**PRIMACY AND THE REMEDY OF DISAPPLICATION**

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**1. Introduction**

This article explores the legal nature of the principle of primacy and, in particular, the requirement that national rules which are found to be incompatible with legally binding and enforceable provisions of Union law should be disapplied by the domestic courts. Section 2 explains the inseparable relationship between primacy and the remedy of disapplication. Section 3 then argues that many of the most iconic “primacy disputes” which have arisen between the Court of Justice and certain domestic judiciaries actually involved the principle of primacy only incidentally and as a second-order issue. The main problems which have arisen, specifically as regards the remedy of disapplication, have instead involved concerns about its impact upon legal certainty as regards existing acts, decisions or relationships. As Section 4 demonstrates, the Court deals with such problems through two discrete channels: some disputes (such as the non-publication of Union acts) are settled through the adoption of a centralised solution determined directly by the Court; the rest (such as limitation periods or *res judicata*) are dealt with by default under national law though subject to the Union principles of equivalence and effectiveness. Section 5 then discusses how another category of “primacy dispute” has acquired greater prominence in recent years: reservations about the potential for the prospective disapplication of incompatible national rules to create a legal vacuum, capable of endangering legitimate public interests, pending the adoption of fully compliant alternative measures by the Member State. In Section 6, we explore the Court’s response to that problem of legal vacuums. The available caselaw is limited, but it again suggests the Court’s preference for a dual jurisdictional system combining centralised and decentralised competence to qualify the full implications of the primacy of Union law. However, for now at least: the precise division of labour between the respective roles of the Court and of the domestic judges remains unclear; while the conditions governing the exercise of each jurisdiction appear ambiguous and arguably insufficiently flexible to offer adequate legal protection against the full risks that the disapplication of incompatible national legislation could create a potentially damaging legal vacuum. Section 7 offers some brief conclusions.

**2. The inseparable relationship between primacy and disapplication**

The primacy of Union law over the laws of the Member States is described by the Court as one of the “essential characteristics” of the Union and its “unique” constitutional framework.[[1]](#footnote-1) Few EU lawyers would disagree: the Court’s foundational caselaw on primacy remains one of the core pillars of, and a common inheritance within, an increasingly complex and disparate discipline.[[2]](#footnote-2) Even in the troubled world beyond our scholarly haven, the well-established proposition that Union law should take precedence over conflicting provisions of national law has (once again) come to occupy a prominent place in public discourse.[[3]](#footnote-3) Primacy has been co-opted as an effective proxy – indeed, virtually a symbolic rallying point – for competing political visions of our European future: defenders of the liberal social market democracy upon which the Union is founded regard primacy as a logical and necessary consequence of the voluntary sovereign act of Union membership based on the collaborative pursuit of common values and policies; radical reformers, on both the left and the right, might prefer to redefine or even invert the existing relationship between Union and national law as part of a broader overhaul of the Union’s vocation, institutions and competences; while the charlatan propagators of post-truth populism cite “primacy” as concrete evidence of just how far the globalist elite has succeeded in its planned destruction of national sovereignty.[[4]](#footnote-4)

Of course, EU lawyers are entitled to regard that entire discourse with bemusement and / or exasperation: the primacy of Union over national law may well be an “essential characteristic” of the Union’s unique constitutional framework; but it is also a much more qualified and nuanced legal proposition than any political rhetoric ever manages to capture and convey. In particular, the Court has long drawn a clear distinction between the abstract question of whether Union law is to be considered compatible with or to preclude any given provision of national law *versus* the practical consequences which are to be drawn from any such abstract state of incompatibility or assessment of preclusion.[[5]](#footnote-5) Notwithstanding certain suggestions to the contrary in several judgments dating from the formative years of the caselaw on relations between the Union and national legal systems,[[6]](#footnote-6) the Court has since been clear and consistent in its understanding that the principle of primacy for Union law cannot and does not have the effect (for example) of suppressing the very existence or exercise of national competence, even to adopt rules which would be precluded by Union law.[[7]](#footnote-7) But also when it comes to drawing the practical consequences of any abstract finding of incompatibility, the reality of primacy is much more prosaic than many lay commentators might assume or expect: in the context of an individual decision or dispute, where the competent national authorities are faced with a direct conflict between legally cognisable provisions of Union law (on the one hand) and measures of purely domestic law (on the other hand), the latter should be disapplied in practice, as a first (though not always sufficient or indeed even necessarily appropriate) step towards securing the effective application and enforcement of the Member State’s obligations under the Treaties.

