The evolution of direct effect in the EU: Stocktaking, problems, projections

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Focusing on the case law developed by the Court of Justice of the European Union since Van Gend en Loos, this article contends that three important shifts occurred concerning the effects of EU law in national courts since that case was decided. First, the existence of a particular category of (“direct effect”) EU norms, which implies a process of selection among EU law provisions, is no longer as problematic as the method of comparison and combination of norms in judicial reasoning that has become a vehicle for the penetration of EU law in courts. Second, the possibility for individuals to claim (subjective) rights on the basis of the Treaty is overshadowed by questions concerning obligations imposed by the Treaty on individuals, and more generally, on the methods through which this horizontal effect occurs. Third, the duty for national courts to apply EU law provisions directly (direct enforcement) is now coupled with one prior question that these courts have to address, and which has become much more sensitive than before in view of the growing centrality of fundamental rights’ protection in the EU system: the question of the applicability of EU and national (constitutional) law. Having examined these three shifts, the article concludes that it has become urgent to reconsider the effects of EU law in member states in order to avoid a decline of individual rights and freedoms resulting from EU law enforcement. Thus, “Revisiting Van Gend en Loos” leads to a reflection on the hypothesis, in which EU law should yield and national courts should be granted more discretion, when confronted with the resisting substance of national law (especially fundamental rights or freedoms protected by national constitutions).

1. Introduction

No account of the development European Law misses the reference to Van Gend en Loos. This is not because the facts are exciting, captivating, or memorable: who would enjoy recounting the facts in Van Gend en Loos? Nor is it because the case addressed a cause, a socially sensitive issue. Rather, the reason for all this attention is because the European Court of Justice (ECJ) named and shaped a “new legal order,” which can still be characterized by “the direct effect of a whole series of provisions which are applicable to

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their nationals and to the Member States themselves.” For that reason, the decision is considered a moment of “passage,” one of these turning points that marked the history of European legal and political integration. Combined with Costa v. E.N.E.L. and the principle of primacy, Van Gend en Loos has allowed a considerable expansion of EU law effects, in national courts, an evolution that was fostered by the dialogue between these courts and the ECJ, through the channel of preliminary ruling.

But what is the significance of the decision today? To be sure, the doctrine of “direct effect,” as affirmed in the decision, remains a powerful instrument through which EU law penetrates national legal systems. And the effectiveness of European treaties’ provisions owes a lot to the role assigned to national courts in the “new legal order” of the European Community (EC), namely to protect individual rights conferred by the treaty.

However, EU law has evolved in so many different ways since Van Gend en Loos was decided, and the “transformation of Europe” has been so profound, that one may doubt that the case can be of any help to face today’s challenges concerning the effects of EU law in national courts. To be sure, the doctrine of direct effect has not been called into question: it remains true, and it is an essential feature of the EU legal order, that some provisions of EU law can be relied on in national courts to claim subjective rights. But the effects of EU law in national courts have diversified and grown more complex to such an extent that Van Gend en Loos seems to grasp only a thin fragment of EU law enforcement issues. It seems, rather, that Van Gend en Loos no longer gives an accurate idea of the ways through which EU law penetrates member states through its enforcement in national courts. And it would be an error, I believe, to cling too rigidly to its doctrine, in trying to address the new challenges that the evolution of EU law has created.

The approach taken in this paper focuses on the case law developed by the ECJ. It is, indeed, a narrow angle: it looks at one particular scene, on which EU law is expressed, and developed, as if it could be isolated from the other “sources” of law development. Of course, I do not pretend that analyzing the court’s discourse and, in particular, the departures from expected repetitions and the moments when improvisation occurs, thus making change possible, can be properly done without taking into account elements of legal, social, or political context. However, because the purpose of this reflection is to revisit a case decided by the ECJ fifty years ago, the choice to focus mainly on case law, existing and prospective, seems appropriate.

When I started to reconsider Van Gend en Loos, I asked myself the following question: what would be today’s version of that case? Or, rather, what situation(s), involving the effects of EU law in national courts, would be as challenging for the ECJ today as Van Gend en Loos was, in its time? The answer, I believe, is that the Court of Justice

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2 Luuk van Middelbaar, The Passage to Europe (2013).
4 On the contribution of preliminary ruling to the effectiveness of direct effect. see Joseph H.H. Weiler, Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy, 12(1) INT’L J. CONST. L. 96 (2014).
would have to rule in a case, or a series of cases, that would be substantially different from *Van Gend en Loos*. Three important shifts would characterize the action(s) before a national court as compared to the situation in *Van Gend en Loos*. First, the claim would be based, not on one particular provision of the Treaty on EU (TEU) or the Treaty on the Functioning of the European Union (TFEU) which satisfies the conditions to be given direct effect, but rather on a combination of norms, regardless of their respective direct effect. Second, instead of involving an individual requesting the benefit of a provision of the Treaty, the action would challenge an obligation imposed by the Treaty on a private actor, not the state, or contest a coercive measure applied to an individual, on the basis of EU law: the effects of the Treaty would be contested, not requested. Lastly, the case would imply a prior question on the applicability of the primary law. More precisely, the CJEU would be questioned on the applicability of the Charter of Fundamental Rights to the situation before it, and would have to consider, at the same time, the possibility for a national court to enforce fundamental rights protected by the constitution of the member state to which the court belongs.

Imagining in detail this abstract case is not the purpose of this article. But sketching out the kind of situations that are most problematic allows us to shed light on three essential outcomes of *Van Gend en Loos* that no longer constitute the major challenges concerning EU law enforcement in national courts: the existence of a particular category of (“direct effect”) EU norms, which implies a process of selection among EU law provisions; the possibility for individuals to claim (subjective) rights on the basis of the treaty; and the duty for national courts to apply EU law provisions directly (direct enforcement). That triad (selection, rights, application) has lost most of its mystery. As far as selection of direct effect norms is concerned, uncertainties have been reduced to a minimum. To be sure, not all questions on that matter have vanished in the course of EU law evolution, but they are somehow overshadowed by a phenomenon that *Van Gend en Loos* had ignored: comparison and combination of norms in judicial reasoning. Concerning subjective rights, without denying the fact that individuals have, since *Van Gend en Loos*, gained new rights from the treaty, and from other sources of EU law, there is more to say, today, on the obligations imposed by the Treaty on individuals, and more generally, on the methods through which this horizontal effect occurs (or does not occur). Lastly, the duty of national courts to apply EU law—the enduring importance of that function assigned to national courts—is now coupled with one prior question that these courts have to address, and which has become much more sensitive than before in view of the growing centrality of fundamental rights’ protection in the EU system: the question of the applicability of EU and national (constitutional) law.

Thus, following *Van Gend en Loos*, a dialectical approach can be constructed using a series of pairs: selection–combination (of norms); (individual) rights–obligations; and application–applicability of EU law. This article intends to use these dialectic pairs, successively (Sections 2 to 4), in order to examine the new questions concerning EU law enforcement in national courts. Unsurprisingly, the conclusions of these analyses are not straightforward. On the one hand, it is quite clear that there are more opportunities than before to mobilize EU law in national courts. This confirms what has been
a constant evolution since the narrow concept of “direct effect” has been extended to allow a much larger variety of claims based on EU law: new forms of invocability of EU law have emerged and to some extent have transformed the notion of EU law effectiveness in national courts. On the other hand, the rigor of direct effect, in its original purity, has become problematic in some particular instances. This is the case when obligations binding on individuals stem from horizontal application of provisions of primary law—in particular, free-market rules which were not meant to apply to private actors. More broadly, the effectiveness of European Union law is too simple an answer, it seems, in cases, more numerous than before, in which EU law imposes obligations or constraints on individuals, rather than states. In 2013, the power of EU law to impose transformations of national policies should not be affirmed at all costs, without consideration to the impact of EU policies on individual rights and freedoms protected by national Constitutions. That is an important matter that “revisiting Van Gend en Loos” also invites us to think about, in guise of conclusion (Section 5).

