CHAPTER 4A

The Scope, Nature and Effect of EU Law

Armin Cuyvers

4.1 Introduction: 'the very foundations of EU law'[1]

This chapter deals with some of the most foundational doctrines of EU law, including supremacy and direct effect.[2] These doctrines have been vital for the success of the EU, also in the early days of European integration. It can safely be said that without these doctrines the EU would never have been as successful and effective as it has been. Considering their vital role in EU integration, it may even be said that direct effect and supremacy form essential elements for any regional system that truly wants to be effective and deliver concrete benefits to its citizens.[3] Both doctrines, therefore, are of vital interest to the EAC as well.

1 This chapter gratefully builds on the LEAC research report by T. Ottervanger and A. Cuyvers, 'The functioning of the East African Community: Common market, Court of Justice and fundamental rights, a comparative perspective with the European Union' (Europa Instituut Leiden, 2013), pp. 1–206, and the excellent master Thesis of Merel Valk, written in 2015 under supervision of the LEAC, entitled 'The Rule of the European Court of Justice and the East African Court of Justice: Comparing Potential Judicial Strategies for Early Stage Integration'. (on file with the author).

2 For further reading on these issues see inter alia See for one among several classics B. de Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order', in: P. Craig and G. De Búrca (eds), *The Evolution of EU Law* (OUP 1999), 209 et seq, or the updated version in P. Craig and G. De Búrca (eds), *The Evolution of EU Law* (2nd ed. OUP 2011), 324, as well as the different contributions in M.P. Maduro and L. Azoulai (eds) *The Past and Future of* EU *Law: The Classics of EU law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010), especially see P. Pescatore, 'Van Gend en Loos, 3 February 1963—A View from Within', 1, B. de Witte, 'The Continuous Significance of *Van Gend en Loos*', 9, F.C. Mayer, '*Van Gend en Loos*: The Foundation of a Community of Law', 16, and of course D. Halberstam, 'Pluralism in *Marbury* and *Van Gend*', 26, as well as N. Fennely, 'The European Court of Justice and the Doctrine of Supremacy: *Van Gend en Loos; Costa v. ENEL; Simmenthal*', 39, and I. Pernice, '*Costa v. ENEL and Simmenthal*: Primacy of European Law', 47.

3 C.F. Nyman-Metcalf, Papageorgiou, *Regional Integration and Courts of Justice.* 1st ed. (Insertia, 2005), p. 6. Mattli, *The Logic of Regional Integration: Europe and Beyond.* 1st ed. (Cambridge University Press, 1999, p. 74. Also: De Burca, Scott. *Constitutional Change in the EU. From Uniformity to Flexibility?.* 1st ed. (Hart Publishing, 2000), p. 63.

Before we look closer at the legal *effect* of EU law, however, it is necessary to first look at the *scope* of EU law, that is the question when and where EU law actually applies. For even EU law can only have direct effect and supremacy in those cases where it applies in the first place. The question of scope, moreover, is equally relevant for the EAC as the precise scope of EAC law seemingly has not yet been settled yet, but will equally be of crucial importance for the success of regional integration in East Africa.

4.2 The Scope of EU Law

When one talks about 'the scope' of EU law, one basically asks which cases are governed by EU law. When two Portuguese companies conclude a contract for IT services in Portugal, for example, does EU law apply? And what if an American undertaking imports products into Ireland, or participates in an American cartel that affects the EU market? Or is EU law applicable when a Spanish region directly awards a multi-million contract to a Spanish company?

Just as EU law determines the limits of EU competences, the CJEU also held that EU law determines its own scope.[4] Whether a certain issue falls under EU law, therefore, is a question of EU law, not of national law. Moreover, the mere fact that a certain issues *also* falls under national law, does not mean it does not fall under EU law, as both can apply at the same time. The exclusive jurisdiction of the CJEU over the scope of EU law is also necessary to ensure the unity of EU law and to enable the CJEU to remain the ultimate arbiter of EU law. After all, if other courts could determine the scope of EU law, they could prevent the Court of Justice from safeguarding the correct interpretation and application of EU norms in certain cases, simply by declaring them outside the scope of EU law. Reducing the scope of EU law would then become an escape route for Member States or national courts to escape or reduce the direct effect and supremacy of EU law. Control over the scope of EU law, consequently, should also be seen as an important precondition for supremacy and direct effect, just like the ultimate jurisdiction over the correct interpretation and application of EU law.[5]

4 Case C-617/10 *Akerberg Fransson*, ECLI:EU:C:2013:105.

5 See already on this point Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, as well as the much discussed CJEU Opinion 2/13 on the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms ECLI:EU:C:2014:2454.

4.2.1 *EU Actions and the Scope of EU Law*

Logically, all actions by EU institutions and bodies fall under the scope of EU law. All EU legislation and all decisions from EU institutions and bodies, therefore, have to comply with EU law, including all fundamental rights guaranteed within the scope of EU law.[6] More complicated is the question when actions by Member States fall under the scope of EU law.[7]

4.2.2 *Member State Actions and the Scope of EU Law*

Essentially, there are three ways in which Member State actions fall under the scope EU law. Firstly, any Member State action falls under the scope of EU law when the Member State is *implements or applies* EU measures.[8] Any national legislation implementing a directive, for example, falls under the scope of EU law.[9] Consequently, if an individual challenges a national act that implements or applies an EU rule, that decision falls under the scope of EU law. So for example, where two companies start legal proceedings against each other, and one company relies on a national law that implements an EU directive, this dispute between two private parties will fall under the scope of EU law.[10]

Secondly, any Member State action that *derogates* from EU rules or rights also falls under the scope of EU law.[11] This category *inter alia* includes all cases where a Member State action restricts free movement. In *Schmidberger*, for example, Austria allowed a demonstration that blocked the Brenner Pas, one

---

6 See for a highly principled position of the CJEU on this point the Kadi-saga: Joined cases C-402/05 P & C-415/05 P *Kadi I* [2008] ECR I-6351, and Case C-584/10 P *Commission v. Kadi* (Kadi II). or further analysis of these cases see M. Avbelj, F. Fontanelli and G. Martinico (eds), *Kadi on Trial* (Routledge, 2014), as well as A. Cuyvers, '"Give me one good reason": The unified standard of review for sanctions after Kadi II', 51(6) *Common Market Law Review* (2014), 1759, and A. Cuyvers, 'The Kadi II judgment of the General Court: the ECJ's predicament and the consequences for Member States'. *European Constitutional Law Review*, 7, 481.

