Concurrence in European Private Law

Graaff, R. de

6 Concurrence in Secondary Union Law

6.1 Introduction

The previous chapter has focused on rules belonging to the body of primary Union law. It has discussed the overlap of, and the relationship between, treaty provisions pertaining to competition, equal treatment and free movement respectively. The current chapter shifts the attention to the rules belonging to the body of secondary Union law. It will focus on the directives and regulations by which the Union legislature seeks to regulate the internal market.[1] We have seen that these measures provide individuals with a range of claims, powers, and defences.[2]

By their very nature, these directives and regulations are limited in scope. Most of them govern areas in which the Union shares its competence to legislate with the Member States: social policy, consumer protection, transport, the area of freedom, security and justice, public health matters, and the internal market more broadly.[3] This means that a Member State may legislate to the extent that the Union has not exercised its competence to legislate, or has stopped doing so.[4] It also means that the exercise by the Union of its competence to legislate is curbed by the principles of subsidiarity and proportionality.[5] In accordance with the principle of subsidiarity, the Union may take action 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States'.[6] In accordance with the principle of proportionality, any action 'shall not exceed what is necessary to achieve the objectives of the Treaties'.[7]

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1 See Art. 26 TFEU and the provisions creating specific requirements for legislative interventions, such as Art. 114 TFEU.

2 See *supra* section 4.4.

3 Art. 4 (2) TFEU. But note that the Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union has been adopted on the basis of Art. 103 (competition law) and 114 (internal market) TFEU. In the area of competition law, the Union has *exclusive* competence (Art. 3 (1) (b) TFEU). This means that Member States may only legislate 'if so empowered by the Union or for the implementation of Union acts' (Art. 2 (1) TFEU).

4 Art. 2 (2) TFEU.

5 See the report of the Report of the Task Force on Subsidiarity, Proportionality and "Doing Less More Efficiently" 2018.

6 Art. 5 (3) TEU. This principle does not apply in areas falling within the exclusive competence of the Union, such as the area of competition law.

7 Art. 5 (4) TEU. This principle also applies in areas falling within the exclusive competence of the Union, such as the area of competition law.

For these reasons, the directives and regulations which will be discussed in this chapter cannot be wholly autonomous and self-contained. They will overlap with other directives and regulations, and they will by complemented by national laws. A single set of facts may, therefore, fall within the ambit of multiple rules, originating from the body of secondary Union law and from other sources of law. The question to consider is whether the scope of application of one rule is affected by the scope of application of another rule. To what extent, if at all, does one rule exclude the applicability of another rule?

This chapter examines how Union law answers these questions by looking closely at the statements made by the Union legislature and by the Court of Justice of the European Union. It purports to demonstrate that we should start from the premise that each rule, however founded, should be realised to the greatest possible extent. By discussing a range of examples, the chapter shows that the scope of application of one rule should only be affected by another rule if this is in accordance with the intentions of the Union legislature. It flows from this reasoning that rules may, in principle, be applicable concurrently if their respective conditions have been established (sections 6.2-6.5). This does not, however, mean that concurrently applicable rules will always coexist peacefully. The chapter discusses two exceptions, namely the existence of alternative rules (section 6.6) and the existence of exclusive rules (section 6.7). In conclusion, the chapter recapitulates the themes running through the various solutions to individual issues of concurrence (section 6.8).

6.2 When the Union legislature explicitly leaves room for other Union rules

The Union legislature often explicitly asserts that the adoption of a directive or regulation does not affect the scope of application of other Union rules. A first example can be found in the area of transport. The Union legislature has emphasised that the rights of travellers under the Package Travel Directive are not affected by the introduction of several regulations in the area of passenger rights.[8] Air passengers are permitted, therefore, to claim compensation from their contracting party for losses resulting from a failure

8 Art. 3 (6), Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights; Art. 1 (4), Regulation (EC) No 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air; Art. 7, Regulation (EC) No 392/2009 on the liability of carriers of passengers by sea in the event of accidents; Art. 21, Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway; Art. 2 (8), Regulation (EU) 181/2011 concerning the rights of passengers in bus and coach transport. These provisions refer to Council Directive 90/314/EEC on package travel, package holidays and package tours. This directive has been replaced by Directive (EU) 2015/2302 on package travel and linked travel arrangements, which states, in Art. 29, that references to the former directive must be construed as references to the latter directive.

to perform the services included in the package travel contract, even if the necessary conditions for awarding compensation because of a cancellation of the flight are not met.[9] For its part, the revised Package Travel Directive confirms that any claim for compensation and any power to reduce the price granted under this directive does not affect the rights which may be derived from the regulations in the area of passenger rights. Passengers are entitled to the consequences flowing from each applicable rule, subject only to the requirement that the quantum of damages be adjusted in order to prevent a double recovery of the losses:

> 'Any right to compensation or price reduction under this Directive shall not affect the rights of travellers under Regulation (EC) No 261/2004, Regulation (EC) No 1371/2007, Regulation (EC) No 392/2009 (…), Regulation (EU) No 1177/2010 and Regulation (EU) No 181/2011, and under international conventions. Travellers shall be entitled to present claims under this Directive and under those Regulations and international conventions. Compensation or price reduction granted under this Directive and the compensation or price reduction granted under those Regulations and international conventions shall be deducted from each other in order to avoid overcompensation.'[10]

A second, distinctive example concerns the Union rules on data protection. There is one remark which appears in a great number of the legislative instruments under consideration here. The Union legislature has emphasised that the rules on the protection of personal data should also be complied with when promoting, selling and supplying goods and services to consumers,[11] when performing transport and travel services,[12] when

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9 As the Court noted in Case C-292/18, *Petra Breyer and Heiko Breyer v. Sundair*, ECLI:EU:C:2018:997, at 26. It is not inconceivable that an air carrier offers different types of travel services for the purpose of the same trip or holiday, so that the facts fall within the scope of both the Package Travel Directive and Regulation (EC) No 261/2004.

10 Art. 14 (5), Directive (EU) 2015/2302 on package travel and linked travel arrangements. Art. 12 (1), Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights provides a similar rule: 'This Regulation shall apply without prejudice to a passenger's rights to further compensation. The compensation granted under this Regulation may be deducted from such compensation.'

11 Recital 26, Directive 2002/65/EC concerning the distance marketing of consumer financial services; Recital 14, Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market; Art. 9 (4), Directive 2008/48/EC on credit agreements for consumers; Art. 18, 20, and 21, Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property; Art. 3 (8) and 16 (2), Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services.

12 Recital 12, Regulation (EC) No 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air; Recital 21 and Art. 10 (5), Regulation (EC) No 1371/2007 on rail passengers' rights and obligations; Recital 29, Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway; Recital 26, Regulation (EU) 181/2011 concerning the rights of passengers in bus and coach transport; Recital 49, Directive (EU) 2015/2302 on package travel and linked travel arrangements.

providing online content to travellers,[13] when using electronic identification and trust services in the context of electronic transactions,[14] when recovering debts through the new European procedure for the preservation of bank accounts,[15] and when providing online intermediation services and online search engines to business users and corporate website users.[16] The mere fact that these activities are governed by these directives and regulations does not mean that they are excluded from the scope of the Union rules on data protection.[17]

The e-Commerce Directive can be mentioned as a third example. The Union legislature has made clear that this directive does not affect the level of consumer protection as established by other Union rules.[18] What is more, the eleventh recital of the preamble mentions several directives by name, including the directives on unfair terms in consumer contracts,[19] on the protection of consumers in respect of distance contracts,[20] on misleading and comparative advertising,[21] on consumer credit,[22] on package travel, package holidays and package tours,[23] on the protection of the users of

13 Recitals 28 and 30, and Art. 8 (1), Regulation (EU) 2017/1128 on cross-border portability of online content services in the internal market.

14 Recital 11 and Art. 5 (1), Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (eIDAS Regulation).

15 Recital 45 and Art. 48 (d), Regulation (EU) No 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

16 Recital 35 and Art. 1 (5), Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services.

17 Most regulations and directives mentioned above refer to Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. This directive has been repealed by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, which states, in Art. 94, that references to the original directive must be construed as references to the regulation.

18 Art. 1 (3), Directive 2000/31/EC on electronic commerce.

19 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

20 Directive 97/7/EC on the protection of consumers in respect of distance contracts. This directive has been repealed by Directive 2011/83/EU of 25 October 2011 on consumer rights, which states, in Art. 31, that references to the former directive must be construed as references to the latter directive.

21 Council Directive 84/450/EEC concerning misleading and comparative advertising. This directive has been repealed by Directive 2006/114/EC concerning misleading and comparative advertising, which states, in Art. 10, that references to the former directive must be construed as references to the latter directive.

22 Council Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit. This directive has been repealed by Directive 2008/48/EC on credit agreements for consumers.

23 Council Directive 90/314/EEC on package travel, package holidays and package tours. This directive has been repealed by Directive (EU) 2015/2302 on package travel and linked travel arrangements, which states, in Art. 29, that references to the former directive must be construed as references to the latter directive.

immovable property on a time-share basis,[24] on the liability for defective products,[25] on the sale of consumer goods and associated guarantees,[26] and on distance marketing of consumer financial services.[27] The Union legislature stresses that the e-Commerce Directive 'complements' the information requirements introduced by these directives.[28]

Such explicit statements, expressed by the Union legislature, play an important role once a legal dispute must be resolved. Consider the approach followed by the Court of Justice in a case between two competitors in the laser technology industry. The first company – Visys – used the corporate name of the second company – BEST – as part of the domain name 'www.bestlasersorter.com'. The content of this website was identical to the content of the websites of BEST. BEST alleged that the use of its corporate name qualified as 'misleading advertising'.[29] Visys replied that the use of a domain name does not fall within the scope of the Directive on misleading and comparative advertising, because it does not qualify as a 'form of representation' which is made 'in order to promote the supply of goods or services'.[30] To support this proposition, the company referred to the e-Commerce Directive. Under this directive, the use of a domain name does not qualify as 'commercial communication', that is a form of communication 'designed to promote, directly or indirectly, the goods, services or image of a company (…)'.[31] In the view of Visys, the same approach should be taken in the context of misleading and comparative advertising.