2. From selection to combination

Among the various ways in which EU law norms are invoked before national courts, there is one which contrasts sharply with the Van Gend en Loos concept of direct effect: the combination of norms emanating from different sources of law. Indeed, in some cases, it seems as if effectiveness of European law depended not on the respective legal force of the norms invoked before the court, but on the relationship that they entail. To be sure, this phenomenon is not specific to EU law, but it takes on specific forms in EU law, in light of the specific system of norms of that legal order.

Van Gend en Loos implied identification by judges of EU law norms possessing direct effect: such norms could be the basis for subjective rights. The case led to distinctions among, and the constitution of, different categories of norms, depending on their capacity to produce direct effect. Although this is not coming to an end, and the taxonomic enterprise must go on, since many new provisions of EU law come to life with an uncertain nature, the power accorded to normative combinations has made it less important than before to ascertain the exact effect of each provision of the law.

2.1. Direct effect as a process of a selection

Van Gend en Loos raised the question whether a provision of the treaty (art. 12 TEU) could be a source of individual rights that national courts should protect. To answer this question, the Court of Justice insisted on the nature of the Community legal order, a nature justifying the capacity of provisions mentioned in the treaty to create rights.

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7 See particularly the provisions of the Charter of Fundamental Rights of the European Union, 2010 OJ. C 83/02 [hereinafter Charter of Rights].
and obligations for individuals, and not only for member states. At the same time, the Court clearly embraced the idea that not all treaty provisions had such effect: only under certain conditions, it indicated, can treaty provisions be invoked by individuals in national courts, in order to claim subjective rights. Since then, the Court of Justice has presided over the process of selection of direct-effect norms.

In Van Gend en Loos, the Court already mentioned the criteria to be taken into account in order to distinguish among EU law norms: to produce direct effect, the provisions concerned must be clear, precise, and unconditional. As the subsequent case law showed, these criteria were given extensive interpretation, particularly when treaty provisions were concerned, and the only true requirement became the possibility of effective enforcement, the “justiciability” of the law. This led, for example, to granting all free movement provisions direct effect.

As was already mentioned, the issue of selection, i.e. the identification of directly applicable norms, is not an outdated question. The question of selection has re-emerged with great force concerning the provisions of the Charter of fundamental rights of the European Union. The distinction between “rights” and “principles” contained in that instrument resembles a modern and explicit version of the distinction among EU law provisions that was implicit in the TEU, and that the Court unveiled in Van Gend en Loos. As Advocate-General Cruz Villalón synthesized: the “principles,” in the Charter, determine the missions assigned to public authorities and are different from “rights,” the purpose of which is to protect the legal situation of individuals—a situation directly defined by the text itself. Public authorities, Cruz Villalón added, must respect the legal situation of individuals guaranteed by “rights,” but, as far as “principles” are concerned, their function is much more open: “principles” define not individual situations, but rather general matters and outcomes that condition the action of public authorities.

There is a high chance that, in a number of future cases, national courts will turn to the Court of Justice to identify the Charter’s provisions which are a source of subjective rights that they have to protect. The French Cour de Cassation did exactly that, not too long ago: in the case of Association de médiation sociale, it questioned the Court of Justice, through the preliminary ruling procedure, on the direct effect of article 27 of the Charter.


On this expansion, see particularly Bruno de Witte, The Continuous Significance of Van Gend en Loos, in The Past and Future of EU Law 11 (Miguel Poiares Maduro & Loïc Azoulai ed. 2010).

CJEU Opinion C-176/12 Association de médiation sociale, July 18, 2013.


Case C-176/12 Association de médiation sociale v. Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouche-du-Rhône, Confédération générale du travail (CGT), Reference lodged Apr. 16, 2012, pending.

Charter of Rights, supra note 7, art 27 (concerning “workers’ right to information and consultation within the undertaking”).
However, even if the identification of direct effect norms remains important, action (or defense) before national courts can also rest on a combination of legal references. Precisely this method is what Advocate-General Cruz Villalón relied on in *Association de médiation sociale*,\(^\text{14}\) once he had reached the conclusion that article 27 of the Charter belonged to the category of “principles” and was, on its own, deprived of direct effect.

### 2.2. Legal effects of normative combination

The rise of fundamental rights, which, in EU law, has been from the outset narrowly tied to the existence of a category of general principles, has shown—as has become more obvious with the Charter of Fundamental Rights—that seeking direct effect was not always the most appropriate, or the most effective, method of sustaining claims in situations covered by EU law. In comparison, normative combination could be described as a shift from application of the law to the interpretation of the law, if we set aside the fact that the two operations are tightly intertwined. Direct effect would lie on the side of “application,” where normative combination belongs to the realm of “interpretation.” Put differently, some references produce effects directly, while others are only “considered” or “taken into account” to construe other norms. Besides the fact that this does not correspond to all types of combinations that have emerged in the case law of the Court of Justice, the distinction, if any, between application and interpretation of the law is not the point I want to discuss in the following lines. What I would like to insist on, instead, is the legal force that the Court of Justice accords to different sorts of combination of norms, inasmuch as this solution differs radically from the process of selection of direct-effect norms that was the outcome of *Van Gend en Loos*.

To begin with, I must admit that “normative combination” is a very synthetic concept for a phenomenon including a large variety of cases, which only have in common that the solution derives from the use of a series of references, and that these references, taken separately, would be powerless. However, because what I want to show and question is the shift from direct effect to a radically different way to ensure EU law effectiveness, I am convinced that various types of combination should be mentioned. They differ according to the source of the norms combined (primary and secondary legislation; soft and hard law; and EU law, international or national law); the relationships between these norms; and the different effects produced by their interaction. To simplify, I will confine my remarks to a basic typology, distinguishing between two categories of combinations.

In the first one, all norms combined belong to EU law: a general principle or a fundamental right is coupled with a provision of derived legislation. Using such a combination, judges were able to satisfy individual claims, whereas neither of the norms, taken separately, could produce such effect.

In the more classical version of this association of norms, provisions of the Charter of Fundamental Rights, notwithstanding the uncertainty concerning their direct effect (in the language of the Charter, their identification as “rights” or “principles”) were used to interpret directives in such a way as to allow the rights to be protected.

\(^{14}\) *Case C-176/12 Association de médiation sociale.*
The evolution of direct effect in the EU: Stocktaking, problems, projections

by national courts to emerge. A good illustration is the *Kamberaj* case,\(^ {15}\) in which the Court of Justice relied on the aim to ensure a decent existence for all those who lack sufficient resources, as defined in article 34(3) of the Charter, to decide that a third-country national should have the right to equal treatment in obtaining housing benefits, according to Directive 2003/109. Similarly, in *Chatzi*,\(^ {16}\) the Court decided, referring to the “principle of equal treatment, which is one of the general principles of European Union law, and whose fundamental nature is affirmed in Article 20 of the Charter of Fundamental Rights,” that clause 2.1 of the Framework Agreement on Parental Leave\(^ {17}\) “read in the light of the principle of equal treatment” obliges the national legislature to establish a parental leave regime which, according to the situation in the Member State concerned, ensures that the parents of twins receive treatment that takes due account of their particular needs.” It is incumbent upon national courts, the court added, to determine whether the national rules meet that requirement and, if necessary, to interpret those national rules, so far as possible, in conformity with European Union law.”\(^ {18}\) To be sure, following *Chatzi*, the claim brought to court may not prove immediately successful; however, the reasoning, which relied on a combination of norms, implied that the national court and the legislator must ensure that the legitimate demand for equal treatment is satisfied.