7 See for a discussion in the context of the Charter K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 EUConst, 375.

8 See for example already case 5/88 *Wachauf* [1989] ECR 2609, paras 17–19, or Case 249/86 *Commission v. Germany* [1989], ECR 1263, or Case C-578/08 *Chakroun* [2010] ECR I-1839.

9 For recent examples see amongst many others Case C-399/11 *Melloni* ECLI:EU:C:2013:107, Case C-131/12 *Google v. Spain* ECLI:EU:C:2014:317 or Case C-300/11 *ZZ* ECLI:EUC:2013:363.

10 For a further delineation of what exactly qualified as 'implementing EU law', see inter alia Case C-206/13 *Cruciano Siragusa* ECLI:EU:C:2014:126, par. 25, Case C-40/11 *Iida* ECLI:EU:C:2012:691, case C-87/12 *Ymeraga* ECLI:EU:C:2013:291, par. 41, and Case C-198/13 *Julian Hernandez* ECLI:EU:C:2014:2055, par. 34.

11 See for example Case C-260/89 *ERT* [1991] ECR I-2925. Similarly see for example Case C-470/03 *AGM-COS.MET* [2007] ECR I-2749 or Case C-390/12 *Pfleger* EU:C:2014:281.

of the main transport routes to southern Europe. The Court held that allowing this demonstration restricted the free movement of goods enjoyed by a transport company. Even though the Court found the restriction justified in the end, the mere fact that Austria had restricted free movement was enough to bring the dispute under the scope of EU law.[12] As many national laws will in some way affect the free movement of goods, services, establishment, persons or capital, this second ground significantly expands the scope of EU law.

In addition to the two grounds set out above, there also is a third, rather vague ground for bringing a case under the scope of EU law. The CJEU sometimes finds that a case does not involve an implementation or a derogation of EU law, but nevertheless falls 'within the scope of EU law' in a *generic sense* because there is a sufficient link between the national act and EU law. The case of *Fransson*, for example, concerned Swedish tax penalties and a criminal prosecution that were not directly based on EU law, nor did they derogate from EU law. Nevertheless the CJEU found these penalties came under the scope of EU law because they were *also* designed to protect the collection of VAT, and therefore the financial interest of the EU.[13] This indirect and partial link was sufficient to bring the case under the scope of EU law in the generic sense. In *Kücükdeveci*, the CJEU brought a case under the scope of EU law primarily because the *subject matter* of the case was covered by a directive, even though the directive did not apply itself.[14]

Some further guidance on this third category of scope was given more recently in *Hernandez*, where the CJEU held that scope 'presupposes a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other.'[15] Despite this clarification, however, this ground for scope remains relatively opaque and unpredictable. These same qualities, of course, may also be part of the appeal to the CJEU, as it sometimes may be in need of a ground to extend the scope of EU law beyond implementation or derogation.[16]

---

12 Case C-112/00 *Schmidberger* [2003] ECR I-5659.

13 Case C-617/10 *Fransson* ECLI:EU:C:2012:340, paras. 24–28.

14 Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG*, [2010] ECR I-365.

15 Case C-198/13 *Julian Hernandez* ECLI:EU:C:2014:2055, par. 34.The CJEU thereby referred to its earlier case law in Case 149/77 *Defrenne* EU:C:1978:130, paras. 29 to 32, Case C-299/95 *Kremzow* EU:C:1997:254, paras. 16 and 17, Case C-144/04 *Mangold* EU:C:2005:709, par. 75, and *Siragusa* EU:C:2014:126, paragraph 24.

16 For the more specific rules on the scope of EU law in the field of competition law, also see companion chapter 14. Essentially the scope of EU competition law is linked to the effect of the anti-competitive behavior on the EU market, as held in Joined cases C-89/85,

4.3 Direct Effect of EU Law

Direct effect is one of the hallmarks of the EU legal order. *Van Gend en Loos*, the case which established direct effect and the autonomy of the EU legal order has a near mythical status as the alpha and omega of the EU legal order.[17] The essence of direct effect is as simple as it is fundamental. Direct effect means that individuals and companies can rely on EU law before all national courts and public bodies, just as they can on national law. EU law, therefore, is not some foreign or international law that must first be imported into the national legal order to have legal effect.[18] Rather, direct effect means that EU *law is part of national law*.

This section first outlines the establishment of the direct effect of Treaty provisions in *Van Gend en Loos*, the criteria that a Treaty provision has to meet to have direct effect, and the main arguments given by the CJEU to justify direct effect of EU law. Subsequently, this section discusses the direct effect of secondary EU law. This discussion will also touch on the main complexities surrounding direct effect, including the direct effect of general principles and directives as well as the difference between vertical and horizontal direct effect.

4.3.1 Van Gend en Loos: *Establishing Direct Effect of Treaty Provisions*

Van Gend en Loos illustrates how small cases can make good law. The judgment concerned the company of Van Gend en Loos that wanted to import the rather unspectacular chemical ureaformaldehyde into the Netherlands from Germany. The Netherlands wanted to impose an import duty of 8%, which was higher than the import tariff that applied when the Netherlands joined

---

C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85 and C-129/85 *Woodpulp I* ECLI:EU:C:1993:120.

17 Case C-26/62 *Van Gend en Loos v Netherlands Inland Revenue Administration*, EU:C:1963:1. Direct effect and supremacy have inter alia been referred to as the 'grounding principles' in: K. Lenaerts and Gutierrez-Fons, The Constitutional Allocation of Powers and General Principles of EU law' (2010) *Common Market Law Review*, 1631, or the 'twin pillars' in: S. Prechal, 'Does Direct Effect Still Matter?' (2000) *Common Market Law Review*, 1047. The Court referred to them 'essential characteristics' in Opinion 1/19 *Draft Agreement relating to the creation of the European Economic Area* [1991] ECR I-6979, para. 21.