Does the scope of application of the e-Commerce Directive affect the scope of application of the Directive on misleading and comparative advertising? Contrary to the Commission, but in line with the advice of its Advocate General,[32] the Court answered this question in the negative.

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24 Directive 94/47/EC on the protection of purchasers in respect of certain aspects on contracts relating to the purchase of the right to use immovable properties on a timeshare basis. This directive has been repealed by Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, which states, in Art. 18, that references to the former directive must be construed as references to the latter directive.

25 Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions concerning liability for defective products.

26 Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. This directive will be repealed and replaced by Directive 2019/771 on certain aspects concerning contracts for the sale of goods, which determines, in Art. 23, that references to the repealed directive must be construed as reference to the new directive.

27 Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services.

28 Art. 1 (3) and Recital 11, Directive 2000/31/EC on electronic commerce.

29 The company also relied upon trade mark law, but we will not consider that issue here.

30 Art. 2 (1) of Directive 84/450/EEC concerning misleading advertising; and Article 2 (a) of Directive 2006/114/EC concerning misleading and comparative advertising.

31 Art. 2 (f) of Directive 2000/31/EC on certain legal aspects of information society services.

32 Opinion A-G Mengozzi, Case C-657/11, *Belgian Electronic Sorting Technology v. Bert Peelaers and Visys*, ECLI:EU:C:2013:195, at 36-45.

In its reasoning, the Court first explained that the use of a domain name 'is clearly intended to promote the supply of the goods or services of the domain name holder'.[33] The Court then explained that the fact that the e-Commerce Directive excludes this activity from its scope of application does not necessarily mean that the same activity is also excluded from the scope of application of the Directive on misleading and comparative advertising.[34] In the view of the Court, the two directives 'pursue different objectives'. The Court also noted that the e-Commerce Directive itself indicates that it is 'without prejudice to the existing level of protection for consumer interests'.[35] Against this background, the Court confirmed that the use of domain names is governed by the Directive concerning misleading and comparative advertising, in spite of the fact that the same activity does not fall within the scope of application of the e-Commerce Directive.[36]

Instead of mentioning the directives or regulations by name, the Union legislature sometimes determines that an entire area of the law should remain unaffected. Consider the Unfair Commercial Practices (UCP) Directive as an example. This directive prohibits commercial practices which limit the consumer's ability to make an informed decision on whether to go ahead with a transaction proposed by a commercial trader.[37] Meanwhile, the UCP Directive is without prejudice to 'contract law and, in particular, (…) the rules on the validity, formation or effect of a contract'.[38] In accordance with this statement, the Court has confirmed that the UCP Directive does not affect the scope of application of the Unfair Terms Directive, which prohibits unfair terms in contracts concluded between a seller or supplier and a consumer, and prescribes that such terms 'shall (…) not be binding on the consumer'.[39] In the view of the Court, the existence of an unfair commercial practice may be taken into account when assessing the unfairness of contractual terms,[40] but does not have a 'direct effect' on whether the contract is valid from the point of view of the Unfair Terms Directive.[41]

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33 Case C-657/11, *Belgian Electronic Sorting Technology v. Bert Peelaers and Visys*, ECLI:EU:C:2013:516, at 46.

34 Case C-657/11, *Belgian Electronic Sorting Technology v. Bert Peelaers and Visys*, ECLI:EU:C:2013:516, at 50.

35 Case C-657/11, *Belgian Electronic Sorting Technology v. Bert Peelaers and Visys*, ECLI:EU:C:2013:516, at 51.

36 Case C-657/11, *Belgian Electronic Sorting Technology v. Bert Peelaers and Visys*, ECLI:EU:C:2013:516, at 60.

37 Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

38 Art. 3 (2), Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

39 Art. 6 (1), Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

40 Case C-453/10, *Jana Pereničová and Vladislav Perenič v. SOS*, ECLI:EU:C:2012:144, at 43; Case C-109/17, *Bankia v. Juan Carlos Marí Merino and Others*, ECLI:EU:C:2018:735, at 49.

41 Case C-453/10, *Jana Pereničová and Vladislav Perenič v. SOS*, ECLI:EU:C:2012:144, at 46; Case C-109/17, *Bankia v. Juan Carlos Marí Merino and Others*, ECLI:EU:C:2018:735, at 50.

These are not the only examples. In many cases, the Union legislature indicates that the adoption of a directive or regulation does not affect the scope of application of other Union rules.[42] We have seen that the Court of Justice attaches decisive importance to such statements. They form a reason for the Court to start from the premise that each rule must be assessed independently and that no rule should be excluded in advance. In principle, then, each directive or regulation ought to have its intended effect if the necessary elements have been established.

6.3 When the Union legislature remains silent about the relationship between Union rules

Does the same principle apply when the Union legislature remains silent about the relationship between secondary Union laws? Indeed, it appears that the scope of application of one rule is only affected by another rule if the Union legislature explicitly asserts that this shall be the case. Case law shows that, in the absence of contraindications, the Court of Justice assumes that each Union rule must be considered on its own merits.

The case *Travel Vac v. Sanchís* can be mentioned as a first example. Travel Vac concluded a so-called 'timeshare' contract with Manuel José Antelm Sanchís. Under the contract, Sanchís was entitled to use a furnished apartment located in Valencia for one week per year. Three days after the parties had signed the document, Sanchís indicated that he wished to cancel the contract. Eventually, Travel Vac decided to claim specific performance before a court of law. Sanchís defended himself by arguing that he had legitimately cancelled the contract. He could not, however, rely upon the Timeshare Directive in support of this argument,[43] because this directive had not yet been transposed into Spanish law.[44] For this reason, Sanchís relied upon the provisions implementing the Doorstep-Selling Directive, which also provides the consumer with the right to withdraw from a

42 Another important example, albeit outside the scope of the present book, is the Services Directive, which explicitly states that it does not affect the Union laws and national laws governing certain topics, such as criminal law and social security. See Art. 1 (3)-(7), Directive 2006/123/EC on services in the internal market.

43 Art. 5 (1), Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis. This directive has been repealed by Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts.

44 Opinion A-G Alber, Case C-423/97, *Travel Vac v. Manuel José Antelm Sanchís*, ECLI:EU:C:1998:576, at 18, who notes that the deadline for the transposition of the directive had not yet been expired at the time of conclusion of the contract.

contract.[45] In his view, a timeshare contract must be qualified as a contract for the supply of services within the meaning of this directive.[46]

Does the Timeshare Directive affect the scope of application of the Doorstep-Selling Directive? The position of the Union legislature was not quite clear. The Timeshare Directive contained no clues at all, and the Doorstep-Selling Directive only mentioned that it shall not apply to 'contracts for the construction, sale and rental of immoveable property or contracts concerning other rights relating to immoveable property'.[47] Yet the Court was not prepared to conclude that a timeshare contract is covered by this exception, because a timeshare contract also concerns the provision of 'separate services'.[48] Neither did the Court concur with the argument, put forward by Travel Vac,[49] that the Union legislature intended to exclude timeshare contracts from the scope of the 'general' Doorstep-Selling Directive, pending the adoption of the 'specific' Timeshare Directive. In the absence of express statements to that effect, the Doorstep-Selling Directive remains applicable, so the Court argued:

> 'Neither directive contains provisions ruling out the application of the other. Moreover, it would defeat the object of Directive 85/577 to interpret it as meaning that the protection it provides is excluded solely because a contract generally falls under Directive 94/47. Such an interpretation would deprive consumers of the protection of Directive 85/577 even when the contract was concluded away from business premises.'[50]

The second example which must be mentioned is the case *Heininger v. Bayerische Hypo- und Vereinsbank*, which concerned the conclusion by a consumer of a credit agreement with the aim of financing the purchase of immovable property. Having concluded that the former Consumer Credit Directive and the former Doorstep-Selling Directive may, on the face of it, both be applicable to such contracts,[51] the Court examined whether the first directive takes precedence over the second directive.[52] The German govern-

45 Art. 5, Council Directive 85/577/EEC on the protection of consumers in respect of contracts negotiated away from business premises.

46 Art. 1 (1), Council Directive 85/577/EEC on the protection of consumers in respect of contracts negotiated away from business premises. This directive has been repealed by Directive 2011/83/EU on consumer rights.

47 Art. 3 (2) (a), Council Directive 85/577/EEC on the protection of consumers in respect of contracts negotiated away from business premises.

48 Case C-423/97, *Travel Vac v. Manuel José Antelm Sanchís*, ECLI:EU:C:1999:197, at 25.

49 Opinion A-G Alber, Case C-423/97, *Travel Vac v. Manuel José Antelm Sanchís*, ECLI:EU:C:1998:576, at 13.

50 Case C-423/97, *Travel Vac v. Manuel José Antelm Sanchís*, ECLI:EU:C:1999:197, at 23.

51 Case C-481/99, *Georg Heininger and Helga Heininger v. Bayerische Hypo- und Vereinsbank*, ECLI:EU:C:2001:684, at 25-35.

