Van Gend & Loos* [1963] E.C.R. I-Case 70/87, *Fediol* [1989] E.C.R. I-1789; Case C-69/89, *Nakajima*, cited above fn.98.
101. Case 6/64, *Costa v ENEL* [1964] E.C.R. 1203. Case T-54/99. *max.mobil Telekomunikation Service v Commission* [2002] E.C.R. II-313, at [47]; Case T-177/01, *Jégo-Quééré* [2002] E.C.R. II-2365, at [41]-[42]. Both judgments have been annulled on appeal, but not on the particular issue. See, however, also Joined Cases T 377/00, 379/00, 380/00, 260/01 & 272/01, *Philip Morris International v Commission* [2003] E.C.R. II-1, at [122].
102. Joined Cases C 397/01-403/01, *Pfeiffer* [2004] E.C.R. I-8835. See, for instance, Consideration 25 of Directive 2005/29 of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450, Directives 97/7, 98/27 and 2002/65 of the European Parliament and of the Council and Regulation 2006/2004 of the European Parliament and of the Council, [2005] O.J. L149/22 (first pillar); Consideration 10 of Council Framework Decision 2002/475/JHA combating terrorism, [2002] O.J. L164/3 (third pillar).
103. Joined Cases C 387/02, 391/02 & 403/02, *Berlusconi* [2005] E.C.R. I-3565. See for an implied application in this sense the Opinion of A.G. Kokott of September 8, 2005 in Case C-540/03, *European Parliament v Council*, not yet reported, at [7] and [61].
104. Case C-105/03, *Pupino* [2005] E.C.R. I-5285. See, for instance, the direct action against a French Ministerial Decree giving rise to Case C-182/02, *Ligue pour la protection des oiseaux* [2003] E.C.R. I-12105.
105. Case C-377/02, *Van Parys* [2005] E.C.R. I-1465. See, for instance, the direct action against legislative acts of the Flemish and French Communities, giving rise to Case C-93/97, *Fédération Belge des Chambres Syndicales de Médecins* [1998] E.C.R. I-4837.
106. Case C-105/03, *Pupino*, cited above fn.5. See, for instance, the application before the High Court of Justice of England and Wales, Queen's Bench Division, resulting in Case C-201/02, *Wells*, cited above fn.89.
107. See the action for damages in Case T-333/02, *Gestoras Pro Amnistía v Council*, rejected by an unpublished order of the CFI of June 7, 2004, notified in [2004] O.J. C228/40 and currently under appeal, see Case C-354/04 P, *Gestoras Pro Amnistía v Council* [2004] O.J. C251/9. Joined Cases C 27/00 & 122/00, *Omega Air*, cited above fn.99.
108. Admittedly, the term does actually appear in Art.72 TEC, but in a wholly unrelated context. Case C-168/95, *Arcaro*, cited above fn.62, at [43].
109. There is a whole series of cases where individuals were given a chance to rely on international treaties concluded by the Community, see for a recent example Case C-265/03, *Simuntenkov* [2005] E.C.R. I-2579; for an overview see K. Lenaerts and P. Van Nuffel, R. Bray (eds), *Constitutional Law of the European Union* (Sweet & Maxwell, London, 2005), pp.742-743. Joined Cases C 387/02, 391/02 & 403/02, *Berlusconi*, cited above fn.4 1st ser.
110. See, for instance, the negative opinion of the Procureur-Generaal of the Ghent Court of Appeals rejecting extradition in the *Erdal* Case, (2000) 1 *Tijdschrift voor Strafrecht* 230. Opinion of A.G. Kokott of October 14, 2004 in Joined Cases C 387/02, 391/02 & 403/02, *Berlusconi*, cited above fn.4 1st ser.
111. Cited above fn.7. Joined Cases C 387/02, 391/02 & 403/02, *Berlusconi*, cited above fn.4 1st ser., at [72]. Arguably, “the Community law requirement that penalties be appropriate” goes beyond the Directive as such. However, the debate in the case was solely centred on the Directive.
112. On the use of the rule of law as a foundation for strengthening the rules on invocability through the concept of “effective judicial protection”, see S. Drake, “Twenty years after *Von Colson* : the impact of ‘indirect effect’ on the protection of the individual's Community rights” (2005) 30 E.L.Rev. 329 at pp.332-334. Case C-226/97, *Lemmens* [1998] E.C.R. I-3711.
113. On the importance of output legitimacy for the EU, see B. Kohler-Koch, “The Commission White Paper and the Improvement of European Governance”, in J. Weiler, Jean Monnet Working Paper 6/01, “Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance”,