This type of case, in which judges use fundamental rights to construe legislative provisions, is not uncommon, of course, in other legal orders. To take just one example, German courts do not hesitate to resort to the German Constitution to interpret general provisions of the civil code. In a famous case, the Federal Labor Court decided that the interpretation of § 315 of the German Civil Code concerning the specification of performance by one party, and requiring that this specification be “equitable,” had to be consistent with article 4. I of the German Constitution, concerning freedom of thought. As a result, an employer was deprived of the right to oblige his employee to perform a duty conflicting with his freedom of thought (producing books glorifying war).\(^ {19}\) In this case, as in the cases decided by the Court of Justice, the effect of fundamental rights does not depend on their direct effect, but it is the result of the interpretation of other norms, according to the doctrine of consistent interpretation.\(^ {20}\)

More original, and specific to EU law, are cases in which a directive and a general principle are combined to produce effects, the former being considered a mere “concretization” of the latter. This combination, as a method of compensating for the lack of implementation, or defective implementation, of directives, is an instrument specific to EU law that requires transposition in national law. A couple of well-known cases decided by the Court of Justice demonstrate, in particular, that derived legislation

\(^{15}\) C-571/10 Kamberaj, Apr. 24, 2012, unreported.

\(^{16}\) C-149/10 Chatzi, Sept. 16, 2010, unreported.


\(^{18}\) C-149/10 Chatzi, ¶ 75.

\(^{19}\) Bundesarbeitsgericht [Federal Labor Court] Dec. 20, 1984, 2 AZR 436/83, NZA 1986, p. 21 (Ger.).

\(^{20}\) Consistent interpretation raises other issues, in terms of effectiveness of EU law in national courts, which we will address in Section 3.
gains force when it can be considered as implementing a general principle of law or fundamental rights. In Mangold\(^{21}\) and Küçükdeveci,\(^{22}\) quite remarkably, the general principle of non-discrimination compensates for the absence of horizontal direct effect of Directive 2000/78/EC on Equal Treatment in Employment and Occupation.\(^{23}\) Conversely, the directive is necessary because the jurisdiction of EU law—and the applicability of the general principle in a given case—depends on it. The outcome of this clever duo, as the Court pointed out in Küçükdeveci, is that, European Union law, more particularly the principle of non-discrimination on grounds of age as given expression by Directive 2000/78, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal.\(^{24}\)

Thus, coupled with the provisions of a directive, general principles of law can, eventually, have the same effect as rights that individuals can claim in national courts against other individuals. This method is the one that Advocate-General General Cruz Villalón suggests in its recent opinion in Association de médiation sociale:\(^{25}\) the principle contained in article 27 of the Charter, concretized in article 3 of Directive 2002/14,\(^{26}\) precludes, he contends, national legislation that excludes some workers from being taken into account when calculating the number of employees of the company in order to ensure information and consultation. The virtue of the association of a general principle and the provisions of a directive can also lie in an extension of the field of application of the derived legislation. In Danosa,\(^{27}\) for instance, the scope of application of directives on equal treatment of men and women was extended to include a person whose status as a worker was uncertain. Referring to the principle of non-discrimination of men and women, and article 23 of the Charter of Rights, the Court decided that:

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\text{[I]} \text{t is of no consequence, whether Ms Danosa falls within the scope of Directive 92/85 or of Directive 76/207, or—to the extent that the referring court categorises her as "a self-employed person"—within the scope of Directive 86/613, which applies to self-employed person. . . .}
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And it added:

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\text{[W]hichever directive applies, it is important to ensure, for the person concerned, the protection granted under EU law to pregnant women in cases where the legal relationship linking her to another person has been severed on account of her pregnancy.}\(^{28}\)
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\(^{21}\) C-144/04 Mangold, 2005 E.C.R. I-09981.

\(^{22}\) C-555/07 Küçükdeveci, 2010 E.C.R. I-00365.


\(^{24}\) C-555/07 Küçükdeveci, ¶ 43.

\(^{25}\) Case C-176/12 Association de médiation sociale.


\(^{28}\) § 70 of the Danosa case, supra note 7, § 70.
Eventually, it remained a mystery which directive should apply, but that did not matter to the Court: the claimant obtained the right to equal treatment.

Another category of combinations covers a variety of sources that do not all belong to the EU legal order. In the field of fundamental rights' protection, this phenomenon reaches beyond the borders of EU law and, again, it is not our objective to demonstrate that EU law is singular in this respect. In terms of normative combination and the use of a variety of instruments that do not belong to its own legal order, the ECJ takes a path that a number of other courts sometimes follow. At the European Court of Human Rights, for example, the decision in Demir and Baykara v. Turkey is a perfect illustration of a reasoning involving a series of sources of different origin and nature.

Most striking, in this category of cases, is the recourse to international law (by which I mean norms other than the European Convention on Human Rights (ECHR), which has a very specific status in EU law). Of course, international law is often relied on, alongside EU norms, because in a number of instances it is binding on EU institutions. One recent example is N.S., where the Court of Justice relied on “the duty of the Member States” to interpret and apply Regulation 343/2003 in a manner that ensures due respect of the Geneva Convention of July 28, 1951 and the Protocol of January 31, 1967 relating to the status of refugees, and other relevant treaties (as required by art. 78 of the TFEU). The more recent Ring and Commission v. Italy cases are other examples. In these cases, the Court of Justice decided that Directive 2000/78 on equal treatment in employment and occupation had to be construed according to the UN Convention on the Rights of Persons with Disabilities ratified by the EU. Taking into account the UN Convention has led to an extension of the scope of EU legislation, and as a result, in Ring, rights could be claimed under the Directive. But as Ring also shows, even when international law is binding on the EU, the combination of EU and International law, is not at all a simple story. Without entering too much into this thorny problem, the Ring case gives an idea of this complex relationship.

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30 To interpret art. 11 of the European Convention, the Court referred to the Right to Organise and Collectively Bargaining Convention (ILO No. 98), 96 U.N.T.S. 257, entered into force July 18, 1951, and to the interpretation of this convention by the ILO’s Committee of Experts. It also mentioned Labour Relations (Public Service) Convention (ILO No. 151), 1218 U.N.T.S. 87, entered into force Feb. 25, 1981. Among European instruments, the Court used art. 6(2) of the European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89, E.T.S. No. 35 (which the state concerned, Turkey, has not ratified), according to which all workers and all unions are granted the right to bargain collectively. The court also found support in the meaning attributed to this provision by the European Committee of Social Rights (ECSR). Charter of Rights, supra note 7, art. 28 was also quoted.
31 On that point, most recently, see Case C-617/10, Åkerberg, Feb. 26, 2013, unreported, § 44.
32 Joined Cases C-411/10 and 493/10 N.S. and others, Dec. 21, 2011, unreported.
33 Joined Cases C-335/11 and C-337/11, Ring, Apr. 11, 2013, unreported, concerning the notion of disability.
34 Case C-312/11, Commission v. Italy, July 4, 2013, unreported, concerning the notion of reasonable accommodation.
35 Case C-312/11, Commission v. Italy.
36 The Convention was signed by the EU on Mar. 30, 2007, and formally ratified on Dec. 23, 2010.
37 On see topic, see JEAN-SYLVESTRE BERGÉ, L’APPLICATION DU DROIT NATIONAL, INTERNATIONAL ET EUROPÉEN (2013).
and of the flexibility of the law that goes with it: “the primacy of international agreements concluded by the European Union over instruments of secondary law,” stated the Court, “means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements.” What happens if such consistent interpretation is not possible?