52 The case concerned the relationship between Council Directive 85/577/EEC concerning consumer contracts negotiated away from business premises and Council Directive 87/102/EEC concerning consumer credit. The first directive has been repealed and replaced by Directive 2011/83/EU on consumer rights, the second by Directive 2008/48/EC on credit agreements for consumers.

ment had taken this position, arguing that, in accordance with the principle *lex specialis derogat legi generali*, a consumer should not be granted a right of cancellation under the 'general' Doorstep-Selling Directive if no such right would be available under the 'specific' Consumer Credit Directive.[53] The Court reached a different conclusion:

> 'It is sufficient to observe, as regards those submissions, that the doorstep-selling directive is (…) designed to protect consumers against the risks arising from the conclusion of contracts away from the trader's premises and, second, that that protection is assured by the introduction of a right of cancellation. (…) Neither the preamble to nor the provisions of the consumer credit directive contain anything to show that the Community legislature intended, in adopting it, to limit the scope of the doorstep-selling directive in order to exclude secured-credit agreements from the specific protection provided by that directive.'[54]

A third example concerns the relationship between Regulation (EC) No 1008/2008, which lays down common rules for the operation of air services, and the Unfair Terms Directive. The Court had to determine whether the terms contained in a contract of carriage by air may be qualified as 'unfair', given the fact that Article 22 (1) of Regulation (EC) No 1008/2008 provides that air carriers may 'freely set air fares and air rates'.[55] Is it possible for such air fares and air rates to be qualified as 'unfair' at all? The Court held that, in the absence of contraindications on the part of the Union legislature, the scope of application of the Unfair Terms Directive is not affected by Regulation (EC) No 1008/2008:

> '[I]t would be possible to find that that directive does not apply in the field of air services governed by Regulation No 1008/2008 only if it is clearly provided for by the provisions of that regulation. However, neither the wording of Article 22 of Regulation No 1008/2008 relating to pricing freedom nor that of the other provisions of that regulation permits such a view, even though Directive 93/13 was already in force on the date of adoption of that regulation. (…) Nor can it be inferred from the objective pursued by Article 22(1) of Regulation No 1008/2008 that contracts of carriage by air are not subject to compliance with the general rules protecting consumers against unfair terms.'[56]

The Court adopts the same approach when it assesses the relationship between multiple rules contained in the same directive or regulation. This may be demonstrated by discussing a fourth example, which concerns the

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53 Case C-481/99, *Georg Heininger and Helga Heininger v. Bayerische Hypo- und Vereinsbank*, ECLI:EU:C:2001:684, at 37.

54 Case C-481/99, *Georg Heininger and Helga Heininger v. Bayerische Hypo- und Vereinsbank*, ECLI:EU:C:2001:684, at 38-39.

55 Art. 22 (1), Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community.

56 Case C-290/16, *Air Berlin & Co. v. Bundesverband der Verbraucherzentralen*, ECLI:EU:C:2017:523, at 45-46.

relationship between two provisions contained in the Copyright Directive. This directive provides for certain exceptions to the exclusive right of authors, performers and producers to authorise or prohibit the reproduction of their works. Under the so-called 'reprography exception', no authorisation is required for reproductions 'on paper or any similar medium', provided that they are 'effected by the use of any kind of photographic technique or by some other process having similar effects'.[57] Under the so-called 'private copying exception', no authorisation is required for reproductions 'on any medium', provided that they are 'made by a natural person for private use and for ends that are neither directly nor indirectly commercial'.[58] Although no prior authorisation is necessary, both provisions do require that the rightholders receive 'fair compensation' for the reproduction of their protected works.

The relationship between these exceptions played a central role in legal proceedings between Reprobel, the organisation responsible for the collection and distribution of the compensation payments in Belgium, and Hewlett-Packard Belgium, an importer of multifunctional printers. Reprobel and Hewlett-Packard Belgium disagreed over the amount of 'fair compensation' which must be paid to Reprobel on the basis of the Belgian laws implementing the Copyright Directive. The Brussels Court of Appeal wondered whether the amount of compensation must be different depending on whether the reproduction is made for commercial or for non-commercial purposes. After all, the 'private copying exception' applies only to reproductions made by natural persons for private use, whereas the 'reprography exception' applies to all users. Does this mean that the commercial or non-commercial use of a multifunctional printer is a relevant factor that should be taken into account when determining the level of 'fair compensation'?

In its reply to this question, the Court of Justice first explained the substantive scope of both exceptions. The Court observed that the 'reprography exception' applies to all users, regardless of whether the reproduction is made for commercial or for non-commercial purposes.[59] The fact that the 'private copying exception' applies only to natural persons does not mean that these users are excluded from the scope of the 'reprography exception'.[60] For its part, the 'private copying exception' applies to 'any medium', regardless of the technique used.[61] The fact that the 'reprography exception' applies only to reproductions made by using photographic techniques does not mean that these reproductions are excluded from the scope

57 Art. 5 (2) (a), Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

58 Art. 5 (2) (b), Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

59 Art. 5 (2) (a), Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

60 Case C-572/13, *Hewlett-Packard Belgium v. Reprobel*, ECLI:EU:C:2015:750, at 30.

61 Art. 5 (2) (b), Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

of the 'private copying exception'.[62] Essentially, what the Court does here is explaining that it is impossible to generally qualify one of the rules as the *lex specialis* and the other as the *lex generalis*, because the differences between them cut both ways.

Having explained the substantive scope of both provisions, the Court concluded that they may be applicable concurrently to photographic reproductions printed on paper and made by natural persons for private use.[63] But instead of giving one of the provisions precedence over the other, the Court took a step back and explained that the amount of 'fair compensation' must always be linked to the actual losses sustained by authors of protected works, whatever the legal basis of the claim.[64] It is appropriate, therefore, to make a distinction between commercial and non-commercial reproductions when determining the amount of compensation under the 'reprography exception', so that the actual losses of the rightholders are compensated.[65] This shows, once again, that the Court is careful not to exclude one of the applicable rules and tries to realise the objectives underlying both rules to the greatest possible extent.

We can see the same principle at work in a judgment concerning the extent of the losses which must be compensated for under the so-called Enforcement Directive.[66] Article 13 (1) determines that the infringer of an intellectual property right must pay the rightholder 'damages appropriate to the actual prejudice suffered by him/her as a result of the infringement'. The provision goes on to determine how judicial authorities should calculate the damages, offering them two different options. If they choose to calculate the damages in accordance with option (a), they must take into account 'all appropriate aspects', including 'lost profits', 'unfair profits made by the infringer', and 'elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement'. If they choose option (b), they must calculate the damages 'as a lump sum', on the basis of elements 'such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question'. Contrary to option (a), option (b) does not mention non-economic elements. What is more, the Union legislature has qualified option (b) as the 'alternative' option. Does this mean that a rightholder who claims compensation in accordance with option (b) cannot claim compensation for non-pecuniary losses under option (a)?

In its reply to this question, referred by the Supreme Court of Spain, the Court of Justice observed that option (b) does not mention 'moral prejudice', but does not exclude this type of harm either. In fact, the Union

62 Case C-572/13, *Hewlett-Packard Belgium v. Reprobel*, ECLI:EU:C:2015:750, at 32.
63 Case C-572/13, *Hewlett-Packard Belgium v. Reprobel*, ECLI:EU:C:2015:750, at 33-34.
64 Case C-572/13, *Hewlett-Packard Belgium v. Reprobel*, ECLI:EU:C:2015:750, at 35-39, referring to Case C-467/08, *Padawan v. SGAE*, ECLI:EU:C:2010:620, at 37, 40 and 42.
65 Case C-572/13, *Hewlett-Packard Belgium v. Reprobel*, ECLI:EU:C:2015:750, at 40-43.
66 Directive 2004/48/EC on the enforcement of intellectual property rights.

legislature states that the lump sum must be calculated on the basis of 'at least' the amount of royalties or fees, leaving room for other elements to be taken into account.[67] Moreover, option (b) should be read in conjunction with the opening sentence of Article 13 (1), which determines that the rightholder must be compensated for the 'actual prejudice' suffered. In the view of the Court, an exclusion of the possibility to claim compensation for non-pecuniary losses would go against the purpose of this provision[68] and against the objectives of the Enforcement Directive, which aims at achieving a high level of protection of holders of intellectual property rights.[69]

It is against this backdrop that the Court concluded that the holder of an intellectual property right should always be 'compensated in full' for the 'actual prejudice suffered', including 'any moral prejudice'.[70] Because a lump sum calculated on the basis of hypothetical royalties merely compensates for pecuniary losses,[71] the rightholder who claims such compensation in accordance with option (b) may also, 'in addition to the damages thus calculated',[72] claim compensation for any 'moral prejudice' in accordance with option (a).[73] In other words: the Court determined that the claims are not mutually exclusive – as might be suggested by the qualification of option (b) as the 'alternative' option – but may be combined, provided that the conditions of each claim are fulfilled.

The foregoing demonstrates that the Court of Justice strives to realise the objectives of each Union rule to the greatest possible extent. The scope of application of one rule is only affected by the scope of application of another rule if this is clearly provided by the Union legislature. In the absence of express indications, the Court assumes that the rules may be applicable concurrently. The question may be raised whether the same principle applies when it comes to the relationship between harmonising measures and national laws. To what extent, if at all, should the latter be excluded in favour of the former?

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67 Case C-99/15, *Christian Liffers v. Producciones Mandarina and Mediaset España Comunicación*, ECLI:EU:C:2016:173, at 15.

68 Case C-99/15, *Christian Liffers v. Producciones Mandarina and Mediaset España Comunicación*, ECLI:EU:C:2016:173, at 17-18.

69 Case C-99/15, *Christian Liffers v. Producciones Mandarina and Mediaset España Comunicación*, ECLI:EU:C:2016:173, at 20-24, referring to Recitals 10, 17 and 26 of Directive 2004/48/EC on the enforcement of intellectual property rights.

70 Case C-99/15, *Christian Liffers v. Producciones Mandarina and Mediaset España Comunicación*, ECLI:EU:C:2016:173, at 25.

71 Case C-99/15, *Christian Liffers v. Producciones Mandarina and Mediaset España Comunicación*, ECLI:EU:C:2016:173, at 20.