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available at www.jeanmonnetprogram.org/papers/01/012101.rtf, pp.5-6. See also K. **Lenaerts** and M. De-somer, “New Models of Constitution-making in Europe: the Quest for Legitimacy” (2002) 39 C.M.L.Rev. 1217-1253. Council Directive 83/189 laying down a procedure for the provision of information in the field of technical standards and regulations, [1983] O.J. L109/8.

114. P. Van Nuffel, “De doorwerking van het Europees gemeenschapsrecht in de Belgische rechtsorde” (2005) 53 S.E.W. 3-4. Case C-194/94, *CIA Security* [1996] E.C.R. I-2201.

115. Declaration on Art.I-6 [2004] O.J. C310/440. Case C-443/98, *Unilever Italia* [2000] E.C.R. I-7535.

116. *Costa v ENEL*, cited above fn.2. Council Directive 83/189 laying down a procedure for the provision of information in the field of technical standards and regulations, [1983] O.J. L109/8, as amended by Directive 94/10 of the European Parliament and the Council materially amending for the second time Directive 83/189, [1994] O.J. L100/30.

117. For extensive argumentation in this sense, see T. Corthaut, “Doorwerking van het tweede pijlerrecht van de EU in de Belgische rechtsorde--de Belgische rechter als doe-het-zelver in GBVB-aangelegenheden?” in J. Wouters and D. Van Eeckhoutte (eds.), *Doorwerking van het internationaal recht in de Belgische rechtsorde. Recente ontwikkelingen in een rechtstakoverschrijdend perspectief* (Intersentia, Antwerpen, forthcoming), paras 10-21. See also the Opinion of A.G. Kokott of November 11, 2004 in *Pupino*, cited above fn.7. For a more cautious approach, see T. Fetzer and T. Groß, “Die Pupino-Entscheidung des EuGH--Abkehr vom intergouvernementalen Charakter der EU?--Erwiderung auf Herrmann, EuZW 2005, 436” (2005) Eu.Z.W. 550-551. S. Prechal, case note under Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3 1st ser.; (2005) 42 C.M.L.Rev. 1445 at p.1447.

118. For more on the legal personality of the EU, see **Lenaerts** and Van Nuffel, cited above fn.10, pp.816-817; see also I. Österdahl, “The EU and its Member States, Other States and International Organizations--The Common European Security and Defence Policy after Nice” (2001) 341 Nordic J.I.L. 350; R. A. Wessel, “De Europese Unie in de internationale rechtsorde” (2001) *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* 11-37. Case C-443/98, *Unilever Italia*, fn.16 2nd ser., at [51].

119. Council Framework Decision 2002/475/JHA of June 13, 2002 on combating terrorism, [2002] O.J. L164/3. Case C-129/94, *Ruiz Bernaldéz* [1996] E.C.R. I-1829.

120. See, for instance, Council Common Position 2003/297/CFSP of April 28, 2003 on Burma/Myanmar, [2003] O.J. L106/36. Council Directive 72/166 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, [1972] O.J. Spec. Ed. 360.

121. Council Framework Decision 2001/220/JHA of March 15, 2001 on the standing of victims in criminal proceedings, [2001] O.J. L82/1. Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3 1st ser.

122. For a recent example, see Council Decision 2005/680/CFSP of August 12, 2005, concerning the conclusion of the Agreement between the European Union and the Democratic Republic of the Congo on the status and activities of the European Union Police Mission in the Democratic Republic of the Congo (EUPOL Kinshasa), [2005] O.J. L256/57. S. Prechal, case note under Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3 1st ser.; (2005) 42 C.M.L.Rev. 1445 at pp.1446-1447.