18 At least as would be required in dualist systems. In pure monist systems even public international law can have direct effect, albeit based on the monist constitution. For a very far reaching position on this point see Cour de Cassation (Belgium), 27 May 1971, S.*A. Fromagerie franco-suisse 'Le Ski'* (1971) RTD eur 495.

the EEC. Van Gend en Loos argued that this increase violated what was then Article 12 of the EEC Treaty, which read:

> Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.[19]

In its defense, the Dutch government argued that Article 12 EEC was an international obligation only directed at the state, and that a private company like Van Gend en Loos could not rely on it. The CJEU disagreed, and held that Treaty provisions could have direct effect if they met three cumulative conditions:

i. The measure must be sufficiently clear and precise;
ii. It must be unconditional, and;
iii. It must leave no legislative discretion to the Member State.

Jointly, these criteria essentially require that, to be directly effective, a rule of EU law actually gives a right to an individual, and that this right can be sufficiently determined on the basis of the Treaty provision alone, without requiring further legislative action by the Member State. For example, imagine an EU rule saying that all Member States must strive to provide reasonable studying grants to all students. This norm is vague and requires implementation by Member States to determine the actual right. How much would the grant be per month, for example, and who precisely would be entitled to it? In contrast, an EU rule holding that all people registered at a university have a right to a four year state sponsored grant of €250 per month, would be sufficiently clear and precise, as one can determine the core elements of an unconditional right from the provision itself. In practice, the CJEU is rather flexible in finding direct effect. It is enough if the core elements or the minimal content of a right can be determined.[20]

---

19 At this stage of European integration, not yet all import tariffs had been abolished. Rather, during the transitional stage, only increases were prohibited as gradually all tariffs were reduced to zero.

20 Case 43/75 *Defrenne* [1976] ECR 455. See for an example of which key elements must be sufficiently clear for a right to exist also Case C-479/93 *Francovich* [1995] ECR I-3843. By now, moreover, the CJEU has been able to rule on the direct effect of all Treaty provisions. When one is in doubt, therefore, if a certain Treaty provision fulfills the requirements for direct effect, this can simply be checked via the case law of the Court of Justice.

Applying these criteria in In *Van Gend en Loos*, the CJEU held that the prohibition to increase customs duties in Article 12 EEC was sufficiently clear, precise and unconditional. As a clear prohibition, furthermore, it required no further implementation.[21] Consequently, Article 12 EEC had direct effect, and the company of Van Gend en Loos could directly rely on it to challenge the Dutch increase in import tariffs.

4.3.2 *Justifying Direct Effect of EU Law*

By holding that EU Treaty provisions could apply directly, the CJEU took a monumental step towards differentiating the EU legal order from 'normal' public international law and ensuring that EU law would become a living reality rather than just another legal norm that applied only between states. Most importantly, the CJEU determined that individuals and companies derived certain rights directly from EU law and that they could directly enforce these rights at the national level.

With this single judgment, the CJEU transformed millions of individuals and companies into EU law policemen that could make sure Member States respected their rights under EU law. This greatly increased the enforcement of EU law. After all, it is extremely unlikely that the Commission would have ever started an infringement proceeding against the Netherlands over something as minor as increasing the tariffs for ureaformaldehyde to 8%. For a transport company like Van Gend en Loos, however, such an increase was important enough to undertake legal action. The principle of direct effect, therefore, linked the enforcement of EU law to the self-interest of individuals and companies, self-interest being one of the more reliable incentives that legal systems can rely on. For no matter how technical or 'minor' an EU rule may seem, there is likely a company or individual deeply affected by it.

To support its monumental ruling, the CJEU essentially relied on four, interconnected arguments derived from the 'spirit, general scheme and the wording' of the Treaty.[22]

Firstly, the CJEU pointed out that the EEC Treaty 'is *more* than an agreement creating mutual obligations between the Member States' alone, as it must have been intended to include individuals as well. Here the CJEU *inter alia* refers to the aim of establishing a common market. The functioning of such a market necessarily concerns individuals as 'stakeholders'. One simply cannot have

21 *Van Gend en Loos*, therefore, also forms a good authority for the conclusion that prohibitions will usually be sufficiently clear, precise and unconditional to have direct effect.

22 Note that the wording only comes last, further underscoring the fundamental as well as the creative exercise in *Van Gend en Loos*.

a market without involving the market actors, so the logic goes.[23] This logic is then further supported by the Preamble of the EEC which 'refers not only to government but also peoples'. Both the text and the objective of the EEC Treaty, therefore, imply that it was intended to be more than just another international treaty only creating rights and obligations between states. Rather, the EEC Treaty was intended to be something more, a legal instrument that unlike traditional international law also included individuals as its objects and subjects.

This finding that the EEC Treaty must be more than an ordinary Treaty connected to the CJEU's second and even more fundamental argument on the nature and autonomy of the EEC legal order:

> ... the Community constitutes a new legal order of international law for the benefit of which states have limited their sovereign rights, albeit within limited fields, and the subject of which comprise not only Member States but also their nationals.[24]

The EEC Treaty, therefore, created a whole new legal order, and this legal order is *autonomous* from the Member States that created it.[25] Both the Member States and individuals are members of this new autonomous legal order, and both can therefore rely on it directly. The autonomy of the EU legal order, and the fact that Member States have actually limited their sovereign rights to create it, also explains why it is EU law itself that can determine its own direct effect.

Thirdly, the CJEU supports these two teleological arguments with a more textual and straightforward argument: the existence of the preliminary reference procedure.[26] The CJEU points out that the preliminary reference procedure allows national courts to ask questions to the CJEU on the correct interpretation and application of EEC law. This possibility implies, according to the CJEU, that these national courts were presumed to apply EEC law directly. Why, after

23 F. Mayer "*Van Gend en Loos:* The Foundation of a Community of Law" in Maduro, Azoulai, *The Past and Future of EU law.* 2nd ed. (Hart Publishing, 2010), p. 20.

24 *Van Gend en Loos*, EU:C:1963:1.