72 Case C-99/15, *Christian Liffers v. Producciones Mandarina and Mediaset España Comunicación*, ECLI:EU:C:2016:173, at 26.

73 Case C-99/15, *Christian Liffers v. Producciones Mandarina and Mediaset España Comunicación*, ECLI:EU:C:2016:173, at 26-27.

6.4 How to determine whether national laws are affected by secondary Union rules?

Does the same principle apply when the relationship between harmonising measures and national laws must be determined? After all, the very purpose of harmonisation is to establish common rules for the whole of the European market. Should we not assume, then, that harmonising measures necessarily exclude or replace otherwise applicable national laws? The reality is more complicated, however. The scope of application of directives and regulations is limited, because the competence of the Union is restricted and because the Union legislature does not regulate all issues exhaustively.

Indeed, the competence of the Union to approximate national laws may be restricted by the very treaty provision upon which it rests. Take social policy as an example. This is an area in which the Union shares competence with the Member States.[74] Importantly, Article 153 TFEU prescribes that any harmonising measure which aims at protecting workers must be cast in the form of a directive, can only be used to introduce 'minimum requirements for gradual implementation',[75] and 'shall not prevent any Member State from maintaining or introducing more stringent protective measures'.[76] It does not come as a surprise, therefore, that the Working Time Directive merely lays down 'minimum safety and health requirements for the organisation of working time',[77] and that the Court of Justice has confirmed that this directive does not affect national laws more favourable to the protection of workers.[78]

Most treaty provisions do not, however, state explicitly that the Union legislature may only introduce 'minimum requirements'.[79] In fact, the provision which forms the basis of most directives and regulations in the area of the internal market – the current Article 114 TFEU – only permits Member States to maintain or introduce national laws 'on grounds of major needs',[80] or in the interest of the protection of the environment or the working environment.[81] What is more, the provision which has been used to introduce common rules concerning the liability for defective products

74 Art. 4 (2) (b) TFEU.

75 Art. 153 (2) (b) TFEU, which refers back the fields listed in Art. 153 (1) (a) to (i), which mentions the working environment, working conditions and social security.

76 Art. 153 (4) TFEU.

77 Art. 1 (1), Directive 2003/88/EC concerning certain aspects of the organisation of working time.

78 Case C-282/10, *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique*, ECLI:EU:C:2012:33, at 48-49; Case C-385/17, *Torsten Hein v. Albert Holzkamm & Co.*, ECLI:EU:C:2018:1018, at 30-31.

79 Art. 16, 50, 53, 81, 91, 100 (2), 114, 115, 168 (4) (c), and 352 TFEU do not contain such statements. Nor does Art. 103 (1) TFEU, but this provision must be distinguished because the Union has exclusive competence in the area of competition law on the basis of Art. 3 (1) (b) TFEU.

80 Art. 114 (4) in conjunction with Art. 36 TFEU.

81 Art. 114 (4)-(10) TFEU.

and common rules governing the contractual relationship between self-employed commercial agents and their principals – the current Article 115 TFEU – does not mention any exception at all, but only prescribes that the measure must be passed unanimously by the Council and must be cast in the form of a directive.[82] This suggests that Member States have little room for manoeuvre when regulating the internal market.

Yet it may be recalled that when the Union shares competence with the Member States, as is the case in the context of the internal market,[83] the Member States may legislate to the extent that the Union has not exercised its competence to legislate, or has stopped doing so.[84] The Member States need not be empowered by the Union to legislate, as is the case when the Treaties confer an exclusive competence on the Union.[85] When it comes to the internal market, the question to consider, therefore, is whether, and to what extent, the Union has actually exercised its competence to legislate.[86] In the words of the Protocol on the Exercise of Shared Competence, Union action 'only covers those elements governed by the Union act in question and therefore does not cover the whole area'.[87] As a consequence, the scope of the exercise by the Union of a shared competence can only be determined by considering the wording, meaning and structure of the directive or regulation at issue.[88]

In this regard, it is important to observe that many directives and regulations assert explicitly that they are aimed at so-called 'minimum harmonisation'. The Union legislature has, for instance, made clear that Member States may adopt or retain a higher level of protection for consumers than the Unfair Terms Directive[89] and the current Consumer Sales Directive[90] require, and that they may maintain or bring into force provisions more favourable to the creditor than the Late Payment Directive contains.[91]

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82 Council Directive 85/374/EEC concerning the liability for defective products; Council Directive 86/653/EEC relating to self-employed commercial agents (also based on today's Art. 53 (1) TFEU, which does not mention any exception either).

83 Art. 4 (2) (a) TFEU.

84 Art. 2 (2) TFEU.

85 Art. 2 (1) TFEU.

86 Craig & De Búrca 2015, p. 84-85.

87 Protocol No. 25 on the exercise of shared competence.

88 As the Court indicates in Case C-52/00, *Commission v. France*, ECLI:EU:C:2002:252, at 16; Case C-402/03, *Skov v. Bilka*, ECLI:EU:C:2006:6, at 22.

89 Art. 8, Council Directive 93/13/EEC on unfair terms in consumer contracts, as confirmed in Case C-484/08, *Caja de Ahorros y Monte de Piedad de Madrid v. Ausbanc*, ECLI:EU:C:2010:309, at 29; Case C-453/10, *Jana Pereničová and Vladislav Perenič v. SOS*, ECLI:EU:C:2012:144, at 34.

90 Art. 1 (1), Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. The situation is different under the new Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods and under Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, which will be explained in section 6.5.

91 Art. 12 (3), Directive 2011/7/EU on combating late payment in commercial transactions.

Examples can also be found in the area of passenger rights. While it is true that only some regulations explicitly state that they establish 'minimum rights for passengers'[92] or provide for a 'minimum level of protection',[93] all regulations in this field do mention that passengers may be entitled to 'further compensation'.[94] In accordance with these statements, the Court has made clear that air passengers may be entitled to compensation 'on a legal basis other than Regulation No 261/2004',[95] and that rail passengers may be entitled to compensation 'on the basis of the applicable national law', in addition to the right to receive compensation under the regulation governing rail passengers' rights and obligations.[96]

The Enforcement Directive, concerning the enforcement of intellectual property rights, provides yet another example. According to the Union legislature, the aim of this directive 'is not to introduce an obligation to provide for punitive damages'.[97] But the Union legislature has also determined that the directive does not affect national legislation which is 'more favourable for rightholders'.[98] Does this mean that awarding punitive damages on the basis of national laws is permitted? In its reply to this question, asked by the Supreme Court of Poland, the Court of Justice notes that the Enforcement Directive aims at ensuring 'a high, equivalent and homogeneous level of protection in the internal market',[99] but also observes that the directive is without prejudice to national laws more favourable to the protection of rightholders.[100] Against this background, the Court holds that the fact that the Enforcement Directive itself does not introduce an obligation on the part of the Member States to provide for punitive damages

92 Art. 1 (1), Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

93 Recital 2, Regulation (EU) 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway.

94 Art. 12 (1), Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights; Art. 11, Regulation (EC) No 1371/2007 on rail passengers' rights and obligations; Art. 21, Regulation (EU) 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway; Art. 22, Regulation (EU) 181/2011 concerning the rights of passengers in bus and coach transport.

95 Subject to the conditions and limits set out in Art. 29 of the Montreal Convention, see Case C-83/10, *Aurora Sousa Rodríguez and Others v. Air France*, ECLI:EU:C:2011:652, at 38; Joined Cases C-581/10 and C-629/10, *Emeka Nelson and Others v. Deutsche Lufthansa AG* (C-581/10), *and TUI Travel and Others v. Civil Aviation Authority* (C-629/10), ECLI:EU:C:2012:657, at 59.

96 Subject to the conditions and limits set out in Art. 32 of the CIV Uniform Rules, see Case C-509/11, *ÖBB-Personenverkehr*, ECLI:EU:C:2013:613, at 40.

97 Recital 26, Directive 2004/48/EC on the enforcement of intellectual property rights.

98 Art. 2 (1), Directive 2004/48/EC on the enforcement of intellectual property rights.

99 Recital 10, Directive 2004/48/EC on the enforcement of intellectual property rights.

100 Case C-367/15, *Oławska Telewizja Kablowa v. Stowarzyszenie Filmowców Polskich*, ECLI:EU:C:2017:36, at 22.

'cannot be interpreted as a prohibition on introducing such a measure'.[101] The Court concludes that awarding punitive damages in accordance with national laws is permitted, subject only to the requirement that the amount of damages does not exceed the losses suffered 'so clearly and substantially' that it constitutes an abuse of rights under the directive.[102]

If the Union legislature has not asserted explicitly that a directive or regulation is aimed at 'minimum harmonisation', this conclusion may nonetheless be drawn on the basis of an assessment of the wording, meaning and purpose of individual provisions. Take the Directive concerning self-employed commercial agents as an example. This directive requires Member States to introduce a right to compensation for commercial agents, so as to make good the losses suffered after termination of the agency contract. When implementing the directive, Member States must choose one of two available compensation schemes.[103] They must either transpose the rules which entitle the commercial agent to an 'indemnity',[104] or opt for the rules which entitle him to 'compensation for the damage he suffers as a result of the termination'.[105]

If a Member State chooses the first alternative, the directive makes clear that the indemnity must be calculated on the basis of the benefits accruing to the principal as a result of the work of the agent.[106] The directive also prescribes that the amount of the indemnity must be 'equitable' when weighed up against the commission lost by the commercial agent and cannot, in any event, exceed the average annual remuneration.[107] Finally, the directive adds that the award of an indemnity shall not 'prevent the commercial agent from seeking damages'.[108] In the view of the Court, this means that the agent may also claim compensation on the basis of the applicable national law, 'when that provides for the principal's liability in contract or tort'.[109]

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101 Case C-367/15, *Oławska Telewizja Kablowa v. Stowarzyszenie Filmowców Polskich*, ECLI:EU:C:2017:36, at 28.