123. Compare *Costa v ENEL*, cited above fn.2. Case C-168/95, *Arcaro*, cited above fn.62; Joined Cases C 387/02, 391/02 & 403/02, *Berlusconi*, cited above fn.4 1st ser.

124. *Pupino*, cited above fn.7, at [41]-[43]. Case C-201/02, *Wells*, cited above fn.89, at [54]-[58].

125. Again, compare *Costa v ENEL*, cited above fn.2. Case C-215/97, *Bellone*, cited above fn.66. As explained more extensively below, in *Bellone* the ECJ suggested to set aside the requirement of Italian law that made the validity of an agency contract dependent on the prior registration of the commercial agent. As a result, the principal of *Bellone* had to pay the contractually agreed compensation, which he had sought to avoid by relying on the nullity of the contract.

126. J. Prinssen, *Doorwerking van Europees recht: de verhouding tussen directe werking, conforme interpretatie en overheidsaansprakelijkheid* (Kluwer, Deventer, 2004), p.11. Case C-129/94, *Ruiz Bernaldéz*, cited above fn.20, 2nd ser.

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127. “The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be *inconsistent* with that legal system.” See *Costa v ENEL*, cited above fn.2, emphasis added. Case C-201/02, *Wells*, cited above fn.89, at [57].

128. Even though a rather rigorous application of primacy is advocated in this paper, it is to be acknowledged that the case law demonstrates that even a principle as fundamental as the primacy of EC law cannot always apply without qualification; see, for instance, the limitations flowing from fundamental rights in Joined Cases C 387/02, 391/02 & 403/02, *Berlusconi*, cited above fn.4. Case C-194/94, *CIA Security*, cited above fn.15 2nd ser.; Case C-443/98, *Unilever Italia* [2000] E.C.R. I-7535.

129. M. Lenz, D. Sif Tynes and L. Young, “Horizontal What? Back to basics” (2000) 25 E.L.Rev. 509-522. Case C-215/97, *Bellone*, cited above fn.66.

130. C. Hilson and T. Downes, “Making Sense of Rights: Community Rights in EC Law” (1999) 24 E.L.Rev. 121-139. It could be argued that having to put up with the adverse repercussions in a procedure such as in *Wells* is even worse. Though national law will usually allow the private party whose rights will be affected to intervene, that party is not necessarily present before the national judge to argue on the compatibility of national law with EU law, as that party is formally a third party to the direct judicial review proceedings, which are between the applicant and the state. By contrast, in instances of incidental review, the party on whom the setting aside of national law will have adverse repercussions, will at least be a party to the case and thus in a position to make its views on the validity of the national act known.

131. P.V. Figuerora Regueiro, “Invocability of Substitution and Invocability of Exclusion: Bringing Legal Realism to the Current Development of the Case-Law of ‘Horizontal’ Direct Effect of Directives”, Jean Monnet Working Paper 7/02, available at www.jeanmonnetprogram.org/papers/02/020701.pdf; see also T. Eilmansberger, “The Relationship Between Rights and Remedies in EC Law: in Search of the Missing Link” (2004) 41 C.M.L.Rev. 1199, at pp.1213-1216. The distinction goes back on earlier, mainly French legal writing often inspired by French administrative law, see in particular Y. Galmot and J.-C. Bonichot, “La Cour de justice des Communautés européennes et la transposition des Directives en droit national” (1988) *Revue française de droit administratif* 16; G. Isaac, *Droit communautaire général* (Masson, Paris, 1994); T. Dal Farra, “L’invocabilité des Directives communautaires devant le juge national de la légalité” (1992) 28 R.T.D.E. 631; P. Manin, “De l’utilisation des Directives communautaires par les personnes physiques ou morales” (1994) 50 A.J.D.A. 259; D. Simon, *La Directive européenne* (Daloz, Paris, 1997); *Le système juridique communautaire* (2nd edn, PUF, Paris, 1998). In this respect a parallel can be drawn between the limited possibilities for private parties to bring an action for annulment under Art.230(4) TEC, which are, in order to ensure that the Community is a Community based on the rule of law, compensated for because of the more extensive possibilities for private parties to obtain indirect judicial review through a preliminary reference made during proceedings before the national court under Art.234 TEC, see Case 294/83, *Parti écologiste “Les Verts” v European Parliament* [1986] E.C.R. 1339, at [23]. In order to ensure the coherence of the system, in both procedures the validity of Community law can be reviewed in light of the same higher norms. Arguably, in order to ensure that the legal orders of the Member States are just as strongly based on the rule of law, as required by Art.6(1) TEU, it is necessary that the types of norms of EU law that can be invoked to assess the validity of a norm of national law do not depend on whether review of the norm of national law takes place during proceedings allowing for direct or indirect judicial review.