International law is, at least temporarily, paralyzed. As we will see in more detail below (Section 3), the same is also true of the relationship between EU law and national law when the former does not have direct effect.

This situation, in which EU law is bound (although with some degree of flexibility) by international law, is different from one in which international law, without being part of the European legal order, is used in a comparative way, in order to show convergence towards a certain interpretation of a right or the recognition of a fundamental right.

This “consensual” method, comparable to the method used by the Court of Human Rights in the *Demir and Baykara v. Turkey* case, was applied in the famous *Viking* and *Laval* cases, where the fundamental right to collective action was recognized. In these two cases, the Court quoted, among other references, the European Social Charter, signed at Turin on October 18, 1961 and Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise, adopted on July 9, 1948 by the International Labour Organisation. More recently, in *Commission v. Germany*, concerning the right to collective bargaining, the Court relied, once again, on article 6 of the European Social Charter.

If this method remains exceptional, the fact that it is enforced in such important and difficult cases suggests that it must be taken seriously. To be sure, the cases do not give much force to the fundamental rights that they identify, based on convergence of a series of legal instruments. Rights are brought to life, but without any effect in the cases concerned. The effectiveness of EU law, as far as these rights are concerned appears illusory. But this does not dwarf the potential efficiency of the process of combination.

Considering the different categories of normative combinations that contribute to the development of EU law, it is no exaggeration to say that the effects of EU law in national courts no longer depend on the identification of norms capable of producing

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38 On this aspect of the case, see *Augustin Boujeka*, *Riccardo Dall'Oglio* 1388 esp. §§ 7–8 (2013).


43 C-341/05 Laval un Partneri, 2007 E.C.R. I-11767 [hereinafter Laval].

44 C-348/05 Viking, ¶ 43; C-341/05 Laval, ¶ 90.

certain legal effects. Rather, it has become crucial to take into account the fact that EU law provisions are often effective when articulated with one another, or with norms borrowed from other legal systems, which are not necessarily binding, but can allow for an evolutive interpretation of the law. Although this phenomenon remains limited, considering the modest number of cases, especially when identifying new fundamental rights is at stake, it indicates that the effects of EU law norms can depend not on their intrinsic nature, but on their association with other references. As a result, there is space, I believe, for a theory of “combined effects” of norms in the EU legal order, a multifaceted model that would depart quite radically from the self-executing and self-sufficient norm celebrated in Van Gend en Loos. This new model can be a source of increased effectiveness of EU law in national courts. It can also be seen as the outcome of an adaptation of legal actors, faced with the congenital weakness or incompleteness that characterizes some provisions of European law: building constructive relationships between norms in order to compensate this weakness has become an essential part of legal reasoning.

3. From rights to obligations, and flexible effects of EU law in national courts

A second line that can be drawn from Van Gend en Loos comes from this essential element of the case: direct effect was defined as a mechanism, through which individuals could obtain rights in member states’ courts, based on EU law and, more precisely and more importantly, on provisions of primary law. Although this was not absent in Van Gend en Loos, the evolution of EU law, since the case was decided, has allowed that, in a larger number of hypotheses, individuals be brought before national courts, on the basis of obligations imposed on them by provisions of the treaties. With so-called horizontal direct effect, EU primary law has shifted away from the dominant concern that permeated Van Gend en Loos: submitting states to an orthopedic treatment aimed at reforming their public policies, along the lines of internal market’s requirements. In that respect, however, the evolution can still be seen as a continuation of Van Gend en Loos: the effectiveness of EU law could justify, to some extent, the submission of private actors to TFEU, and to internal market rules in particular. In comparison, it is no longer a mere extension of direct effect, when, in the absence of direct effect, national courts are required to interpret national law in conformity with European Union law: under the “indirect horizontal effect” doctrine, the effects of EU law become dependent on the capacity of national courts to tailor national law to European fashion, a made-to-measure approach contrasting with Van Gend en Loos uniform requirement for national courts to grant subjective rights.

3.1. Vertical direct effect as a source of subjective rights

As opposed to the French version of the case, the Italian version of Van Gend en Loos is explicit about the fact that individuals can claim subjective rights on the basis of treaty provisions. The case made it clear that the treaty was available to entertain private
claims in municipal courts. As a result, not only would citizens of member states benefit directly from the treaty, but they would, as the court pointed out, exercise “an effective supervision” on member states to ensure that they respect EU law requirements. Individual rights derived from the Treaty were key, as through them EU law could penetrate national legal orders and transform them. And it did. In particular, when direct effect of common market rules was affirmed, it became clear that member states would have to face requests based on free movement of goods, persons, capital or free provision of services and, as a consequence, would have to reform their systems of regulation in many different fields.  

Although the Court also mentions in Van Gend en Loos that the treaty imposes obligations on individuals, the lesson from that particular case was that national courts had to protect individual rights, not that they had to make sure that obligations deriving from the treaty were enforced against individuals. At the time, the obligations binding on individuals were indeed quite limited. Competition law was an important source of such obligations, as antitrust rules and the prohibition of abuse of a dominant position were explicitly targeting the behavior of private companies. They still do, of course, and continue to frame the behavior of private economic actors. But what has been a major source of extension of obligations binding on private parties is the recognition of a horizontal direct effect to treaty provisions concerning the internal market. This evolution has raised new questions concerning the consequences of direct effect of treaty provisions.

3.2. Horizontal direct effect and the problem of submitting individuals to free market rules

The evolution that led to the recognition of horizontal direct effect to Treaty provisions, and, in particular, free movement rules has gone, until recently, largely unnoticed. One reason for this is that the extension was only apparent in rare cases (and not necessarily very clear in all of them). As a result, it did not seem to imply important changes at once. The story has been told many times, but recent examples have brushed away, it seems, obstacles or limits to the horizontal direct effect of free movement rules, even if the Court of Justice has, not so long ago, continued to suggest that free trade provisions of the EU treaty were public law rules.  

46 For a recent example, in the field of gambling, see C-347/09 Dickinger and Ömer, 2011 E.C.R. I-08185.
47 On the notion of horizontal effect, see, e.g., Achim Seifert, L’effet horizontal des droits fondamentaux, 48 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 801 (2012).
49 See in particular: Case C-159/00 Sapod Audic, 2002 E.C.R. I-05031, ¶ 74: “contractual provision cannot be regarded as a barrier to trade for the purposes of Article 30 of the Treaty since it was not imposed by a Member State but agreed between individuals.” The court provides no justification for this solution. On the public–private distinction concerning free movement rules, see, e.g., Okeoghene Odudu, The public/private distinction in EU Internal Market Law, 46(4) REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 826 (2010) and Loïc Azoulai, Sur un sens de la distinction public/privé dans le droit de l’Union européenne, 46(4) REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 842 (2010).
In spite of this inconsistency, the language used in Viking\textsuperscript{50} is unambiguous: “there is no indication” in case law, the Court of Justice said, that horizontal effect “applies only to associations or to organisations exercising a regulatory task or having quasi-legislative powers.” No distinction is made, in particular, between the different types of private actions, depending on their impact, a distinction that Advocate-General Maduro supported in his opinion in the case. In the subsequent Laval case,\textsuperscript{51} the Court simply pointed that the right of trade unions to take collective action, whereby undertakings established in other member states may be forced to sign a collective agreement, is liable “to make it less attractive, or more difficult, for such undertakings to carry out its activity in the State concerned,” and “therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC” (now art. 56 TFEU). In sum, according to these decisions, only the restriction, or potential restriction, on free exercise of economic freedom matters, regardless of the private action that induces it.