25 Cf. also K. Lenaerts, "The Court of Justice as the Guarantor of the Rule of Law Within the European Union" in: G. De Baere and J. Wouters, *The Contribution of International and Supranational Courts to the Rule of Law"*, 1st ed. (Edward Elgar Publishing Limited, 2015), 243.

26 Article 177 EEC, now Article 267 TFEU. See for a more detailed discussion of this remedy EU Chapter 8.

all, would national courts ask preliminary questions on EEC law to the CJEU if these courts were not even allowed to apply EEC law in the first place? The indirect remedy of the preliminary reference, therefore, implies the direct effect of EU law.

Fourth, and most fundamentally, however, the CJEU seems to base direct effect on *effectiveness*. If the Member States seriously wanted the EEC to achieve its objectives, they must have accepted the direct effect of EEC law, for without direct effect the EEC could not work.[27] Not only is the participation of individuals necessary to achieve objectives such as the internal market, it is also necessary to ensure the effective enforcement and application of EU law. In the words of the CJEU:

> The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.[28]

This logic of effectiveness seems to be the most fundamental reason underlying direct effect, as well as many other key principles of EU law.[29] If the ambitions of the EU are to be taken seriously, the EU legal order must be conceived as something that goes far beyond an ordinary international treaty. Innovations such as direct effect, therefore, are a necessary price to pay for effective regional integration, and as Member States surely must have wanted to create an effective regional organization, the CJEU also assumes they intended to pay this price. Consequently, even though it may not have been made explicit in the EEC Treaties, the CJEU found that the potential direct effect of Treaty provisions was inherent in EEC law.[30]

---

27 For an explicit reference to the *effet utile* of EU law also see Case C-9/70 *Franz Grad v Finanzamt Traunstein* ECLI:EU:C:1970:78.

28 *Van Gend en Loos,* EU:C:1963:1.

Referenced to as a "prophetic" statement, since the preliminary reference procedure seems to have "... effectively become the infringement procedure for the European citizen". See: "*Van Gend en Loos*, 3 February 1963—A View from Within" in: Maduro, Azoulai, *The Past and Future of EU law.* 2nd ed. (Hart Publishing, 2010), p. 7.

29 Also see EU chapter 6 on the general principles of EU law.

30 Note that even unwritten General Principles of EU law, which are also pat of EU primary law, can also have direct effect if they are sufficiently clear, precise and unconditional. Precisely because of their generality, many principles of EU law may struggle to meet this criterion, but for example the general principle prohibiting discrimination on the basis of age has been found to be directly effective. See Case C-144/04 *Mangold* [2005]

Treaty provisions, moreover, usually have both vertical and horizontal direct effect. Vertical direct effect refers to situations where parties rely on EU law against the state, or any entity wielding public authority.[31] Horizontal direct effect concerns situations where none of the parties wield any public authority, for example in a dispute between two private companies. Even in such purely horizontal situations, where no party wields any public authority, the CJEU has found that most Treaty provisions apply directly and can therefore be relied upon against each other. For example, the Belgian stewardess Defrenne could rely directly on then Article 119 EEC, at least to the extent that it required equal pay for equal work for men and women.[32] Equally, Mr. Angonese could rely on the freedom of workers against a private bank in Italy, which would only hire staff with a language certificate awarded in Bolzano.[33] For some Treaty provisions, including those on the free movement of goods and services, however, the CJEU seemingly has not yet fully made up its mind.[34]

4.3.3 *Direct Effect of other EU Norms*

Van Gend en Loos only established the direct effect of Treaty provisions. The question therefore remained if secondary EU law could also have direct effect, and if so under what conditions.[35] By now the CJEU has also ruled on the direct effect of all forms of secondary legislation enumerated in Article 288 TFEU, being regulations, directives, decisions, recommendations and opinions. In

---

ECR I-9981 and Case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21. The possible direct effect of the Charter of Fundamental rights of the EU remains a more contested issue, as the CJEU has so far avoided ruling on it. At the same time, any rights embodied in the Charter may also form General Principles of EU law as such, and in that capacity enjoy direct effect if they meet all the criteria. On the direct effect of the Charter see Case C-282/10 *Dominguez*, ECLI:EU:C:2012:33, and especially the Opinion of AG Trstenjak in this case, as well as Case C-176/12 *AMS* ECLI:EU:C:2014:2. For a further discussion on the nature of EU General Principles as such see EU chapter 6.

31 See for examples Case 152/84 *Marshall I* [1986] ECR 723, Case 71/76 *Thieffry* [1977] ECR 765, Case C-309/99 *Wouters* [2002] ECR I-1577, par. 120, Case 13/76 *Dona* [1976] ECR 1333, or Case 36/74 *Walrave and Koch* [1974] ECR 1405.

32 Case 43/75 *Defrenne* ECLI:EU:C:1976:56.

33 Case C-281/98 *Angonese* [2000] ECR I-4139.

34 See Case C-171/11 *Fra.bo* ECLI:EU:C:2012:453, as well as Case C-341/05, *Laval un Partneri* ECLI:EU:C:2007:809.

35 For a more elaborate overview of the different regimes and requirements for direct effect, in a comparative perspective to the US, see K. Lenaerts 'Constitutionalism and the Many Faces of Federalism' 4 *American Journal of Comparative Law* (1990), 208, 212. et seq.

addition, the CJEU has clarified that international agreements concluded by the EU law can also have direct effect.

4.3.3.1 Direct Effect of Regulations

The potential direct effect of directives is inherent in their very nature. As Article 288 TFEU provides, a regulation 'shall be binding in its entirety and *directly applicable* in all Member States.'[36] Regulations, therefore, do not require any support of or conversion into national law to directly apply in the national legal orders of the Member States. At the same time, this does not mean that all parts of all regulations apply directly. To be directly effective, a provision in a directive must also be unconditional, sufficiently clear and precise, and require no further implementation.[37] For if a provision in a regulation does not contain a sufficiently specific right, there simply is nothing that can be applied directly.