102 Case C-367/15, *Oławska Telewizja Kablowa v. Stowarzyszenie Filmowców Polskich*, ECLI:EU:C:2017:36, at 31, referring to Art. 3 (2), Directive 2004/48/EC on the enforcement of intellectual property rights.

103 Art. 17 (1), Council Directive 86/653/EEC relating to self-employed commercial agents.

104 Art. 17 (2), Council Directive 86/653/EEC relating to self-employed commercial agents.

105 Art. 17 (3), Council Directive 86/653/EEC relating to self-employed commercial agents.

106 Art. 17 (2) (a), Council Directive 86/653/EEC relating to self-employed commercial agents.

107 Art. 17 (2) (a)-(b), Council Directive 86/653/EEC relating to self-employed commercial agents.

108 Art. 17 (2) (c), Council Directive 86/653/EEC of 18 December 1986 relating to self-employed commercial agents.

109 Case C-338/14, *Quenon v. Citibank and Citilife*, ECLI:EU:C:2015:795, at 31.

If anything, the examples discussed in this section show that directives and regulations do not necessarily affect the scope of application of national laws.[110] Sometimes, the very treaty provision upon which the competence of the Union legislature is based prescribes that any harmonising measure can only ever establish minimum requirements. In many other instances, the wording, meaning and purpose of the directive or regulation itself indicate that the Union legislature has merely aimed at introducing minimum requirements. In both situations, it is clear that the scope of application of directives and regulations is limited and that they do not automatically replace or exclude otherwise applicable national laws.

6.5 The case of 'complete' harmonisation of national laws

Sometimes, however, the Union legislature has not aimed at introducing minimum requirements, but at a 'complete' harmonisation of the laws of the Member States. In fact, 'complete' harmonisation has gradually emerged as the preferred technique in the field of consumer protection.[111] Does this mean that such measures do exclude otherwise applicable national laws? Again, it is appropriate to adopt a cautious approach and to avoid jumping to this conclusion. Although they certainly have the capacity to trump otherwise applicable national laws, as will be shown in section 6.7, even directives and regulations aimed at 'complete' harmonisation often do leave room for the application of such laws. They might exhaustively regulate some issues, but they cannot be wholly autonomous and self-contained.

The Product Liability Directive may serve as an illustrative example. According to the Court, this directive seeks to achieve 'complete harmonisation' with regard to the matters regulated by it.[112] On the other hand, the directive itself indicates that the harmonisation 'cannot be total at the present stage'.[113] Indeed, the directive leaves considerable room for the application of national laws. It introduces a system of strict liability, but it does not preclude the application of 'other systems of contractual or

110 Another important example, albeit outside the scope of the present book, is the Services Directive, which explicitly states that it does not affect the Union laws and national laws governing certain topics, such as criminal law and social security. See Art. 1 (3)-(7), Directive 2006/123/EC on services in the internal market.

111 As observed by e.g. Faure 2008, p. 434-435; Mak 2009, p. 55-58; Whittaker 2009, p. 224-226; Smits 2010, p. 5-7; Weatherill 2012, p. 183-185; Giliker 2015, p. 6-7.

112 Case C-52/00, *Commission v. France*, ECLI:EU:C:2002:252, at 24; Case C-154/00, *Commission v. Greece*, ECLI:EU:C:2002:254, at 20; Case C-402/03, *Skov v. Bilka*, ECLI:EU:C:2006:6, at 23; Case C-127/04, *Declan O'Byrne v. Sanofi Pasteur*, ECLI:EU:C:2006:93, at 35; Case C-285/08, *Leroy Somer v. Dalkia France and Ace Europe*, ECLI:EU:C:2009:351, at 21; Case C-495/10, *Centre hospitalier universitaire de Besançon v. Thomas Dutrueux and Caisse primaire d'assurance maladie du Jura*, ECLI:EU:C:2011:869, at 20; Case C-310/13, *Novo Nordisk Pharma*, ECLI:EU:C:2014:2385, at 23; Case C-621/15, *Sanofi Pasteur and Others*, ECLI:EU:C:2017:484, at 20.

113 Recital 18, Council Directive 85/374/EEC concerning the liability for defective products.

non-contractual liability based on other grounds'.[114] Moreover, Article 9 of the directive determines that the producer must compensate for damage resulting from death or from personal injuries and for damage to, or destruction of, an item of property intended and used for private use or consumption. This means that the compensation for non-material damage[115] and for damage to an item of property intended and used for professional purposes is not governed by the directive, but by the applicable national law.[116]

Consider also the UCP Directive, which determines that Member States cannot restrict the freedom to provide services or the free movement of goods for reasons falling within its scope.[117] In the view of the Court, this means that the directive 'fully harmonises' the rules on unfair business-to-consumer commercial practices.[118] Meanwhile, Article 5 makes significant inroads into the directive's own scope of application. To begin with, its rules are 'without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract'.[119] As we have seen, the Court has interpreted this provision as meaning that the UCP Directive, which is aimed at 'maximum' harmonisation, does not affect the scope of application of the Unfair Terms Directive, which is aimed at 'minimum' harmonisation.[120] It is fair to assume, then, that the UCP Directive has no direct effect on whether a contract is valid from the point of view of national

114 Art. 13, Council Directive 85/374/EEC concerning the liability for defective products, as interpreted in Case C-52/00, *Commission v. France*, ECLI:EU:C:2002:252, at 22; Case C-154/00, *Commission v. Greece*, ECLI:EU:C:2002:254, at 18; Case C-402/03, *Skov v. Bilka*, ECLI:EU:C:2006:6, at 47; Case C-285/08, *Leroy Somer v. Dalkia France and Ace Europe*, ECLI:EU:C:2009:351, at 23.

115 Art. 9 expressly provides that it 'shall be without prejudice to national provisions relating to non-material damage'. According to the Court, this issue 'is governed solely by national law', see Case C-203/99, *Henning Veedfald v. Århus Amtskommune*, ECLI:EU:C:2001:258, at 27.

116 As the Court confirmed in Case C-285/08, *Leroy Somer v. Dalkia France and Ace Europe*, ECLI:EU:C:2009:351, at 24-32.

117 Art. 4, Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

118 Joined Cases C-261/07 and C-299/07, *VTB-VAB v. Total Belgium* (C-261/07) *and Galatea v. Sanoma Magazines Belgium* (C-299/07), ECLI:EU:C:2009:244, at 52; Case C-304/08, *Zentrale zur Bekämpfung unlauteren Wettbewerbs v. Plus Warenhandelsgesellschaft*, ECLI:EU:C:2010:12, at 41; Case C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag & Co. v. 'Österreich'-Zeitungsverlag*, ECLI:EU:C:2010:660, at 30; Case C-288/10, *Wamo v. JBC and Modemakers Fashion*, ECLI:EU:C:2011:443, at 33; Case C-265/12, *Citroën Belux v. FvF*, ECLI:EU:C:2013:498, at 20; Case C-343/12, *Euronics Belgium v. Kamera Express*, ECLI:EU:C:2013:154, at 24; Case C-421/12, *Commission v. Belgium*, ECLI:EU:C:2014:2064, at 55 ('complete harmonisation'); Case C-295/16, *Europamur Alimentación*, ECLI:EU:C:2017:782, at 39.

119 Art. 3 (2), Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

120 Case C-453/10, *Jana Pereničová and Vladislav Perenič v. SOS*, ECLI:EU:C:2012:144, at 45-46; Case C-109/17, *Bankia v. Juan Carlos Marí Merino and Others*, ECLI:EU:C:2018:735, at 50.

contract law either.[121] What is more, the UCP Directive also determines that Member States may impose stricter requirements in relation to financial services and immovable property.[122] This has been a reason for the Court to permit Member States to generally prohibit so-called 'combined offers', which include financial services, to consumers.[123]

The same approach has been chosen in the context of the Consumer Credit Directive, the Consumer Rights Directive, the revised Consumer Sales Directive and the newly introduced Directive concerning contracts for the supply of digital content and digital services. These directives generally prohibit Member States to depart from their respective provisions.[124] But they also leave important issues to the applicable national law. The Consumer Credit Directive does not, for instance, affect the power to terminate the credit agreement for breach.[125] Nor does the Consumer Rights Directive preclude the consumer to 'have recourse to other remedies provided for by national law',[126] such as claiming performance and compensation,[127] in addition to the power of the consumer to terminate the contract if the trader has failed to deliver the goods in time.[128] Finally, all these directives are without prejudice to 'general contract law', such as 'the rules on the validity, formation or effect of a contract'.[129] Member States are permitted, for instance, to prescribe that a consumer contract is invalid – and may, for that reason, be declared null and void – if it has not been put down in writing or has not been signed by the contracting parties.[130]

The foregoing demonstrates that we may only reach the conclusion that a directive or regulation excludes otherwise applicable national laws after a careful assessment of the wording, meaning and purpose of the harmonising measure at issue. Even if the aim of the Union legislature has been to exhaustively regulate some issues, the resulting harmonisation will always

121 See e.g. Stuyck 2015, p. 743-744.

122 Art. 3 (9), Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

123 Case C-265/12, *Citroën Belux v. FvF*, ECLI:EU:C:2013:498, at 22.

124 Art. 22 (1), Directive 2008/48/EC on credit agreements for consumers; Art. 4, Directive 2011/83/EU on consumer rights; Art. 4, Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods; Art. 4, Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services.