Even more striking is the comparison of two cases, one decided in 2000 and the other in 2012. In Ferlini,\textsuperscript{52} it seems, the Court limited to certain hypothesis the horizontal application of the non-discrimination rule in a case of free movement of workers: “article 6 of the Treaty also applies in cases where a group or organisation exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty.”\textsuperscript{53} In Erny,\textsuperscript{54} in contrast, the Court went much further, bluntly affirming that the prohibition of discriminations laid down in article 45(2) TFEU on free movement of workers “applies not only to the actions of public authorities, but also to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals.”\textsuperscript{55} As in a previous case,\textsuperscript{56} one must admit, this solution only concerns the prohibition of discriminations based on nationality, which may well be a limit to the extension of horizontal effect of free movement rules, and could be justified by the particular status of the principle of non-discrimination, as a general principle of EU law.

This possible restriction of horizontal direct effect of free market rules does not call into question the observation that, in the course of EU law development, private parties have been subject to certain provisions of the treaty concerning the realization of the internal market, that were considered to be binding only on governments at the time of Van Gend en Loos. Through horizontal direct effect, these provisions of the treaty stepped into the realm of private law. The “constitutionalization of private law” that this evolution achieves creates a series of problems that the Court of Justice has not yet addressed in its case law.\textsuperscript{57} Rather, although the transposition of a reasoning

\textsuperscript{50} C-438/05 Viking.
\textsuperscript{51} C-341/05 Laval.
\textsuperscript{52} Case C-411/98 Ferlini, 2000 E.C.R I-8081.
\textsuperscript{53} Case C-411/98 Ferlini, ¶ 50.
\textsuperscript{54} Case C-172/11 Erny, June 28, 2012, unreported.
\textsuperscript{55} Id. ¶ 36.
\textsuperscript{56} Case C-94/07 Racanelli, 2008 E.C.R. I-05939.
\textsuperscript{57} On the problems of horizontal direct effect of Constitutional law, and in particular EU fundamental freedoms, see, e.g., Hugh Collins, The Constitutionalization of European Private Law, in The Many Concepts of Social Justice in European Private Law 133, 142–146 (Hans Micklitz ed., 2011. See also Seifert, supra note 47.
designed for cases involving states or other public entities is not necessarily appropriate, where private law relationships are concerned, the Court of Justice had, until now, ignored the need for a separate doctrine when obligations binding on individuals are derived from free market rules. This is particularly striking in Erny,\(^{58}\) which addressed the justification of restrictive measures: “neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the disputed provisions,” the court contended. Yet, it is clear that justification of restrictions by reason of general interest or public good can hardly be available when private actors are responsible for a restriction to free movement. The crucial issue of justification of free movement restrictions, to which the Court and legal scholars have devoted enormous attention after Cassis the Dijon,\(^{59}\) remains a virgin land, when private restrictive conducts are at stake.

In addition, the types of actions and remedies available, in cases of treaty violations resulting from the behavior of individuals, need to be adapted to the particular situation of private actors.\(^{60}\) While making states liable for free movement restrictions is the inevitable, and acceptable, outcome of their commitments at the EU level, the same is not true for private actors. In particular, when the latter fulfill a particular economic or social function, which is the case for trade unions or other non-governmental organizations, making them liable under free movement provisions may jeopardize their very existence. This is not only because of potentially high damages. The unpredictability generated by the introduction of constitutional arguments (the reference to fundamental freedoms) in private law disputes is also problematic. Indeed, uncertainty may deter the organizations concerned from taking action, although this action can be considered socially useful. Along the same lines, when fundamental freedoms reach the sphere of contractual relations, the resulting disruption in the parties’ commitments should also be taken into account. Until now, “insufficient attention was paid to the way in which private law has already sought to balance competing rights through its legal doctrines and rules.”\(^{61}\)

In comparison, the requirement of consistent interpretation of EU law, a source of indirect horizontal effect, seems more respectful of existing settlements between competing rights.\(^{62}\) The questions it raises are of a different kind, but still closely related to the effectiveness of EU law in national courts: the issue is not the overbroad conception of what the effectiveness of EU internal market law requires (imposing obligations on individuals), but the variability of this effectiveness when it applies to private relationships, depending on the possible interpretations of national law according to national courts. This solution is a far cry from the recognition of direct effect to a treaty provision, which allowed individuals to claim the same right before all national courts.

\(^{58}\) C-172/11 Erny.
\(^{59}\) Case 120/78 Cassis the Dijon, 1979 E.C.R. 649.
\(^{60}\) For an illustration concerning the issue of sanctions in Swedish courts, after the decision of the Court of justice in the Laval case (C-341/05), see Jonas Malmberg, Trade Union Liability for “EU-Unlawful” Collective Action, 3(1) EUR. LABOUR L.J. 5 (2012).
\(^{61}\) Collins, supra note 57, at 143.
\(^{62}\) Id.
3.3. Indirect horizontal effect and the challenge of variable effectiveness

The doctrine of indirect effect requires national courts to interpret national law “in the light” of EU law.\(^{63}\) Indirect effect is a method of ensuring the effect of EU law when direct effect is missing. As the Court of Justice has stated: “this obligation to interpret national law in conformity with European Union law is inherent in the system of the Treaty on the Functioning of the European Union, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of European Union law when they determine the disputes before them.”\(^{64}\) If this requirement is “inherent in the system of the Treaty,” as the Court has mentioned, it is also part of a more general trend: recently, domestic courts have, outside any European obligation, relied on the doctrine of indirect effect to give force to international law.\(^{65}\) This method of internalization of international law, transcending the distinction between monist and dualist systems, has retained much attention, and concern, beyond the frontiers of EU law.\(^{66}\)

In EU law, consistent interpretation was used in applying EU law in disputes between private parties: individuals were subject to EU law provisions, even when those provisions had no horizontal direct effect. The requirement of a consistent interpretation implies consideration of EU law in many cases in which it generates no subjective rights that can be claimed by an individual, but may still result in unexpected duties or burdens for individuals. Thus, indirect effect contributes, when applied horizontally, to increased obligations on individuals, resulting from EU law developments.

The progress of harmonization in many fields of private law, criminal law, or tax law,\(^{68}\) has resulted in new rights and duties for member states’ citizens, which, in most instances, did not need the doctrine of direct effect, nor any theory about the effects of EU law in national courts, to be enforced: these obligations, having their source in EU directives, only applied after implementation through internal law. However, the impact of directives themselves in private disputes has become more and more obvious

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\(^{63}\) On this doctrine, see, e.g., Allan Rosas & Lorna Armati, EU Constitutional Law 72–76 (2012). On the distinction between direct and indirect effect, see Robert Schütze, European Constitutional Law, 2012, 304.

\(^{64}\) Case C-282/10 Dominguez, Jan. 24, 2012, unreported, ¶ 24.

\(^{65}\) For an example in German law, see Bundesverfassungsgericht [Federal Constitutional Court] Sept. 19, 2006, JZ 62 (2007), at 887 (Ger.), a decision, in which the German Constitutional Court found that the right to a fair procedure guaranteed by the German Constitution had to be interpreted in light of art. 36 of the Vienna Convention of Consular Relations, 596 U.N.T.S. 261, entered into force Mar. 19, 1967.