4.3.3.2 Direct Effect of Directives

The possible direct effect of directives is one of the more complex and potentially confusing parts of EU law.[38] The starting point, however, is very clear. Directives normally do not have direct effect. As Article 288 TFEU states, directives are addressed to Member States, not to individuals. If all goes well, Member States implement directives in their own legal order within the prescribed period. Individuals can then rely on the national law implementing the directive, and do not need to rely on the directive itself. If directives are implemented timely and correctly, therefore, they never acquire direct effect.

Problems arise, however, where Member States fail to implement a directive or implement a directive incorrectly. In such cases, individuals are unable to rely on a national implementing law to enforce any rights that the directive may have given them. To fill this gap, and make sure Member States do not get away with not implementing directives, the CJEU has found that directives can have vertical direct effect where they have not been correctly implemented and the implementation period is over. Compared to Treaty provisions and

36 The existence of regulations, therefore, also provides a possible counterargument to the reliance of the CJEU on the preliminary reference procedure as proof of the fact that the EEC Treaty should have direct effect. The existence of directly effective regulations could have been sufficient explanation for the inclusion of the preliminary reference procedure in the EEC Treaty.

37 See for example C-403/98 *Azienda Agricola Monte Arcosu v Regione Autonoma della Sardegna* ECLI:EU:C:2001:6, paras 28–29.

38 For a more general analysis see S. Prechal, *Directives in EC law* (2nd edn., OUP 2005).

regulations, therefore, directives must meet some additional requirements in order to have direct effect. The cumulative requirements for a provision in a directive to have direct effect are as follows:

i. The provision must be sufficiently clear and precise;
ii. It must be unconditional, and;
iii. It must leave no legislative discretion to the Member State.
iv. In addition, the implementation period must have passed, and;
v. The directive has not been implemented or has not been implemented correctly.[39]

Directives, therefore, cannot have direct effect before the implementation period has expired.[40] Moreover, the CJEU has consistently ruled that directives can only have so-called *vertical* direct effect. This means that the direct effect of directives can only be relied upon against the state or emanations of the state. Directives can never have *horizontal* direct effect, which means they cannot be relied upon against other individuals.[41] In a conflict between two individuals, for example two private companies litigating over a commercial contract, neither party can therefore directly rely on any EU directives, even if these directives grant them a clear, precise and unconditional right.

The lack of horizontal direct effect of directives creates a certain gap in the legal protection of individuals and the effectiveness of EU law. Where Member States for example fail to implement a directive on consumer protection, consumers cannot invoke their rights under the directive against private companies violating these rights.[42] The CJEU has, therefore, developed several other doctrines to at least reduce the impact this gap has and to ensure the

39 See for example Case C-41–74 *Van Duyn* ECLI:EU:C:1974:133, paras. 4–7, Case C-148/78 *Criminal proceedings against Tullio Ratti* ECLI:EU:C:1979:110, para. 46. Also note that there is a general obligation on National Courts to interpret national law in conformity with EU law. Even if a directive has not (yet) been implemented by a Member State, therefore, the national court is obliged to interpret national law in line with the directive. Only where this would require an interpretation *contra legem* is a national court allowed to choose an interpretation of EU law that conflicts with a directive. This obligation, moreover, applies to all EU norms, even those that are not directly effective. See Case C-397–403/01 *Pfeiffer* [2004] ECR I-8835.

40 Even before the implementation deadline has expired, however, Member States are obligated to refrain from acting in ways that might nullify the effect of the directive, see Case C-129/96 *Inter-Environment Wallonie* ECLI:EU:C:1997:628, par. 50.

41 Case C-152/84 *Marshall* EU:C:1986:84, par. 48, Case C-91/92 *Faccini Dori* [1994] ECR I-3325.

42 See for example Cases 189 & 190/94 *Dillenkofer v Germany*, ECLI:EU:C:1996:375.

effectiveness of EU law as much as possible. To begin with, the CJEU employs a very wide conception of the State, and therefore of vertical situations. Bodies that wield some form of public authority will rather quickly qualify as a part of the State, and hence have to accept that directives may be relied upon against them directly.[43] In addition, the CJEU allows for so called *triangular* direct effect and, exceptionally, for *indirect* horizontal direct effect.[44] Even where no direct effect can be created, moreover, the duty of conform interpretation requires that national courts try and interpret national law in conformity with EU law, including directives, even where these do not have direct effect.[45] Although national courts are never obligated to interpret national law *contra legem*, they must try to find a way to read any rights granted by a directive into national law. Lastly, the doctrine of Member State liability allows individuals to sue the Member State for any damages they have suffered due to the failure to (correctly) implement the directive.[46] Ultimately, however, the fact remains that directives in principle do not have direct effect, and never have real horizontal direct effect.

4.3.3.3 Direct Effect of Decisions, Opinions and Recommendations

Decisions can have direct effect.[47] According to the CJEU, the mere fact that the Treaty does not explicitly mention the direct effect of decisions, as it does for regulations, does not mean that decisions lack the capacity for direct effect.[48] The addressee of a decision can, therefore, directly rely on the decision if it is sufficiently clear and precise, unconditional, and leaves no discretion to Member States with regards to its implementation.[49]

Opinions and recommendations, on the other hand, lack binding legal force altogether and hence cannot have direct effect.[50]

---

43 See for example Case C-188/89 *Forster* [1990] ECR I-3313 or Case C-282/10 *Dominguez*, ECLI:EU:C:2012:33.

44 See Case C-201/02 *Wells* [2004] ECR I-723, and Case C-194/94 *CIA Security* [1996] ECR I-220.

45 This duty is part of the duty of sincere cooperation. Case 14/83 *Von Colson & Kamann* ECLI:EU:C:1984:153 and Case C-106/89 *Marleasing*. The duty of conform interpretation, moreover, does apply horizontally.

46 See Cases C-6/90 and 9/90 *Francovich* [1991] ECR I-5357, and Cases C-46 and 48/93 *Brasserie du Pêcheur* [1996] ECR I-1029. For these principles also further see EU chapter 6.