125 Recital 33, Directive 2008/48/EC on credit agreements for consumers.

126 Art. 18 (4), Directive 2011/83/EU on consumer rights.

127 As explained in Recital 53, Directive 2011/83/EU on consumer rights.

128 Art. 18 (2), Directive 2011/83/EU on consumer rights.

129 Recital 30 ('contract law issues') and Art. 10 (1) ('the validity of the conclusion of credit agreements'), Directive 2008/48/EC on credit agreements for consumers; Art. 3 (5), Directive 2011/83/EU on consumer rights; Art. 3 (6), Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods; Art. 3 (10), Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services.

130 As the Court determined in Case C-42/15, *Home Credit Slovakia v. Klára Bíróová*, ECLI:EU:C:2016:842, at 39-45, concerning the interpretation of Art. 10 (1), Directive 2008/48/EC on credit agreements for consumers.

limited in scope and is almost never really complete. Rather than assuming that a harmonising measure excludes otherwise applicable national laws we should, therefore, start from the premise that each applicable rule, however founded, must be considered on its own merits.

6.6 The first exception: alternative rules

The previous sections have shown that directives and regulations are, by their very nature, limited in scope. They will overlap with other directives and regulations, and they will be complemented by national laws. As a result, a single set of facts may fall within the scope of multiple rules, belonging to the body of secondary Union law and to the applicable national law. In principle, then, the objectives underlying each rule must be realised to the greatest possible extent. This does not, however, mean that concurrently applicable rules will always coexist peacefully. An exception must be made when cumulative application would lead to inconsistent outcomes which cannot exist concurrently. In such situations, an election between the available alternatives is required.

It may be recalled, for instance, that it is impossible to combine termination for breach and specific performance of the same contract. After all, termination means that the duty to perform the obligations under the contract ceases to exist.[131] Likewise, passengers who are confronted with a failure in the performance of the contract of carriage are entitled to elect between several alternatives. They may demand performance – often called 're-routing' – or they may, alternatively, terminate the contract, demand transport to their point of departure and claim 'reimbursement' of the ticket price. Article 18 (1) of Regulation (EU) 1177/2010 determines, for example, that if a carrier reasonably expects a cancellation or a delay in departure from a port terminal for more than 90 minutes, the carrier must offer the passenger a choice between:

> '(a) re-routing to the final destination, under comparable conditions, as set out in the transport contract, at the earliest opportunity and at no additional cost;
> (b) reimbursement of the ticket price and, where relevant, a return service free of charge to the first point of departure, as set out in the transport contract, at the earliest opportunity.'[132]

131 See *supra* section 2.5.

132 Art. 18 (1), Regulation (EU) 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway. Similar rules can be found in Art. 8, Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights; Art. 16, Regulation (EC) No 1371/2007 on rail passengers' rights and obligations; Art. 10 (3) and 19, Regulation (EU) No 181/2011 concerning the rights of passengers in bus and coach transport.

The current and future versions of the Consumer Sales Directive may also serve as examples.[133] If the goods delivered by the seller do not meet the requirements for conformity, these directives entitle the consumer to elect between several types of specific performance and termination. In the first instance, the consumer may require the seller to repair the goods or to replace them.[134] The Union legislature considers repair and replacement to be 'alternative remedies'.[135] In the second instance, the consumer may elect between two types of termination. He may require 'an appropriate reduction' of the price or terminate the entire contract.[136] According to the Court, price reduction and termination are 'alternative remedies'.[137] If the necessary conditions are fulfilled, it is up to the consumer to opt for the rule which appears to him to be the most advantageous, both in the first instance (repair or replacement of the goods) and in the second instance (price reduction or termination of the contract).[138]

These are not the only options available to the consumer. It may be recalled that the current Consumer Sales Directive permits Member States to adopt or retain a higher level of protection for consumers than the directive prescribes.[139] In fact, the Union legislature has determined that the rights flowing from the Consumer Sales Directive 'shall be exercised without prejudice to other rights which the consumer may invoke under the national rules governing contractual or non-contractual liability'.[140]

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133 Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, which will be repealed by Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods.

134 Art. 3 (3), Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Art. 13 (2)-(3), Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods. It must be noted that the consumer cannot opt for either repair or replacement if this is 'impossible or disproportionate'.

135 Art. 3 (3), Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Art. 13 (2), Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods.

136 Art. 3 (5), Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Art. 13 (4), Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods. Note that the latter directive mentions several circumstances which are not mentioned in the former directive.

137 Joined Cases C-65/09 and C-87/09, *Gebr. Weber* (C-65/09) *v. Jürgen Wittmer, and Ingrid Putz* (C-87/09) *v. Medianess Electronics*, ECLI:EU:C:2011:396, at 72.

138 It must be noted that the rules are not entirely similar, for termination of the contract cannot be obtained when the lack of conformity is minor, according to Art. 3 (6), Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, and Art. 13 (5), Directive 2019/771 on certain aspects concerning contracts for the sale of goods. See also Case C-32/12, *Soledad Duarte Hueros v. Autociba and Automóviles Citroën España*, ECLI:EU:C:2013:637, at 28.

139 Art. 8 (2), Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

140 Art. 8 (1), Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

By contrast, the future Consumer Sales Directive explicitly prohibits Member States to maintain or introduce provisions diverging from the provisions laid down by the directive.[141] Still, the directive only 'fully' harmonises the rules governing the conformity of the goods.[142] It does not deal with 'aspects of general contract law', such as 'the rules on the validity, formation or effect of a contract'.[143]

This means that there may be other alternatives available to the consumer, in addition to the possibilities to demand repair or replacement and to reduce the price or terminate the contract for breach. Under the Dutch law of obligations, for instance, the consumer may be entitled to rescind the sales contract for pre-contractual misrepresentation,[144] or to claim compensation for losses resulting from the misrepresentation.[145] The consumer may also be able to rescind the contract if the seller has committed an unfair commercial practice.[146] Moreover, it might be possible for the consumer to request a court to modify or terminate the contract because of unforeseen circumstances.[147] Even though the necessary conditions of all these rules can be satisfied concurrently on a single set of facts, the legal consequences differ and cannot be awarded cumulatively. It is fair to assume, then, that the consumer must choose which avenue appears to him to be the most advantageous.

Can two liability rules ever lead to inconsistent outcomes, so that an election between them is required? It may be remembered that most differences can be bridged at the stage of assessing the quantum of damages. After all, awarding compensation on the basis of one rule may reduce or even completely remove the damage which is relevant in the context of another applicable rule.[148] It is fair to assume that the same solution can and should be adopted in the context of secondary Union law. Consider, for instance, the relationship between the rights of passengers and travelers.

141 Art. 4, Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods.

142 As the Union legislature emphasises in Recitals 10, 11 and 47, and in Art. 1, Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods.

143 Art. 3 (6), Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods.

144 Art. 6:228 BW.

145 On the basis of Art. 6:162 BW. See Hijma 2018, p. 570-571.

146 Art. 6:193j BW. Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market defines what commercial practices must be considered 'unfair', but does not, at present, require the national legislature to introduce the possibility to rescind the contract for that reason, with retroactive effect. In the near future, a right to termination for breach of the Unfair Commercial Practices Directive will have to be made available by the Member States, see Art. 3 of the Directive concerning the better enforcement and modernisation of Union consumer protection rules.

147 Art. 6:258 BW.

148 See *supra* section 2.5.

We have seen that these rights are not mutually exclusive, but complementary.[149] The Union legislature does not, however, require the claimant to elect between the rules, but only prescribes that the compensation or price reduction granted on one legal basis and the compensation or price reduction granted on another legal basis 'shall be deducted from each other in order to avoid overcompensation'.[150]

Overcompensation is also avoided, as much as possible, by the Court of Justice. It will be remembered that the Court has determined that the amount of 'fair compensation' which must be paid for the use of protected works must always be linked to the actual losses sustained by the authors of those works, regardless of the legal basis of the claim.[151] The same reasoning has been followed by the Court with regard to the amount of compensation which must be paid by the principal to his commercial agent after termination of their contract. Even though the agent is, in principle, entitled to claim damages on the basis of the applicable national law,[152] this may not result 'in the agent being compensated twice for the loss of commission following termination of that contract'.[153] Consider also the Late Payment Directive, which entitles the creditor both to a 'fixed sum of EUR 40' to compensate the creditor's 'own recovery costs'[154] and also to 'reasonable compensation' for 'any recovery costs exceeding that fixed sum'.[155] The Court has made clear that these claims may be combined, provided that the award of 'reasonable compensation' does not cover the costs which have already been compensated for by way of the fixed sum of EUR 40.[156]

If we wish to avoid both under- and overcompensation we should, indeed, examine carefully whether the applicable rules are aimed at repairing the same type of loss. This is not an easy task, as may be demonstrated by examining Regulation (EC) No 261/2004 in more detail. Article 12 (1) of this regulation permits air passengers to claim 'further compensation' on the basis of national and international laws,[157] in addition to the

149 See *supra* section 6.2.

150 Art. 14 (5), Directive (EU) 2015/2302 on package travel and linked travel arrangements.

151 Case C-572/13, *Hewlett-Packard Belgium v. Reprobel*, ECLI:EU:C:2015:750, at 35-39, referring to Case C-467/08, *Padawan v. SGAE*, ECLI:EU:C:2010:620, at 37, 40 and 42.

152 Art. 17 (2) (c), Council Directive 86/653/EEC relating to self-employed commercial agents, as interpreted in Case C-338/14, *Quenon v. Citibank and Citilife*, ECLI:EU:C:2015:795, at 31.

153 Case C-338/14, *Quenon v. Citibank and Citilife*, ECLI:EU:C:2015:795, at 35.

154 Art. 6 (1), Directive 2011/7/EU on combating late payment in commercial transactions. The precise conditions under which the liability itself is created are laid down in Art. 3-4, Directive 2011/7/EU on combating late payment in commercial transactions.