It is worth exploring in greater detail each of the elements which contribute towards that prosaic reality of the principle of primacy. In the first place, the Court insists that primacy and disapplication should be treated only as a legal tool of last resort.[[8]](#footnote-8) Where there is an apparent conflict between provisions of Union and national law, the preferred means of resolving that tension is through the duty of consistent interpretation: national law must, as far as possible, be construed so as to comply with the Member State’s obligations under the Treaties.[[9]](#footnote-9) Only if such consistent interpretation proves impossible (for example, when faced with a simple *contra legem* incompatibility between Union and national legislation) does the domestic court need to reconstruct and address the relationship between Union and national law in potentially more abrasive terms.[[10]](#footnote-10)

In the second place, even in those situations where the duty of consistent interpretation is unable to offer a solution, it does not necessarily or inevitably follow that the national court will face a live conflict between Union and national law which requires active resolution through recourse to primacy and disapplication. As the Court has repeatedly confirmed in its caselaw: the capacity of Union law to enjoy and express its primacy over conflicting national law depends upon the relevant Union provisions first being recognised as a valid source of law within the domestic legal system. To be more precise, the relevant Union provisions must fulfil the cumulative conditions for producing direct effect: those provisions must be sufficiently clear, precise and unconditional; there must be no outstanding deadline for implementation or transposition; and (where relevant) they must belong to a class of Union act capable (in and of itself) of creating and imposing obligations for and upon private individuals.[[11]](#footnote-11) Only if that cumulative threshold is crossed can the relevant Union measure legitimately be considered a direct source of rights and obligations within the national legal system: at that point, the national court is indeed faced with a live conflict between two legally cognisable sources of law which should be resolved through primacy and disapplication.[[12]](#footnote-12) But as the Court recently stressed in *Popławski*: primacy cannot have the effect of undermining the essential distinction between provisions of Union law which have direct effect and those which do not, and consequently of creating a single set of rules for the application of all provisions of Union law by the national courts.[[13]](#footnote-13) So if the relevant provisions of Union law fail to cross the threshold of cognisability required for direct effect, national law will retain its domestic priority (regardless of any abstract state of incompatibility with Union law).[[14]](#footnote-14) The only remaining avenue of legal redress for disappointed intended beneficiaries of the relevant Union provisions is to seek reparation from the Member State pursuant to the *Francovich* caselaw.[[15]](#footnote-15)

In the third place, the basic mechanism by which primacy resolves any direct and actionable conflict of norms is indeed through the practical disapplication of the relevant national measures.[[16]](#footnote-16) In particular, the principle of primacy does not have the effect of rendering incompatible national measures void or otherwise requiring such acts to be treated as invalid as a matter of either Union or domestic law.[[17]](#footnote-17) The primacy of Union law entails merely the setting aside of conflicting national rules within the context of an individual decision or dispute. Moreover, such disapplication is expected only to the extent that the relevant situation or dispute falls within the scope of the Treaties: one and the same national measure may still continue to be fully operational for purposes falling outside the realm of Union law.[[18]](#footnote-18) Similarly, disapplication is required only to the extent of national law’s actual incompatibility with the Member State’s obligations under Union law: primacy does not apply in situations where the domestic rule is not in fact precluded by Union law.[[19]](#footnote-19) Of course, each Member State can decide for itself that provisions of national law which are found to be incompatible with its Treaty obligations should be rendered or capable of being declared invalid for the purposes of the domestic legal system; or to provide for itself that the remedy of disapplication (or optional finding of invalidity) should extend to situations which strictly speaking fall either outwith the scope of Union law or beyond the extent of national law’s actual incompatibility with the Treaties.[[20]](#footnote-20) But those are essentially national choices. And in any case, the availability of the remedy of disapplication within the national legal system at the request of natural or legal persons, does not affect the Member State’s underlying Union law obligation to bring its national legislation into full conformity with its Treaty obligations, or the Member State’s amenability to enforcement proceedings for having permitted such a state of (even if only formal) non-compliance to arise or persist.[[21]](#footnote-21)

In the fourth place, there are disputes where the remedy of disapplication may prove insufficient to safeguard adequately those interests which the relevant Union act is intended to promote; including (where appropriate) to provide effective judicial protection for those natural or legal persons falling within its protective scope. In particular, the Court has consistently asserted that the principle of primacy is without prejudice to the power or duty of national courts to ensure the effectiveness of Union law and / or to protect individual rights under the Treaties (if necessary) through action and / or redress over and above the remedy of disapplication per se.[[22]](#footnote-22) That includes the availability of specific remedies which are mandated directly under Union law: for example, the right to recovery of unlawfully levied charges, which should be treated as a direct consequence of the incompatibility and disapplication of national law;[[23]](#footnote-23) or the possibility of seeking financial reparation from the defaulting Member State – an action which is available equally in the case of disputes involving directly effective Union provisions capable of generating their own primacy.[[24]](#footnote-24) Indeed, there may well be disputes where the direct effect and primacy of Union law imply that the remedy of disapplication should be theoretically available – but such disapplication would in fact serve little useful purpose, because the relationship between Union and national law is not one of incompatibility between two positive legal acts, of the sort that can properly be resolved by setting aside one in favour of the other; instead, the Member State’s default consists of a failure to adopt a specific measure or pursue a particular course of action, of the sort which can only be remedied by ordering the competent authorities to engage in concrete action in proactive fulfilment of their Treaty obligations.[[25]](#footnote-25)