47 Case C-9/70 *Franz Grad v Finanzamt Traunstein* ECLI:EU:C:1970:78, par. 9.

48 Idem, paras. 4–5.

49 Idem, par. 9.

50 In this respect, see also Berry, Homewood and Bogusz, *EU Law—Text, Cases and Materials.* 2nd ed. (Oxford University Press, 2015). 90.

4.3.3.4 Direct Effect of EU International Agreements

International agreements concluded by the EU form an integral part of EU law and can also have direct effect.[51] Formally, the criteria for their direct effect are the same as the criteria for the direct effect of Treaty provisions, meaning a provision in an international agreement has to be legally binding as well as sufficiently clear, precise and unconditional.[52] In practice, however, the CJEU has sometimes been more hesitant to accept the direct effect of international agreements. This hesitation is largely due to the different political and practical consequences of giving full direct to international agreements. The main example in this regard is WTO law, where the CJEU has generally been unwilling to accept the direct application of WTO obligations or decisions from the WTO Dispute Resolution Body.[53]

4.4 The Supremacy of EU law

The principle of supremacy concerns the hierarchical relationship between EU law and national law, and forms the necessary counterpart to the principle of direct effect. What, after all, should happen where an EU rule enters into the national legal order but comes into conflict with a rule of national law? As we shall see, the answer from the CJEU is pretty clear: EU law always has absolute supremacy over all national law. At the same time, the view of most national constitutional courts tends to differ, even though they agree that in almost all cases EU law should indeed trump national law as well.

This section first outlines the principle of supremacy as developed in the case law of the CJEU, as well as the main arguments developed by the Court to support the absolute primacy of EU law. Subsequently, we briefly turn to some of the national responses to this absolute claim, and the functioning of primacy in daily reality.

---

51 On the status of such agreements see Article 216(2) TFEU as well as Case 181/73 *Haegeman* [1974] ECR 449, par. 5 and Opinion 1/91 (*EEA Agreement*) [1991] ECR 6079, par. 37.

52 Case C-12/86 *Demirel* ECLI:EU:C:1987:400.

53 See Cases 21–24/72 *International Fruit Company* [1972] ECR 1219, Case C-149/96 *Portugal v. Council* [1999] ECR I-8395 and Cases C-120 and 121/06 *FIAMM* [2008] ECR I-6513.This despite some complex and not always convincing legal meandering, for example in case C-69/89 *Nakajima* [1991] ECR I-2069 and Case C-280/93 *Germany v. Commission* [1994] ECR I-4873, as seemingly restricted again in Case C-351/04 *Ikea Wholesale* [2007] ECR I-7723.

4.4.1 *From* Costa E.N.E.L. *to Opinion 1/09: Establishing Absolute Primacy of EU Law*

Although the supremacy of EU law was already implicit in *Van Gend en Loos*, the principle was only explicitly established in *Costa E.N.E.L.*, another judgment in the EU law hall of fame:[54]

> 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. The executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the treaty set out in article 5 (2) and giving rise to the discrimination prohibited by article 7.
>
> (...)
>
> 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 Community law and without the legal basis of the community itself being called into question.

In later cases such as *Simmenthal* and *Internationale Handelsgesellschaft* the CJEU confirmed and clarified that the supremacy of EU law also covered national legislation of a later date and national constitutional law.[55] A more recent confirmation of this absolute supremacy doctrine was given in Opinion 1/09:

> It is apparent from the Court's settled case-law that the founding treaties of the European Union, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the European Union legal

54 Case 6/64 *Costa v E.N.E.L.*, ECLI:EU:C:1964:66.

55 Case 106/77 *Simmenthal*, ECLI:EU:C:1978:139 and Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125.

> order thus constituted are in particular its primacy over the laws of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.[56]

From the EU perspective, therefore, the principle of supremacy is very straightforward. EU law has absolute supremacy over all national law, including national constitutional law.[57] Article 4(2) TEU, which protects national identities, does not change this supremacy but only creates an obligation for the EU to respect these identities. Where a conflict arises, therefore, all national courts are obligated, by EU law itself, to disapply the conflicting national law and apply the relevant EU law instead.[58] Note though that the national law is not annulled, but only has to be disapplied to the extent that it conflicts with EU law.[59]

4.4.2 *Justifying Supremacy*

The EU Treaties do not provide an explicit basis for the supremacy of EU law.[60] Supremacy, therefore, is a judge made doctrine developed by the CJEU.

---

56 Opinion 1/09 [2011] ECR I-1137, par. 65.

57 See also Case C-399/11 *Melloni,* ECLI:EU:C:2013:107, paras 58–59, and Ottervanger, Cuyvers, Ammeloot, Croft, Etienne, Gallerizzo, Harrer, Wernitzki, *'The functioning of the East African Community: Common Market, Court of Justice and fundamental rights, a comparative perspective with the European Union'.* Leiden Centre for the Legal and Comparative Study of the East African Community (LEAC), November 2012, p. 31. For the pivotal importance of this doctrine also see J.H.H. Weiler, 'The Tranformation of Europe', 1991 *The Yale Law Journal*, 2414, who also claims that here the relation between national law and Community law is 'indistinguishable from analogous relationships in constitutions of federal states.'

58 This also means that even a court of first instance, which might normally not have the authority to disapply parts of the constitution, derives both the right and the obligation to do so where the constitution conflicts with EU law. Primacy, therefore, also affects the hierarchical ordering of national judicial systems.

59 Cf. for example Case C-10/97 to C-22/97 *Ministero delle Finanze v IN.CO.GE.'90 Srl and 12 others* ECLI:EU:C:1998:498, par, 29.

60 An explicit recognition of supremacy was included in Article I-6 of the Constitutional Treaty, which however never entered into force. In the Lisbon Treaty, this explicit recognition was replaced by Declaration no. 17 Concerning Primacy. Not only is this Declaration very indirect in its recognition of supremacy, as a declaration it also has no legally binding effect. Cf. on the silence of the Treaties on primacy also A. Von Bodandy and S. Schill, Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty" (2011) *Common Market Law Review*, 1417. And Gingsberg, *Demystifying the European Union: the Enduring Logic of Regional Integration* (2nd edn, Rowman & Littlefield Publishers, 2010), 112.