155 Art. 6 (3), Directive 2011/7/EU on combating late payment in commercial transactions.

156 Case C-287/17, *Česká pojišťovna v. WCZ*, ECLI:EU:C:2018:707, at 30-31; Case C-131/18, *Vanessa Gambietz v. Erika Ziegler*, ECLI:EU:C:2019:306, at 22-25.

157 Case C-83/10, *Aurora Sousa Rodríguez and Others v. Air France*, ECLI:EU:C:2011:652, at 38; Joined Cases C-581/10 and C-629/10, *Emeka Nelson and Others v. Deutsche Lufthansa AG* (C-581/10), *and TUI Travel and Others v. Civil Aviation Authority* (C-629/10), ECLI:EU:C:2012:657, at 59; Case C-354/18, *Rusu and Rusu v. SC Blue Air – Airline Management Solutions*, ECLI:EU:C:2019:637, at 36.

compensation which must be paid by the carrier on the basis of the regulation.[158] According to the Court, the purpose of this provision is to ensure that passengers 'are compensated for the entirety of the damage that they have suffered due to the failure of the air carrier to fulfil its contractual obligations'.[159] Meanwhile, the same provision determines that the compensation granted under the regulation 'may be deducted' from the compensation owed on another legal basis.[160] But when should this solution be applied?

The question to consider is whether the applicable rules are aimed at repairing the same type of loss. The Court itself has explained that the compensation granted under the regulation is aimed at repairing the 'inconvenience' resulting from the 'loss of time' suffered by all passengers whose flights are delayed.[161] The regulation is not aimed at repairing the 'individual damage' of each passenger, which requires an assessment of the circumstances of each case.[162] If we follow this reasoning and assume that the rules are aimed at repairing different types of loss, then surely we cannot conclude that the amount of compensation should always be adjusted.[163] Such a solution would prevent overcompensation in some cases, but may lead to undercompensation in other cases.

Indeed, the Court of Justice has recently confirmed that Article 12 (1) permits, but does not oblige, the national courts to deduct the compensation granted under the regulation from the compensation granted on another legal basis.[164] Bearing in mind that the purpose of Article 12 (1) is to ensure that the entirety of the damage is compensated, it should remain possible,

158 Art. 4-7, Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, as interpreted in Joined Cases C-402/07 and C-432/07, *Sturgeon v. Condor Flugdienst*, ECLI:EU:C:2009:716.

159 Case C-83/10, *Aurora Sousa Rodríguez and Others v. Air France*, ECLI:EU:C:2011:652, at 38.

160 Passengers are not, therefore, 'free to receive double recovery', as Dempsey & Johansson 2010, p. 219, observe.

161 Case C-344/04, *IATA and ELFAA*, ECLI:EU:C:2006:10, at 43; Joined Cases C-581/10 and C-629/10, *Emeka Nelson and Others v. Deutsche Lufthansa AG* (C-581/10), *and TUI Travel and Others v. Civil Aviation Authority* (C-629/10), ECLI:EU:C:2012:657, at 51-53.

162 Case C-344/04, *IATA and ELFAA*, ECLI:EU:C:2006:10, at 43; Joined Cases C-581/10 and C-629/10, *Emeka Nelson and Others v. Deutsche Lufthansa AG* (C-581/10), *and TUI Travel and Others v. Civil Aviation Authority* (C-629/10), ECLI:EU:C:2012:657, at 53.

163 This conclusion has also been drawn by Radoševic 2013, p. 106; Van der Bruggen 2016, p. 597-599. Doubts have also been expressed by De Vos 2012, p. 173-174.

164 Case C-354/18, *Rusu and Rusu v. SC Blue Air – Airline Management Solutions,* ECLI:EU:C:2019:637, at 44-47.

then, to combine the claims, subject only to the requirement that the passenger is not compensated twice for the inconvenience resulting from a loss of time.[165]

6.7 The second exception: exclusive rules

The previous section has demonstrated that, although each rule must be considered on its own merits, an election is nonetheless required if the rules lead to outcomes which cannot exist concurrently. The underlying reason is that the objectives of one rule cannot be realised if the other rule is also applied. For the same reason, Union law sometimes dictates that one of the rules takes priority, so that no election can be made at all. If the Union legislature has intended a particular rule to govern a particular situation exhaustively, it should not be possible to avoid the application of this rule by relying upon another applicable rule.

Consider the Product Liability Directive as an example. It may be remembered that this directive seeks to achieve a 'complete harmonisation' of the strict liability of producers and suppliers for certain damage caused by the defective products they have produced or supplied.[166] The Court has confirmed that it is not possible to change the conditions under which these parties can be held strictly liable. Member States may not, for instance, provide that damage to an item of property intended and used for private use or consumption must always be compensated, because the directive itself sets a threshold of EUR 500.[167] Member States may

165 The same solution has been proposed by Van der Bruggen 2016, p. 600-602, who, like Dempsey & Johansson 2010, p. 219, considers the compensation granted by the regulation to be part of the total compensation owed on the basis of Art. 19 of the Convention for the Unification of Certain Rules for International Carriage by Air ('Montreal Convention'), even though the Court has ruled that the compensation under the regulation cannot be qualified as 'damage occasioned by delay' within the meaning of Art. 19 of the Montreal Convention (see Joined Cases C-581/10 and C-629/10, *Emeka Nelson and Others v. Deutsche Lufthansa AG* (C-581/10), *and TUI Travel and Others v. Civil Aviation Authority* (C-629/10), ECLI:EU:C:2012:657, at 49). The relationship between Regulation No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and the Montreal Convention is not examined here, but forms the subject of De Graaff 2014b.

166 Case C-52/00, *Commission v. France*, ECLI:EU:C:2002:252, at 24; Case C-154/00, *Commission v. Greece*, ECLI:EU:C:2002:254, at 20; Case C-402/03, *Skov v. Bilka*, ECLI:EU:C:2006:6, at 23; Case C-127/04, *Declan O'Byrne v. Sanofi Pasteur*, ECLI:EU:C:2006:93, at 35; Case C-285/08, *Leroy Somer v. Dalkia France and Ace Europe*, ECLI:EU:C:2009:351, at 21; Case C-495/10, *Centre hospitalier universitaire de Besançon v. Thomas Dutrueux and Caisse primaire d'assurance maladie du Jura*, ECLI:EU:C:2011:869, at 20; Case C-310/13, *Novo Nordisk Pharma*, ECLI:EU:C:2014:2385, at 23; Case C-621/15, *Sanofi Pasteur and Others*, ECLI:EU:C:2017:484, at 20.

167 Art. 9 (b), Council Directive 85/374/EEC concerning the liability for defective products, as interpreted in Case C-52/00, *Commission v. France*, ECLI:EU:C:2002:252, at 26-35.

not require the producer to prove that he has taken appropriate steps to avert the consequences of a defective product either, if such action is not required in order to benefit from the exemptions laid down in the directive.[168] Nor are Member States permitted to provide that a supplier can generally be held liable under the same conditions as the producer, because the directive deliberately allocates the strict liability for damage caused by defective products to producers and only shifts this burden to suppliers in exceptional cases.[169] Finally, Member States are not permitted to extend the limitation period applicable to the right to claim compensation beyond the periods provided for under the directive.[170]

However, directives and regulations aimed at 'complete harmonisation' do not always have priority. It may be recalled that such instruments may leave room for the application of other rules.[171] In the present context, it must be observed that such rules may even take precedence over a regime aimed at complete harmonisation. Consider the UCP Directive, which fully harmonises the rules on unfair business-to-consumer commercial practices. Member States are not permitted, therefore, to depart from the provisions of the directive when determining whether a commercial practice is unfair.[172] But Article 3 (4) of the UCP Directive also states:

> 'In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.'[173]

168 Art. 7 (d) and (e), Council Directive 85/374/EEC concerning the liability for defective products, as interpreted in Case C-52/00, *Commission v. France*, ECLI:EU:C:2002:252, at 42-48.

169 Art. 3 (3), Council Directive 85/374/EEC concerning the liability for defective products, as interpreted in Case C-52/00, *Commission v. France*, ECLI:EU:C:2002:252, at 36-41; Case C-402/03, *Skov v. Bilka*, ECLI:EU:C:2006:6, at 22-45; Case C-127/04, *Declan O'Byrne v. Sanofi Pasteur*, ECLI:EU:C:2006:93, at 35-38; Case C-495/10, *Centre hospitalier universitaire de Besançon v. Thomas Dutrueux and Caisse primaire d'assurance maladie du Jura*, ECLI:EU:C:2011:869, at 24-26.

170 Art. 10, Council Directive 85/374/EEC concerning the liability for defective products, as interpreted in Case C-358/08, *Aventis Pasteur v. OB*, ECLI:EU:C:2009:744, at 37-44.

171 See section 6.5.

172 Joined Cases C-261/07 and C-299/07, *VTB-VAB v. Total Belgium* (C-261/07) *and Galatea v. Sanoma Magazines Belgium* (C-299/07), ECLI:EU:C:2009:244, at 52-68; Case C-304/08, *Zentrale zur Bekämpfung unlauteren Wettbewerbs v. Plus Warenhandelsgesellschaft*, ECLI:EU:C:2010:12, at 41-54; Case C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag & Co. v. 'Österreich'-Zeitungsverlag*, ECLI:EU:C:2010:660, at 29-41; Case C-288/10, *Wamo v. JBC and Modemakers Fashion*, ECLI:EU:C:2011:443, at 32-40; Case C-206/11, *Georg Köck v. Schutzverband gegen unlauteren Wettbewerb*, ECLI:EU:C:2013:14, at 34-50; Case C-343/12, *Euronics Belgium v. Kamera Express*, ECLI:EU:C:2013:154, at 23-31; Case C-421/12, *Commission v. Belgium*, ECLI:EU:C:2014:2064, at 55-78; Case C-295/16, *Europamur Alimentación*, ECLI:EU:C:2017:782, at 39-43.