132. Opinion of A.G. Léger of January 11, 2000 in Case C-287/98, *Linster* [2000] E.C.R. I-6917, at [57] *et seq.* Case C-72/95, *Kraaijeveld* [1996] E.C.R. I-5403.

133. Opinion of A.G. Saggio of December 16, 1999 in Joined Cases C 240/98-244/98, *Océano Grupo Editorial* [2000] E.C.R. I-4941, at [30]. However, doubts have been expressed whether the claimed “exclusion” made by Saggio really sufficed to explain the result in that case, see in this sense the annotation by T. Corthaut (2002) 8 *Columbia Journal of European Law* 293-310. Case C-287/98, *Linster*, cited above fn.33 1st ser.

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134. Opinion of A.G. Ruiz-Jarabo Colomer of May 6, 2004 in Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3. Case C-201/02, *Wells*, cited above fn.89.
135. Opinion of A.G. Kokott of October 14, 2004 in Joined Cases C 387/02, 391/02 & 403/02, *Berlusconi*, cited above fn.4. Case C-194/94, *CIA Security*, cited above fn.15 2nd ser.
136. **Lenaerts** and Van Nuffel, cited above fn.10, p.740. Case C-215/97, *Bellone*, cited above fn.66; Case C-443/98, *Unilever Italia*, cited above fn.20 2nd ser.
137. Case 26/62, *Van Gend & Loos* [1963] E.C.R. 1. Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3 1st ser.
138. Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3. National procedural law may make it even hardly possible to distinguish between purely private disputes and objective review procedures. A nice example is offered by a recent case of the Belgian constitutional court (Cour d'Arbitrage, judgment No.41/2005 of February 16, 2005, available on www.arbitrage.be). The dispute had started before a civil court as a conflict between a sales agent and his principal about the fees that were due. The Belgian legislation implementing Council Directive 86/653 on the co-ordination of the laws of the Member States relating to self-employed commercial agents had excluded commercial agents in the insurance sector from the legislation. During the proceedings before the Ghent Court of Appeal the agent challenged the validity of the national implementing act, claiming that the exclusion of the insurance sector is discriminatory and thus contrary to Belgian constitutional law. However, as a civil court is precluded from setting aside legislation the Court of Appeal referred the case to the constitutional court. We now have a preliminary reference proceeding, quite similar to the one before the ECJ under Art.234 TEC, solely concerned with the validity of the national implementing measure and which now results in the Belgian Government being a party to the dispute. Of course, even if the validity control primarily takes place against the background of the non-discrimination principle of Arts 10 and 11 of the Belgian Constitution, the Directive is being invoked as well. Accordingly the validity of the national legislation is reviewed in a separate procedure using both Belgian constitutional law and the Directive as yardstick. The Constitutional Court, unsurprisingly, comes to the conclusion that the legislation is indeed invalid and sends this answer back to the Civil Court which must now apply this outcome between the original private parties, presumably resulting in imposing obligations on the principal where none seemed to exist before.
139. Case C-322/88, *Grimaldi* [1989] E.C.R. 4407, at [13] and [16]. For a defence of national procedural autonomy and a critique of certain unwelcome inroads to it in the context of validity control, see **K. Lenaerts** and T. Corthaut, "Judicial Review as a Contribution to the Development of European Constitutionalism" (2003) 23 *Yearbook of European Law* 16-17.
140. Opinion of A.G. Tizzano of June 30, 2005 in Case C-144/04, *Mangold* [2006] All E.R. (EC) 383, at [115]-[120]; Opinion of A.G. Kokott of October 27, 2005 in Case C-212/04, *Adeneler*, not yet reported, at [42]-[54]. Case C-188/89, *Foster* [1990] E.C.R. I-3313.
141. Case C-144/04, *Mangold*, cited above fn.41. Case C-271/91, *Marshall* [1993] E.C.R. I-4367.
142. Case C-129/96, *Inter-Environnement Wallonie* [1997] E.C.R. I-7411. Case C-456/98, *Centrosteeel*, cited above fn.65.
143. Case C-144/04, *Mangold*, cited above fn.41, at [67]-[78]. Case C-215/97, *Bellone*, cited above fn.66.
144. Case C-105/03, *Pupino*, cited above fn.7, at [41]-[43]. Belgian Cour de Cassation, September 28, 2001, C.00.0066.F and *idem*, January 24, 2003, C.00.0483.N.
145. Arguably, the task for the Court would have been easier if it had to deal with second pillar law, in light of provisions such as Art.11(2) TEU. See in this sense, T. Corthaut, "Doorwerking van het tweede pijlerrecht van de EU in de Belgische rechtsorde--de Belgische rechter als doe-het-zelver in GBVB-aangelegenheden?" in J. Wouters and D. Van Eeckhoutte (eds.), *Doorwerking van het internationaal recht in de Belgische rechtsorde. Recente ontwikkelingen in een rechtstakoverschrijdend perspectief* (Intersentia, Antwerpen), forthcoming, paras 31-32. Case C-215/97, *Bellone*, cited above fn.66.
146. Case C-105/03, *Pupino*, cited above fn.7, at [41]-[43]. For more about this example, see P. Van Nuffel, "De doorwerking van het Europees gemeenschapsrecht in de Belgische rechtsorde" (2005) 53 S.E.W. 12-13.