\(^{68}\) For a recent illustration, see C-617/10 Åkerberg, ¶ 24: “tax penalties and criminal proceedings to which Mr Åkerberg Fransson has been or is subject are connected in part to breaches of his obligations to declare VAT according to EU law.” On that decision, see, in particular, Denys Simon, 4 Revue Europe, 14 (2013); Michel Aubert, Emmanuelle Broussy & Herve Cassagnadère, Chronique de jurisprudence de la CJUE, 20 Actualité juridique droit administratif 1154, 1154–1156 (2013).
over time. But, having accepted long ago that directives could have vertical direct effect,\textsuperscript{69} the Court of Justice has, continuously, refused to give horizontal direct effect to their provisions.\textsuperscript{70} As a result, directives are still considered not to be binding on individuals, and should not be a source of obligations for them, the Court continuously confirmed.\textsuperscript{71} However, at the same time, the ECJ’s case law has constructed bypasses, allowing directives to produce effects in private disputes.\textsuperscript{72} And these bypasses, including indirect horizontal effect,\textsuperscript{73} have proved, \textit{prima facie}, to be as powerful as direct horizontal effect.\textsuperscript{74}

At first, consistent interpretation seems to be a very basic demand, in line with the principle of sincere cooperation laid down at article 4(3) TFEU. But, looking closer, it is not so trivial as it seems.\textsuperscript{75} Consistent interpretation compels judges to overrule previous interpretations, if needed. This means, possibly, to introduce, without notice, an unexpected change in the law.\textsuperscript{76} Of course, overruling also happens in member states’ courts, without EU commanding it. But the disruption it creates, depriving citizens of their legitimate expectations, should make it exceptional. As a method prescribed by EU law to give effect to a directive when states have failed to implement it properly, overruling loses its marginality. This is not, to say the least, a satisfying way for EU law to penetrate national legal systems.

However, the most problematic aspect of consistent interpretation, related to EU law effectiveness in national courts, lies elsewhere. The outcome of the order to interpret national law in conformity with EU law very much depends on the flexibility of national law. When the provisions of national legislation that are inconsistent with EU law are very clear and precise, according to their interpreters, EU law will have little impact, because interpreting \textit{contra legem} is not required.\textsuperscript{77} When, on the contrary, the fabric of national law is soft, malleable, or at least considered so by those in charge of its enforcement, the impact of EU law will be potentially much stronger. As a result, the penetration of EU law into national legal orders depends on national legislators, national legislative styles, and national techniques of interpretation. To be sure, the Court of Justice does not leave entire discretion to national courts, and requires that they try as hard as they can to achieve consistent interpretation, which implies, for instance, that they take “the whole body of domestic law into consideration” and make use of the interpretative methods recognized by domestic law with

\textsuperscript{69} Case 41/74 Van Duyn, 1974 E.C.R. 1337.
\textsuperscript{70} Case C-91/92 Faccini Dori, 1994 E.C.R. I-03325, and for a recent confirmation, see Case C-282/10 Dominguez.
\textsuperscript{71} Cf. Case C-282/10 Dominguez.
\textsuperscript{72} On the different ways to invoke norms of EU law, see, e.g., Koen Lenaerts & Tim Corthaut, \textit{Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law}, 31 Eur. L. Rev. 287 (2006).
\textsuperscript{73} For a consecration of this doctrine, see Case 14/83 Von Colson, 1984 E.C.R. 01891 and Case C-106/89 Marleasing, 1990 E.C.R. I-04135.
\textsuperscript{74} For a nuance, in the field of criminal law, compare Case C-168/95 Arcarao, 1996 E.C.R. I-04705 and Case C-105/03 Pupino, 2005 E.C.R. I-05285.
\textsuperscript{75} On the power of the duty of consistent interpretation, see Lenaerts & Corthaut, \textit{supra} note 72.
\textsuperscript{76} Which is exactly what happened in Case C-282/10 Dominguez.
\textsuperscript{77} C-105/03 Pupino.
a view to ensuring that EU law is fully effective. Eventually, however, it remains clear that such interpretation is not always possible.\footnote{C-282/10 Dominguez, \S\S 30–31.}

The resulting flexibility concerning the effects of EU law throughout the Union contrasts with Van Gend en Loos, a case in which the Court decided what the effect of an EU law norm was going to apply in all states and before all courts. This flexibility could be considered as an aspect of procedural autonomy, a concept that describes and justifies the limited effectiveness of EU law, in the absence of a complete system of justice and procedural rules. Because procedural autonomy concerns remedies, it may indeed result in differences in the enforcement of EU law. But the various consequences of consistent interpretation, which depend on national substantive law, would imply a considerable extension of that concept. Indeed, the hypothesis is one in which the variation in the implementation of EU law does not depend on the system of justice and procedures, but on the legal force given to the EU provisions concerned, in each national court: the variation concerns the binding force of the norm. The doctrine of consistent interpretation admits, contrary to Van Gend en Loos, that it is not possible, for every individual, to expect that EU law will have a pre-determined effect, in national courts.

As a result of consistent interpretation, individual claims will thrive in some national courts, and obligations will be imposed on individuals as a result, whereas, in others, they will be unsuccessful because of the limits in the courts’ power to interpret national law. This solution seems quite remote from the idea of direct application and full effectiveness of EU law: beyond procedural autonomy, EU law effectiveness is made dependent on the specificity of national substantive laws and methods of interpretation.

If this is acceptable, and the effect of EU law in national courts can differ depending on the substance of national law and the techniques of interpretation available to national courts, there may be a case for more flexibility in other instances, in particular when applicability of constitutional rights is concerned.

4. From application to applicability

According to Van Gend en Loos, national courts “must” apply treaty provisions, and protect individual rights that they create. The mission entrusted to national courts in that case imposed “role splitting”\footnote{On this theory and its application to EU law, see Antonio Cassese, \textit{Remarks on Scelle’s Theory of “Role Splitting” (dédoubllement fonctionnel) in International Law}, 1(1) \textit{Eu. J. Int’l L.} 210 (1990).};\footnote{For recent statistics, see the Annual Report of the Court of Justice for 2012 (2013), \url{http://curia.europa.eu/jcms/jcms/jo2_7000/\%202013}.} national judges were required to act both as organs of national and European judiciary, and apply the rules emanating from two different legal orders. Fifty years after Van Gend en Loos, it is still not absolutely sure that all national courts have fully understood, and accepted, that role. Looking, for instance, at the variations in the use of the preliminary ruling procedure among national courts\footnote{For recent statistics, see the Annual Report of the Court of Justice for 2012 (2013), \url{http://curia.europa.eu/jcms/jcms/jo2_7000/\%202013}.} suffices to indicate that national contexts have some influence on
the impact of EU law in national courts. However, in terms of effective application of EU law norms in national courts, there is little doubt that direct effect, coupled with preliminary references, contributed extensively to effective application of EU law. The “collaboration” of national courts with the Court of Justice was rightly considered a decisive source of EU law effective enforcement.