173 Art. 3 (4), Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

Surely this statement should not be taken to mean that other Union rules must always be applied at the expense of the UCP Directive. To begin with, Article 3 (4) only applies when other Union rules govern 'specific aspects of unfair commercial practices'. Consider the Universal Services Directive as an example. This directive determines the information which must be inserted in a contract concluded between a consumer and an electronic communications services provider and gives the consumer the power to withdraw from the contract when the conditions change.[174] The directive does not, however, determine that non-compliance with these information requirements constitutes an unfair commercial practice. What is more, the provisions of the directive apply 'without prejudice to Community rules on consumer protection'.[175] For these reasons, the Court has determined that the Universal Services Directive does not regulate 'specific aspects' of unfair commercial practices. If the facts of the case fall within the scope of the Universal Services Directive, the UCP Directive may nonetheless be applicable.[176]

What is more, Article 3 (4) merely determines that 'specific' rules shall prevail where they 'conflict' with the UCP Directive. In the view of the Court, the term 'conflict' indicates that there must be a 'divergence which cannot be overcome by a unifying formula enabling both situations to exist alongside each other'.[177] In principle, then, the specific rules should be applied cumulatively with the provisions of the UCP Directive, provided that the necessary conditions have been fulfilled.[178] In accordance with this principle, the Court has tried to realise the objectives underlying the UCP Directive and the Directive concerning the advertising of medicinal products to the greatest possible extent.[179] Even though the Court qualified the first directive as the *lex generalis* and the second directive as the *lex specialis*,[180] it also observed that the directives have a 'complementary

174 Art. 20 (2)-(4), Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

175 Art. 20 (1), Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

176 Joined Cases C-54/17 and C-55/17, *Autorità Garante della Concorrenza e del Mercato v. Wind Tre* (C-54/17) *and Vodafone Italia* (C-55/17), ECLI:EU:C:2018:710, at 65-70.

177 Joined Cases C-54/17 and C-55/17, *Autorità Garante della Concorrenza e del Mercato v. Wind Tre* (C-54/17) *and Vodafone Italia* (C-55/17), ECLI:EU:C:2018:710, at 60, referring to Opinion A-G Campos Sánchez-Bordona, Joined Cases C-54/17 and C-55/17, *Autorità Garante della Concorrenza e del Mercato v. Wind Tre* (C-54/17) *and Vodafone Italia* (C-55/17), ECLI:EU:C:2018:377, at 124 and 126.

178 Also observed by Keirsbilck 2011, p. 173-195.

179 Directive 2001/83/EC on the Community code relating to medicinal products for human use.

180 Joined Cases C-544/13 and C-545/13, *Abcur v. Apoteket and Farmaci*, ECLI:EU:C:2015:481, at 80.

nature'.[181] After all, the Union legislature itself has determined that a commercial practice may be qualified as misleading, and hence as 'unfair' within the meaning of the UCP Directive,[182] if the specific rules concerning the advertising of medicinal products have not been complied with.[183]

According to the Court, a conflict is present only when the 'specific' rules impose obligations upon undertakings 'which are incompatible with (…) Directive 2005/29' and leave them 'no margin of discretion' at all.[184] This was the case with the information requirements concerning the energy consumption of products. Before the Antwerp Commercial Court, the company Dyson had complained that its competitor BSH had not accurately informed consumers about the efficiency of its vacuum cleaners. Dyson argued that BSH should have provided consumers with information on the conditions under which the products had been tested in order to determine their efficiency. BSH replied that it had merely followed the Union rules governing energy labelling, which did not require such testing conditions to be mentioned.[185] Indeed, the Court confirmed that these Union rules govern 'specific aspects' of unfair commercial practices[186] and that they establish 'an exhaustive list of information' which must be brought to the attention of consumers.[187] No additional information requirements may be imposed on the basis of the UCP Directive.[188]

What if a particular situation has not been exhaustively regulated by the Union legislature? It may be recalled that, in such situations, the Member States are permitted to go beyond the requirements introduced at the European level. The discretion granted to them is not, however, unlimited. Member States must, in any event, ensure the level of protection prescribed

181 Joined Cases C-544/13 and C-545/13, *Abcur v. Apoteket and Farmaci*, ECLI:EU:C:2015:481, at 78, referring to Opinion A-G Szpunar, Joined Cases C-544/13 and C-545/13, *Abcur v. Apoteket and Farmaci*, ECLI:EU:C:2015:136, at 61.

182 Art. 7 in conjunction with Art. 5 (4) (a), Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

183 Joined Cases C-544/13 and C-545/13, *Abcur v. Apoteket and Farmaci*, ECLI:EU:C:2015:481, at 78. The Court refers to Art. 7 (5), Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, which determines that information requirements flowing from Union law in relation to commercial communication 'shall be regarded as material'. In Annex II, which contains a non-exhaustive list of such requirements, reference is made to Directive 2001/83/EC on the Community code relating to medicinal products for human use.

184 Joined Cases C-54/17 and C-55/17, *Autorità Garante della Concorrenza e del Mercato v. Wind Tre* (C-54/17) *and Vodafone Italia* (C-55/17), ECLI:EU:C:2018:710, at 61.

185 Directive 2010/30/EU on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products, and Commission Delegated Regulation (EU) No 665/2013 supplementing Directive 2010/30/EU with regard to energy labelling of vacuum cleaners. The current framework is established by Regulation (EU) 2017/1369 setting a framework for energy labelling.

186 Case C-632/16, *Dyson v. BSH Home Appliances*, ECLI:EU:C:2018:599, at 33.

187 Case C-632/16, *Dyson v. BSH Home Appliances*, ECLI:EU:C:2018:599, at 44.

188 Case C-632/16, *Dyson v. BSH Home Appliances*, ECLI:EU:C:2018:599, at 46.

by the directive or regulation at issue.[189] And if they adopt or retain more protective rules, these rules must still comply with the rules belonging to the body of primary Union law.[190] In practice, this means that the defendant may argue that the national rule upon which the claimant relies must be set aside because it is contrary to treaty provisions pertaining to, for instance, the prohibition of discrimination[191] or the free movement of workers, the freedom of establishment or the freedom to provide services.[192]

6.8 Conclusion

This chapter has examined the relationship between rules originating from harmonising measures and the relationship between these measures and otherwise applicable national laws. In this context, it is generally assumed that harmonising measures introduce uniform legal regimes embracing all the Member States and replace or exclude otherwise applicable laws. This chapter has aimed to provide a more complete and nuanced account of the relationship between these rules.

A careful assessment of the statements made by the Union legislature and by the Court of Justice of the European Union has shown that the existence of one rule does not, in principle, affect the scope of application of another rule. On the contrary, the assumption is that each rule must be assessed independently and that no rule should be excluded from the outset. The Union legislature has regularly expressed itself in favour of this assumption by holding explicitly that the adoption of a directive or regulation shall not affect the scope of application of other harmonising measures and national laws. The Court, for its part, strives to realise the objectives underlying each rule to the greatest possible extent. In the absence of express statements by the Union legislature, the Court assumes that each rule ought to have its intended legal effect. Accordingly, rules may be applicable concurrently if the conditions of each rule have been established.

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189 See e.g., in the context of Council Directive 87/102/EEC concerning consumer credit, Case C-429/05, *Max and Marie-Jeanne Rampion v. Franfinance*, ECLI:EU:C:2007:575, at 47; Case C-76/10, *Pohotovosť v. Iveta Korčkovská*, ECLI:EU:C:2010:685, at 66.

190 E.g. Case C-322/01, *Deutscher Apothekerverband*, ECLI:EU:C:2003:664, at 64; Case C-205/07, *Lodewijk Gysbrechts v. Santurel Inter BVBA*, ECLI:EU:C:2008:730, at 34, both concerning the interpretation of Art. 14 (1), Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts. See also Case C-265/12, *Citroën Belux v. FvF*, ECLI:EU:C:2013:498, at 31, concerning the interpretation of Art. 3 (9), Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

191 Laid down in Art. 18 TFEU, protected as a fundamental right under Art. 21 of the Charter and recognised as general principle of Union law. See *supra* sections 4.3 and 5.2.

192 Case C-438/05, *International Transport Workers' Federation v. Viking Line*, ECLI:EU:C:2007:772, at 33, with references to earlier case law. See *supra* section 4.3.

This does not mean that concurrently applicable rules will always coexist peacefully. This chapter has shown that an exception must be made when cumulative application would lead to inconsistent outcomes. In such situations, an election between the available alternatives is required. The underlying reason is that the objectives of one rule cannot be realised if the other rule is also applied. For the same reason, Union law sometimes dictates that one of the rules applies exclusively, so that no election can be made at all. If the Union legislature has intended a particular rule to govern a particular situation exhaustively, it should not be possible to avoid the application of this rule.

Meanwhile, it is clear that the existence of alternative and exclusive rules is an exception which requires justification. The applicability of one rule is only affected by another rule to the extent that this is necessary in order to realise the intentions of the Union legislature. Rules with a higher constitutional rank do not, therefore, automatically exclude the application of rules lower down the hierarchy. Nor do measures aimed at achieving 'complete harmonisation' automatically replace other rules, originating from harmonising measures or from the applicable national law.

It flows from the foregoing that the party concerned – usually the claimant – may rely on the most advantageous rule – usually a specific cause of action – unless the rules are incompatible or one of them applies exclusively. We have seen that the benefit of this choice may nonetheless be affected, because the content of one rule might affect the content of another rule. The existence of an unfair commercial practice may, for instance, be taken into account when assessing the unfairness of contractual terms. This does not mean that the rules are identical in all respects, nor that one of the rules is swallowed up by the other. The rules continue to exist side by side, in accordance with the principle that the objectives underlying each rule should be realised to the greatest possible extent.