Consequently, it is important to analyse which arguments were used by the CJEU to justify primacy, also as some of these arguments might also prove relevant in the EAC context.

Logically, the four main arguments of the CJEU to justify primacy bear great resemblance to the arguments underlying direct effect.[61] Firstly, the CJEU returns to its ruling in *Van Gend en Loos* on the autonomous nature of the EU legal order. This autonomy means that EU law determines its own validity, and that its validity cannot be undermined by national law. If EU law could be trumped by national law, after all, its validity would ultimately depend on national law, which would undermine its autonomy.

Secondly, the CJEU bases primacy on the principle of *pacta sunt servanda*, and does so much more explicitly than it did in *Van Gend en Loos*. It holds that the Member States accepted EU law 'on the basis of reciprocity', which means that each Member State promised the others it would respect all its obligations under EU law. If one Member State could unilaterally reject some obligations of EU law by changing its laws or its constitution, this would undermine the reciprocity of EU law.

Thirdly, the CJEU also provides some more textual arguments for the supremacy of EU law. To begin with, it indicates that 'wherever the Treaty grants the States the right to act unilaterally, it does this by clear and precise provisions.'[62] Applying an *a contrario* reasoning, this means that Member States are not allowed to deviate from EU law unilaterally, for example by adopting laws that violate EU law, where the Treaty does not explicitly allow this. In addition, the CJEU points to the definition of regulations in Article 288 TFEU, providing that regulations are 'binding' and 'directly applicable in all Member States.' This binding and direct effect would be effectively 'nullified' if Member States could adopt later national legislation that went against a regulation. Essentially the CJEU here also conflates bindingness and absolute supremacy.

The fourth, and *de facto* the most central argument, however, again concerns the effectiveness of EU law and of European integration as a whole. The CJEU essentially argues that the *effet utile* of EU law would be undermined if Member States could unilaterally overrule parts of EU law. This risk is exacerbated if one takes into account the possible *cumulative effects*. If all Member States would start to deviate from different parts of EU law, even on a limited scale, the collective effect could undermine the unity and coherence of EU law itself. EU law would then differ from Member State to Member State based on national legislation, which is the opposite of the effective and unified regional

61 See also I. Pernice *Costa v ENEL* and *Simmenthal*: Primacy of European Law', in: M. Maduro and L. Azoulai, *The Past and Future of EU law.* (2nd edn, Hart 2010), 47.

62 *Costa v. E.N.E.L.* ECLI:EU:C:1964:66.

system the EU wants to establish. As the CJEU states, this would call into question 'the legal basis of the Community itself'.

From the perspective of the CJEU, therefore, defending the supremacy of EU law is of existential importance for the EU legal order and for European integration as such.[63] Undermining supremacy risks opening the floodgates, as 28 Member States may than (ab)use national law or constitutional principles to limit or distort the uniform application of EU law.[64]

4.4.3 *The National Reception of EU Supremacy*

From the perspective of national courts, and especially of national constitutional courts, however, one may understand a certain hesitation to accept absolute supremacy of EU law, certainly over key principles of national constitutional law. After all, one of the key functions of constitutional courts is to protect their own constitution, as well as the fundamental rights the constitution grants to individuals.

In practice, therefore, almost all national supreme or constitutional courts reject the absolute supremacy as postulated by the CJEU.[65] Only a few national courts come close to accepting absolute supremacy, and this acceptance is linked to the monist nature of their constitution, and not EU law as such.[66] The overwhelming majority of national constitutional courts only accept

63 See for a recent example of just how important the CJEU considers this task Opinion 2/13 *Accession of the EU to the ECHR* ECLI:EU:C:2014:2454.

64 Cf. also Case C-399/11 *Melloni*, ECLI:EU:C:2013:107, paras. 58–59, where the CJEU finds that supremacy is an 'essential feature', and it 'cannot be allowed to undermine the effectiveness' of EU law.

65 D. Chalmers, G. Davies, and G. Monti, *European Union Law* (CUP 2010), 190.

66 For Estonia see the conclusion of the Constitutional Chamber of the Supreme Court of Estonia in the Euro Decision, Opinion No. 3-4-1-3-06 of 11 May 2006, par. 16, available in English translation at: http://www.nc.ee. For Belgium see the ruling by the Belgian *Court de Cassation* of 27 May 1971, *S.A. Fromagerie franco-suisse 'Le Ski'* (1971) RTD eur 495, which grants inherent and absolute supremacy to international law, including EU law. This line, which is not based on EU law as such, has been maintained, see for example *Court de Cassation*, 9 Nov. 2004, Pas., 2004, 1745 and *Court de Cassation*, 16 Nov. 2004, Pas., 2004, 1802. A second Belgian highest court, the *Conseild'Etat*, has so far generally followed the line of the *Court de Cassation*, yet following a different reasoning (*Conseil d'Etat* Case 62.922 of 5 November 1996 (Orfinger). J.T., 1997, 254). To complicate matters in Belgium, however, a third highest court was created in 2007, namely the Belgian *Cour Constitutionnelle*, and subsequently chose a different position than the other two courts. The *Cour Constitutionnelle* holds that the authority of EU law derives from the Belgian constitution, and hence must be limited by it as well. (*Cour Constitutionnelle* 16 October. 1991, No. 26/91 and *Cour Constitutionnelle*, 3 February 1994, No. 12/94). For the Netherlands

a more relative form of EU supremacy that is based on and limited by the national constitution.[67] The general line of reasoning is that Member States did accept a certain form of primacy when they joined the EU, as primacy is a necessary element of EU law. However, this primacy is ultimately *based on* the national constitution, and therefore also subject to any limitations that the national constitution imposes, such as fundamental rights or core constitutional values.[68] In addition, because the EU is based on conferred powers, any *ultra vires* actions would not bind the Member States either.[69] This means that it is ultimately up to the national constitutional courts to decide in specific cases if EU law manifestly violates certain key principles or provisions of the national constitution, or is *ultra vires*, and if it is, to disapply the relevant parts of EU law within 'their' national legal order.[70]

---

see *Hoge Raad*, 2 November 2011, LJN AR1797, R.O. 3.6, *Hoge Raad* 1 October 2004, LJN AO8913 and *Raad van State* 7 July 1995, AB 1997, 117.