Today, the issue of EU law enforcement in national courts is faced with another major challenge: the uncertainty concerning the applicability of EU law. In recent times, this question has been particularly visible, and strenuous, in the field of fundamental rights’ protection. On one side, the question is one of applicability of EU law provisions protecting fundamental rights. It has, indeed, become a more acute issue since the Charter of Fundamental Rights has gained the same legal value as the Treaties with the Lisbon Treaty, and at a time when it is settling in the EU legal environment. To be sure, this does not mean that applicability has not been a major concern in other fields, such as free movement of citizens, as the Zambrano saga illustrated, but the issue concerning the applicability of the Charter of Fundamental Rights has a much broader scope. On the other hand, fundamental rights’ protection by national courts depends on the applicability of national constitutions protecting these rights and freedoms. In this respect, the question that arises, and that national courts have to face, concerns the restriction to the protection of fundamental rights granted by national constitutions, which is, or should be, required in order to ensure effectiveness of EU law. The ever-growing impact of EU policies on fundamental rights has brought to the fore the question of the limits to the effectiveness of EU law which would leave room for national constitutions. This issue touches on a tension deeply rooted in the history of EU federalism.

Considered from these two angles, the protection of fundamental rights appears as one of the most important domains, if not the most important, in which EU law effectiveness is challenged, these days, in relation with the issue of applicability of EU and national law. This has been illustrated in recent important cases. Correlatively, “role splitting” is no longer the new frontier for national courts, but their mission to ensure a distribution of roles, when confronted with a plurality of sources of protection of fundamental rights and freedoms. Some of the hardest questions, for national courts, are no longer whether EU law contains rights that they have to protect, but rather, on the one hand, whether fundamental rights embedded in EU law can apply in the case before them (a question of applicability of fundamental rights protected by the EU) and, on the other hand, whether they have power, and to what extent, to guarantee a higher degree of protection of fundamental rights on the basis, for example, of their own constitution, even if the situation lies within the scope of EU law (a question of applicability of constitutional or international law, in situations falling under EU law).

82 Cf. the Consolidated Version of the Treaty on the Functioning of the European Union art. 6(1), 2008 O.J. C 115/47 [hereinafter TFEU].
The answers to both questions are crucial for the enforcement of EU law in member states’ courts. The applicability of fundamental rights protected by EU law would be a mundane question, although no less tricky, for that matter, on the jurisdiction of EU law, if the question had not given rise to recent developments in the case law of the Court of Justice that need to be confronted with the doctrine of EU law effectiveness in national courts. As far as the applicability of national constitutional rights is concerned (or rather, as the case law shows, the refusal, by the Court, to accept this applicability), recent developments do not only show that the need to ensure EU law effectiveness, an heritage of Van Gend en Loos, resists the passage of time; the question concerning there being room for national law when the fabric of EU law is only loosely woven, has become more crucial than ever.

4.1. Applicability of fundamental rights protected by the EU

Since the Charter of Fundamental Rights has been proclaimed, and, even more so, since the Lisbon Treaty conferred the status of primary law on that instrument, the delimitation of its scope of application has been a major concern and a source of uncertainty in national courts in charge of enforcing EU law, as Van Gend en Loos made clear. Interpretations of article 51(1) of the Charter, according to which the Charter only applies to member states “when they are implementing EU law,” are not unanimous. Whether this provision should be narrowly construed to include only situations of actual implementation of EU law or should be interpreted more extensively to allow EU fundamental rights to apply in all situations falling within the scope of EU law, has been the source of important debates.84

Recently, in the Åkerberg case, the Court of Justice showed preference for the extensive approach.85 Questioned on the application of the ne bis in idem principle laid down in article 50 of the Charter to criminal proceedings and tax penalties for tax evasion, the Court answered that “in essence, the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations.”86 And the Court went on to explain “that definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it.”


85 C-617/10 Åkerberg. On this extensive approach, see, e.g., Jean-François Akanji-Kombé, Arrêt ‘Åkerberg Fransson”: l’application juridictionnelle de la Charte européenne des droits fondamentaux, 5(191) JOURNAL DE DROIT EUROPEEN 184 (2013).

86 C-617/10 Åkerberg, ¶ 19.
According to those explanations, “the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law.” And it is “the applicability of European Union law” that determines “applicability of the fundamental rights guaranteed by the Charter.”

The line drawn by the Court relies, eventually, on the notion of implementation, distinguished from a stricter notion of “transposition”: the Court insists that tax penalties and criminal proceedings at stake, even not adopted in order to transpose an EU directive, are meant to implement an obligation imposed on the member states by the Treaty. As a result, the concept of “implementation,” construed extensively, becomes the central criterion. Therefore, to answer the question of EU law effects, national law must scrutinize national law and identify if it fits, or not, within the notion of “implementation.”

As compared to the reasoning suggested by Advocate-General Cruz Villalón in his opinion on the case, the approach followed by the Court of Justice does not provide much guidance to national courts. The Court of Justice did not accept the idea that “the competence of the Union to assume responsibility for guaranteeing the fundamental rights vis-à-vis the exercise of public authority by the Member States when they are implementing Union law must be explained by reference to a specific interest of the Union in ensuring that that exercise of public authority accords with the interpretation of the fundamental rights by the Union” and that “the mere fact that such an exercise of public authority has its ultimate origin in Union law is not of itself sufficient for a finding that there is a situation involving the ‘implementation’ of Union law.” If the applicability of the Charter had been considered to depend on “the presence, or even the leading role, of Union law in national law in each particular case,” that would have required national courts to assess the intensity of the role of Union Law in each field. Admittedly, that would not have been an easy test in all cases; but it would have given national courts a more precise guideline than the solution deriving from Åkerberg. In the absence of such a guideline, the effectiveness of EU law, as far as fundamental rights are concerned, remains very uncertain.

4.2. Applicability of constitutional rights in situations covered by EU law: testing the resistance of EU law effectiveness

Having considered the applicability of fundamental rights protected by EU law, it may seem abrupt to turn to the protection granted by national constitutions in situations submitted to EU law. It is not. As Åkerberg shows, the two questions are closely connected. In that case, after dealing with the applicability of the Charter, the Court envisaged the possible application of national standards of protection of fundamental rights.

Until now, the Court of Justice has been faithful to the philosophy of Van Gend en Loos, requiring national courts, in case of conflict, to enforce EU law, including obligations.

87 Id. ¶ 20.
88 Id. ¶ 21.
89 Id. ¶ 40 of the Opinion.
90 Id. ¶ 41 of the Opinion.
or coercive measures resulting from EU legislation, even if this was inconsistent with constitutional rights. This orthodoxy can be justified, in part, by the fact that protection of fundamental rights is supposed to be ensured through integrating fundamental rights protection in the process of drafting legislation, in order to make sure that those rights are not violated, where high risks exist that such violations occur (in such fields as cooperation for criminal matters, or immigration law). This is a requirement of both article 6 TFEU, according to which fundamental rights constitute general principles of EU law, and article 51 of the Charter of Fundamental Rights, requiring EU institutions to respect the rights and observe the principles of the Charter.

To take a recent example, such reliance on preventive integration of fundamental rights was well illustrated in the *Jeremy F.* case concerning the European arrest warrant, in which the Court recalled that article 1(3) of the Framework Decision indicates that the text “shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union,” obligation which “in addition, concern[s] all member states, in particular the Member state issuing and executing the arrest warrant.” It added, that, as far as article 47 of the Charter and the right to an effective remedy were concerned, “the provisions of the framework decision already organise a procedure that respect article 47 of the Charter, independently of the modalities chosen by member states to enforce that framework decision.” Similarly, in *Melloni*, the Court mentioned that the framework decision ensures the protection of the rights of defense by providing an exhaustive list of the circumstances, in which the execution of a European arrest warrant can be issued in order to enforce a decision rendered *in absentia*.