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147. On the other hand, in this way the ECJ managed, wholly in line moreover with the approach taken by A.G. Kokott, to steer away from making any positive comment about the primacy of EU law. However, as argued above, the latter should not be that controversial. Brussels Court of Appeals, judgment of January 5, 2000.

148. See Case C-286/90, *Poulsen and Diva Navigation* [1992] E.C.R. I-6019; Joined Cases C 300/98 & 392/98, *Parfums Christian Dior* [2000] E.C.R. I-11307. Belgian Cour de Cassation, January 24, 2003, C.00.0483.N.

149. Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3. This confirms that there is a major difference between direct effect and direct applicability. See for an example Case C-403/98, *Azienda Agricola Monte Arcosu* [2001] E.C.R. I-103. Remarkably, the ECJ omitted to include in its answer to the national judge the task of interpreting his national law, as far as possible, in line with the regulation, see in this respect Kronenberger, note under Case C-403/98, *Azienda Agricola Monte Arcosu* [2001] E.C.R. I-103 in (2001) 38 C.M.L.Rev. 1545-1556.

150. Joined Cases C 397/01-403/01 *Pfeiffer*, *ibid.*, at [116], which reads “In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the Directive.” Case C-271/91, *Marshall*, cited above fn.42 2nd ser.

151. For an analysis of the interpretative tools known in the German legal order and available to the national court in *Pfeiffer*, see K. Riesenhuber and R. Domröse, “*Richtlinienkonforme Rechtsfindung und nationale Methodenlehre*” (2005) 47 R.I.W. 51 and pp.52-53. Case 43/75, *Defrenne* [1976] E.C.R. I-455.

152. See in this sense also S. Prechal, case note under Joined Cases C 397/01-403/01, *Pfeiffer* (2005) 42 C.M.L.Rev. 1445 at p.1459. Case C-271/91, *Marshall*, cited above fn.42 2nd ser.

153. Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3. One could of course also wonder about the instruments of the second pillar. At least no explicit prohibition of direct effect can be found. In the absence of guidance by the ECJ it is for every Member State to determine what the consequences may be. For an application in the Belgian legal order in line with the approach taken in this essay, see T. Corthaut, “*Doorwerking van het tweede pijlerrecht van de EU in de Belgische rechtsorde--de Belgische rechter als doe-het-zelver in GBVB-aangelegenheden?*” in J. Wouters and D. Van Eeckhoutte (eds.), *Doorwerking van het internationaal recht in de Belgische rechtsorde. Recente ontwikkelingen in een rechtstakoverschrijdend perspectief* (Intersentia, Antwerpen, forthcoming), in particular paras 48-55.

154. See in this sense Opinion of A.G. Tizzano of June 30, 2005 in Case C-144/04, *Mangold*, cited above fn.41, at [115]-[120]; Opinion of A.G. Kokott of October 27, 2005 in Case C-212/04, *Adeneler*, not yet reported, at [42]-[54]. Art.7 of Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings, [2001] O.J. L82/1.

155. See in this respect also M. H. Wissink, *Richtlijnconforme interpretatie van burgerlijk recht* (Kluwer, Deventer, 2001), pp.78-79, making a useful distinction between norms adopted after the Directive in order to implement it, pre-existing norms which are later seen as meant to implement the Directive and pre-existing norms without the objective of implementing the Directive. Case C-176/03, *Commission v Council* [2005] E.C.R. I-0000.

156. Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3. Joined Cases C 387/02, 391/02 & 403/02, *Berlusconi*, cited above fn.4 1st ser.

157. M. H. Wissink, *Richtlijnconforme interpretatie van burgerlijk recht* (Kluwer, Deventer, 2001), pp.204-205. Joined Cases C 6/90 & 9/90, *Francovich* [1991] E.C.R. I-5357.

158. Case C-105/03, *Pupino*, cited above fn.7, at [47]. If the national legislation has made that choice, for instance by designating the state as the guarantor for the claims that arise under the Directive, then the Directive can be invoked against the government without there being further barriers to the vertical direct effect of the Directive, see Case C-441/99, *Gharehveran* [2001] E.C.R. I-7687.

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159. M. H. Wissink, *Richtlijnconforme interpretatie van burgerlijk recht* (Kluwer, Deventer, 2001), p.205. *Three Rivers District Council v Bank of England* [2000] 3 C.M.L.R. 205, HL.

160. Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3, at [114]-[119]. See also Case C-105/03, *Pupino*, cited above fn.7, at [47]. For more on this case and the need to make the distinction, see S. Prechal, *Directives in EC Law* (OUP, Oxford, 2005), pp.126-127.

161. Case C-168/95, *Arcaro* [1996] E.C.R. I-4705, at [42]. Joined Cases C 46/93 & 48/93, *Brasserie du Pêcheur* [1996] E.C.R. I-1029, at [51].

162. J. Prinssen, *Doorwerking van Europees recht: de verhouding tussen directe werking, conforme interpretatie en overheidsaansprakelijkheid* (Kluwer, Deventer, 2004), p.171. See also M. H. Wissink, *Richtlijnconforme interpretatie van burgerlijk recht* (Kluwer, Deventer, 2001), pp.204-205. A contrario, it follows from the fact that the norms breached “do not in principle form part of the rules by which the Court of Justice and the Court of First Instance review the legality of acts adopted by Community institutions under the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC), that individuals cannot rely on them before the courts and that any infringement of them will not give rise to non-contractual liability on the part of the Community”, see Case T-210/00, *Biret v Council* [2002] E.C.R. II-47, at [71]. This implies, of course, that must be examined whether the specific norm relied upon meets *in concreto* this criterion, see Case C-94/02 P, *Biret v Council* [2003] E.C.R. I-10565, at [60]. The application made by the ECJ in that case in respect of the implementation of a DSB decision before the end of the reasonable period is but one application of this broader principle. In the same vein it can be explained why a Member State is in principle not liable for non-implementation of a Directive before the end of the transitional period, with the possible exception of the situation where a Member State has breached its duty to abstain under Case C-129/96, *Inter-Environnement Wallonie* [1997] E.C.R. I-7411, see in this sense J. Prinssen, *Doorwerking van Europees recht: de verhouding tussen directe werking, conforme interpretatie en overheidsaansprakelijkheid* (Kluwer, Deventer, 2004). For more on the possibilities for Community liability in the context of the WTO, see A. Thies, “Biret and beyond: the status of WTO rulings in EC law” (2004) 41 C.M.L.Rev. 1661-1682; A. von Bogdandy, “Legal Effects of World Trade Organization Decisions Within European Union Law: A Contribution to the Theory of the Legal Acts of International Organizations and the Action for Damages Under Article 288(2) EC” (2005) 39(1) *Journal of World Trade* 45-66.