67 For an overview of the classic national case law see A. Oppenheimer (ed) *The Relationship Between European Community Law and National Law: The Cases Vol I and II* (CUP 1994 and 2003).

68 For several typical examples of this reasoning see the Czech Constitutional Court, Pl. ÚS 19/08, 26 November 2008 *Lisbon I*, and Pl. ÚS 29/09, 3 November 2009 *Lisbon II*, the Hungarian Constitutional Court, Decision 143/2010 (VII. 14.) AB, of 12 July 2010 *Lisbon Treaty*, the German *Bundesvefassungsgericht* in BVerfGE, 2 BvE 123,267, 2 BvE 2/08 (2009) *Lissabon Urteil*, the Italian Corte Costituzionale, Decision No. 348 and No. 349, 24 of October 2007 confirming the *controlimiti* doctrine, the Conseil constitutionnel, Decision 2004–2005 DC of 19 November 2004, *Traité établissant une Constitution pour l'Europe*, Conseil constitutionnel, Decision 2600–540 DC of 27 July 2006, *Loi transposant la directive sur le droit d'auteur*, or the Spanish Constitutional Court Declaration 1/2004 of December 13 2004 on the Constitutional Treaty, (BOE number 3 of 4 January 2005), the UK Supreme Court in *R* (*on the application of HS2 Action Alliance Limited*) (*Appellant*) *v The Secretary of State for Transport and another* (*Respondents*) (https://www.supremecourt.uk/decided-cases/docs/uksc_2013_0172_judgment.pdf), or the Polish Constitutional Court in its decision on Poland's Membership in the European Union (Accession Treaty), 11 May 2005 (Polish Constitutional Tribunal), http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdfn.

69 See for example the judgment of the German Constitutional Court in BVerfGE 89, 155 (1993) *Maastricht Urteil*, or the reasoning of the Czech Constitutional Court in its judgment of 31 January 2012, *Landtova* Pl. ÚS 5/12.

70 See for instance the ruling of the Polish Constitutional Court of 11 May 2005, K18/04 on Polish accession to the EU, or the Constitutional Court of Lithuania in joined cases No. 17/02, 24/02, 06/03 and 22/04, judgment of 14 March 2006. Cf. also B. De Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order', in: P. Craig and G. De Búrca (eds), *The Evolution of* EU *Law* (2nd ed. OUP 2011), 356: 'Everywhere the national constitution remains at the apex of the hierarchy of norms, and EU law is to trump national law only

It should be stressed that so far the differing views on the basis, scope and limits of EU supremacy have largely remained in the realm of theory and principle. In the day-to-day practice, the primacy of EU law, certainly over non-constitutional national law, is generally accepted.[71] Moreover, even in cases where important principles are at stake, national courts generally try to avoid an open conflict, or at least conflicting judgments.[72] The CJEU, in return, has often incorporated concerns of the national high courts into its case law, for example improving the protection of fundamental rights or granting a certain leeway to a Member State on a politically or culturally sensitive issue.[73] The only open conflict so far, where a national constitutional court has openly declared a judgment of the CJEU *ultra vires*, is the *Landtova* judgment of the Czech Constitutional Court, which concerned the sensitive issue of pensions after the dissolution of Czechoslovakia into the Czech Republic and Slovakia.[74]

From one perspective, precisely this lack of a formal and linear hierarchy, or 'pluralism', within the EU legal order can be seen as valuable in itself. It can be said to reflect the cooperative nature of the EU that depends on shared values and dialogue, rather than on force or formal authority.[75] In any event the

---

under the conditions, and within the limits, set by the national constitution.' Also see the discussion in this context of the European Union Act of 2011, including its 'sovereignty clause' in art. 18 in P. Craig, 'The European Union Act 2011: Locks, limits and legality' 48 *CMLRev* (2011), 1881.

71 G. de Búrca, 'Sovereignty and the Supremacy Doctrine of the European Court of Justice', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 454. See also House of Lords *R v Secretary of State for Transport ex. p. Factortame* (No. 2) [1991] A.C. 603 or the French *Conseil constitutionnel*, in Decision 2004–2005 DC of 19 November 2004, *Traité établissant une Constitution pour l'Europe*.

72 For a recent, very high stake, example of a dialogue where ultimately the German Constitutional Court accepted the position of the CJEU see the OMT saga resulting in the OMT decision [2016] - 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13, summary available via http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/06/rs20160621_2bvr272813.html.

73 See *inter alia* Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, or Case C-391/09 *Runevič-Vardyn and Wardyn* [2011] ECLI:EU:C:2011:291.

74 Judgment of 31 January 2012, *Landtova* Pl. ÚS 5/12, and the analysis by J. Komarek, 'Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires' 8 *European Constitutional Law Review* (2012), 323.

75 See on the concept of pluralism especially N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*' (OUP 1999), N. Walker, 'The Idea of Constitutional Pluralism', 65 *The Modern Law Review* (2002), 317, or M.P. Maduro,

EU demonstrates that 'the system can work' even where there is disagreement on such a fundamental point. From another perspective, however, this open disagreement also reflects the still unfinished nature of the EU, and that even now the EU still seems to be in a transitional phase. In addition, as long as this disagreement remains open, there is the risk that a more serious conflict arises that does threaten the stability of the EU, for example in the context or aftermath of Brexit. From this perspective, the search remains on for a more mature and nuanced doctrine of supremacy that can accommodate sufficient respect for national constitutional principles whilst still preserving a sufficient level of unity and coherence of EU law.[76] A quest that the EAC can join, benefiting from the experiences in the EU, when searching for a doctrine of supremacy that fits within its own legal and political context.

'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in: N. Walker (ed), *Sovereignty in Transition*, (Hart 2006), 501.

76 For a first attempt to create such a 'softer' variant of supremacy along *confederal* lines A. Cuyvers, *The EU as a Confederal Union of Sovereign Member Peoples, Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU*, (2013, Diss. Leiden), available via, https://openaccess.leidenuniv.nl/handle/1887/22913.