However, this is not sufficient to guarantee that constitutional rights are never affected by EU legislation. On the contrary, the enforcement of EU law has been challenged in national courts on the basis of member states’ constitutional laws, and the

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91 This concern to integrate the fundamental rights dimension throughout the process of drafting legislation was thoroughly described by the Commission in its Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the Charter of Rights, supra note 7.


94 Case C-168/13 Jeremy F., ¶ 40.

95 Id., ¶ 47.


97 Case C-399/11 Melloni, ¶ 44.

conflict reaches the Court of Justice, in some instances, through preliminary ruling, as the recent Melloni case shows. In Jeremy F., by contrast, the question is about the exact requirements stemming from the EU legislation at stake: the possible conflict between that legislation and the protection of fundamental rights guaranteed by the Constitution depends on this prior question.99

In Melloni, the Spanish Constitutional Court suggested that article 53 of the Charter should be interpreted as giving a general authorization to member states to apply the standard of protection of fundamental rights guaranteed by their Constitution, when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law.100 The Court refused this interpretation: “the primacy, unity and effectiveness of European Union law,” it considered, shall not be compromised. This language was reiterated in Åkerberg.101 Applying the higher standard of protection guaranteed by a national constitution was rejected, namely, because it would cast “doubt on the uniformity of the standard of protection of fundamental rights defined in that framework decision,” “undermine the principles of mutual trust and recognition which that decision purports to uphold,” and, therefore, “compromise the efficacy of that framework decision.”102

Only when some competence remains in the hands of member states, in the process of transposing EU law in national law, as Åkerberg suggests, can national constitutions step in: “where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights.”103 In Melloni, this opening could not be exploited because member states had been deprived of all competence as a result of the uniformization of the law: the action of member states, in the domain concerned, was entirely determined by EU law.

This touches upon one decisive point, for the purpose of applicability of other sources of fundamental rights than EU law in a situation covered by EU law: the extent to which the action of the member states is determined by European Union law. Determining the degree of harmonization, total or partial, and, in the latter case, the remaining powers of member states, was already an issue, when national Constitutions were not concerned.104 But the current resistance to EU law influence, in some constitutional

99 In the case, the conflict is avoided. According to the ECJ: “provided that the application of the Framework Decision is not frustrated . . . it does not prevent a Member State from applying its constitutional rules relating inter alia to respect for the right to a fair trial” (Case C-168/13 Jeremy F., ¶ 53).
100 Case C-399/11 Melloni, ¶¶ 55 and 56.
101 C-617/10 Åkerberg.
102 Id. ¶ 63.
103 Id. ¶ 29 (emphasis added).
courts, makes it more sensitive than before. Indeed, constitutional courts are not always keen nowadays to follow the direction of direct effect and supremacy. In this context, clashes can only be avoided when situations are only partially determined by EU law, and there remains room for constitutional protection.

Otherwise, the forces that find their origin in Van Gend en Loos continue to resist the change of times. Undeniably, if the solution proposed by the Spanish Constitutional Court had been accepted, the situation of EU citizens in national courts would have been, in a number of cases, very different from the one that brought Van Gend en Loos before the Dutch Tariefcommissie: in many instances, nationals of member states would request, and possibly obtain, constitutional protection against coercive measures taken against them in the course of implementation of EU law. If the Court of Justice accepted that solution, it would, no doubt, limit, albeit only in the particular field of fundamental rights’ protection (and not in general), the effectiveness of European Union law.

5. Conclusion: EU law effectiveness reconsidered

Important as it is for European integration, effectiveness of European Union law is not absolute. And this is not only the outcome of procedural autonomy. As the requirement of consistent interpretation illustrates, for instance (see Section 3 of this article), there are hypotheses in which it is accepted that EU law should yield, at least temporarily, when confronted to the resisting substance of national law. And this does not undermine the presence of EU law in national courts where it is quite clear that not only the increased domain, but also the evolutive reasoning that characterizes the development of EU law, call for an extension, rather than a retraction, of EU law influence. Overall, EU law executive force is contingent on the situation of each national legal system (rules, actors), and this is a feature of the system of EU law. That is already a reason why effectiveness does not stand as a very strong argument to justify that constitutional protections be set aside, even in cases in which the solution is entirely determined by EU law.

At the time of Van Gend en Loos, it was probably difficult to imagine that the impact of EU policies on individual rights and freedoms would become a major concern. Today, no one contests that the protection of fundamental rights has become a central issue, especially in the development of the area of freedom, security, and justice. In those fields, the reasoning and principles that were crafted for the achievement of the internal

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105 See, e.g., the decision of the Polish Constitutional Court, Dec. 16, 2011, SK 45/09, in which that court considered that it had the power to review, on the basis of the Polish Constitution, EU Regulation 44/2001 of Dec. 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 012).

106 This was exactly what happened in the cases decided by the German Constitutional Court, Bundesverfassungsgericht [Federal Constitutional Court] July 18, 2005, BVerfGe 2236/04.

market are not always well-suited, although they may apply at the moment. More generally, there is a distinction to be made between the possibility for individuals to obtain that the interests they draw from EU law are effectively protected in national courts, and the situation in which individuals are brought to courts and held responsible for their actions under European law. As these situations becomes more frequent, namely in relation to the development of EU policies, it becomes urgent to reconsider the effects of EU law in member states in order to avoid a decline of individual rights and freedoms resulting from EU law enforcement. The same is true when a situation cannot be described in terms of reduced protection, but is one in which a European conception of a fundamental right or freedom opposes, without solid justification, the national conception of the same right. This hypothesis was illustrated in the recent Alemo-Herron case. In that case, the Court based its interpretation of the directive on transfers of undertakings on a particular conception of the freedom to conduct a business laid down by article 16 of the Charter, which includes, according to the decision, freedom of contract. This interpretation was preferred to the British conception of contractual freedom, which would have to allowed enforcement of the terms of a private contract.

To avoid such solutions, judicial discretion, at national courts’ level, could be a tentative method. By judicial discretion, I only mean granting a margin of appreciation to national courts in cases in which enforcement of EU law impacts fundamental rights or freedoms. Inspiration can be found, mutatis mutandis, in the relationships entered by courts of different legal orders (the European Court of Human Rights and the Court of Justice of the European Union, for instance), where mutual trust goes together with some retained sovereignty. But if national courts are allowed to enforce constitutional rights, this cannot happen without restriction. The disruption to the basic principles of EU federalism needs to be contained and occur only in cases in which it is particularly important that national constitutional rights are not called in question. In this perspective, article 4(2) TEU must be considered: it can justify that national constitutional law prevails, and, at the same time, avoid abuses. If, according to article 4(2) TEU, the Union must respect “member states national identities, inherent in their fundamental structures political and constitutional,” national courts should be able to set aside EU law provisions in order to preserve their national identity whenever it is threatened by the application of EU law. In addition to this condition, national courts’ discretion could also be limited by taking into account the need to ensure that the essential objective pursued by EU law, in the particular field, can still be fulfilled. Teleological interpretation, a traditional method of interpretation of EU law, would serve, this time, to circumscribe, not expand, EU jurisdiction.

108 Case C-426/11 Alemo-Herron and others, July 18, 2013, unreported.
110 On the interpretation of this article, see, e.g., Armin von Bogdandy & Stephan Schill, Overcoming absolute Primacy: Respect for National Identity under the Lisbon Treaty, 48 Common MkT L. Rev. 1417 (2011).
111 On this idea, see Damian Chalmers & Luis Barroso, What Van Gend en Loos Stands For, 12(1) Int’l J. Const. L. 105 (2014), suggesting that art. 4(2) be granted direct effect.