163. In this sense, S. Prechal, case note under Joined Cases C 397/01-403/01, *Pfeiffer* cited above fn.3. Case C-224/01, *Köbler* [2003] E.C.R. I-10239, at [32].

164. Case C-456/98, *Centrosteeel* [2000] E.C.R. I-6007. Joined Cases C 6/90 & 9/90, *Francovich*, cited above fn.58 2nd ser., at [36].

165. In this sense, see T. Corthaut, case note under ECJ, June 27, 2000, Joined Cases C 240/98-244/98, *Océano Grupo Editorial SA*, January 29, 1998; Case C-215/97, *Bellone* [1998] E.C.R. I-2191; Case C-456/98, *Centrosteeel*, cited above fn.65; (2002) 8 *Columbia Journal of European Law* 293-310. Case C-105/03, *Pupino*, cited above fn.7 1st ser., at [41]-[43].

166. Joined Cases C 397/01-403/01, *Pfeiffer*, cited above fn.3. On the issue of when a Directive confers rights on individuals to fulfill the criteria for liability, see S. Prechal, *Directives in EC Law* (OUP, Oxford, 2005), pp.106-108.

167. Case C-105/03, *Pupino*, cited above fn.7. Case C-5/89, *Commission v Germany* [1991] E.C.R. I-4983, at [14].

168. *ibid.*, at [60]. Joined Cases C 46/93 & 48/93, *Brasserie du Pêcheur* [1996] E.C.R. I-1029, at [51].

169. P. Van Nuffel, “De doorwerking van het Europees gemeenschapsrecht in de Belgische rechtsorde” (2005) 53 S.E.W. 3-4. *ibid.*, at [41]-[44].

170. On this K. Lenaerts and M. Desomer, “Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures” (2005) 11 *European Law Journal* 744. Case C-352/98 P, *Bergaderm and Goupil v Commission* [2000] E.C.R. I-5291, at [41]-[42].

171. Joined Cases C 465/02 & 466/02, *Germany and Denmark v Commission* [2005] E.C.R. I-0000. Judgment of the European Court of Human Rights of Sept. 24, 2002, App.No.27824/95, *Posti and*

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Rahko v Finland.

172. Admittedly, the parties to the dispute were not individuals, but Member States. However, it follows from Case C-149/96, *Portugal v Council* [1999] E.C.R. I-8395 that the rules for invocability are as strict for Member States as they are for individuals. On the limited judicial protection in CFSP affairs under the European Constitution, see T. Corthaut, “An Effective Remedy for All? Paradoxes and Controversies in Respect of Judicial Protection in the Field of the CFSP under the European Constitution” (2005) 12 *Tilburg Foreign Law Review* 110-144.

173. Commission Regulation 1829/2002 amending the Annex to Regulation 1107/96 with regard to the name ‘Feta’, [2002] O.J. L277/10. Case T-383/00, *Beamglow v European Parliament, Council and Commission*, judgment of December 14, 2005, at [169]-[216].

174. Council Regulation 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, [1992] O.J. L208/1. Effectively, neither in Case T-383/00, *Beamglow v European Parliament, Council and Commission*, both cited above fn74 2nd ser., nor in any of its companion cases was liability accepted.

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