Of course, within the constraints of that basic legal framework, the principle of primacy is undoubtedly both expansive in its potential scope and potent in its potential effects. Thus, incompatible provisions of national law are in principle capable of being set aside in favour of legally binding and enforceable provisions of Union law regardless of the latter’s nature or status within the Union’s own classification and hierarchy of norms: Treaty provisions,[[26]](#footnote-26) legislative acts,[[27]](#footnote-27) administrative measures,[[28]](#footnote-28) the Charter of Fundamental Rights,[[29]](#footnote-29) the general principles of Union law,[[30]](#footnote-30) and Union international agreements.[[31]](#footnote-31) Similarly, Union law is capable of prevailing over conflicting provisions of national law regardless of the latter’s nature or status within the Member State’s particular classification and hierarchy of domestic norms: from fundamental constitutional provisions right down to local administrative decisions or practices.[[32]](#footnote-32)

Moreover, the obligations flowing from primacy are binding upon all national courts – the Court having delivered an extensive caselaw concerning purported restrictions upon the ability of every competent domestic tribunal either to assess the initial question of whether national rules are incompatible with Union obligations; or to request a preliminary reference from the Court about the proper interpretation or application of Union law; or to select and enforce the remedy of disapplication, as and when required by the principle of primacy, so as to resolve the individual dispute at hand.[[33]](#footnote-33) The Court has also long held that the principle of primacy applies not only to the national courts but also the domestic administrative authorities: executive bodies and agencies of the Member State are directly obliged to disapply national provisions which are incompatible with legally binding and enforceable Union obligations and to do so even without any prior intervention by the relevant judicial authorities.[[34]](#footnote-34)

Yet the prosaic reality remains: the principle of primacy is virtually inseparable, if not altogether indistinguishable, from its remedy of disapplication. That is not to deny the rightful place of primacy among the “essential characteristics” of Union law or its centrality to broader conceptual debate and scholarly controversy about the “uniqueness” of the Union’s constitutional framework: of course the very existence of primacy represents a fundamental statement by the Court about the nature and implications of Union membership and an equally significant acceptance by the Member States of a profound reordering of their internal legal system and its place within the wider European order. Nor is it to deprive anyone of the chance to muse over whether established doctrines such as the duty of consistent interpretation or the principle of Member State liability are better regarded, either as specific facets or expressions (alongside disapplication) of the principle of primacy,[[35]](#footnote-35) or instead as constitutionally distinct elements of their own which contribute (alongside primacy) to the overall relationship between Union and national law.[[36]](#footnote-36) But ultimately, the operational core of primacy lies in disapplication, with all its various limitations and nuances, and there is scant evidence in the caselaw to suggest that primacy entails some more profound structural hierarchy allowing Union law, per se and by its very existence, to produce a more far-reaching array of tangible effects directly upon national law.[[37]](#footnote-37)

**3. Challenges to the primacy of Union law: addressing national concerns about the content of Union law and about the consequences of disapplication**

Understanding primacy essentially in terms of the remedy of disapplication has the potential to enhance our understanding of other constraints upon the full legal effects of Union law within the national legal systems. In particular, we all know that senior domestic courts across the Member States have expressed various concerns about and objections to the authority of Union law; and that the Court has sought to respond to those challenges through a range of constitutional innovations and methodologies.[[38]](#footnote-38) Such “primacy disputes” can usefully be divided into two main categories.

The first category involves national judicial objections to a particular obligation created or arising under the Treaties on the basis that the disputed Union act is alleged (for example) to exceed the competences legitimately conferred upon the Union institutions by the Member State; or to impinge upon fundamental rights in a manner which would not be tolerated under purely domestic law; or to impact unduly upon national choices in particularly sensitive policy fields. Evidently, that description applies to many of the most familiar debates and examples involving national judicial challenges to the authority of Union law – including the tripartite grounds for reviewing the legal effects of Union acts (ultra vires, fundamental rights and national identity) which have been developed within Germany by the Federal Constitutional Court but also widely adopted / adapted across various other Member States.[[39]](#footnote-39)

Those debates and examples may well routinely be conceived, understood and expressed in terms of the fundamental constitutional relationship between the Union and its Member States and of the (more or less contingent) status of the principle of primacy within the national legal system.[[40]](#footnote-40) But this category of “primacy dispute” derives essentially from substantive objections to the nature and / or content of particular Union acts or obligations: their vires, scope, impact, severity or sensitivity. If such substantive Union obligations were accepted at face value, that would provoke a situation of incompatibility with domestic law. If such incompatibility were then translated from abstract terms into practical consequences, it could lead to disapplication of the relevant national measures. To avoid that ultimate outcome, the national court must refuse to recognise: either that the relevant Union act is a cognisable source of rights and obligations within the domestic legal system (on the grounds that it is not a valid exercise of the Union’s own competences or at least not a valid exercise of Union competence in relation to that Member State); or that the relevant Union act is entitled to benefit from a conflict resolution principle that would allow it to take priority over incompatible provisions of purely national provenance. However any given national court choses to formulate its precise resolution of the problem within the framework of its domestic constitutional system, the analysis nevertheless remains the same: the underlying objection is of a substantive nature; the domestic judges are searching, from among the tools at their disposal, for the most suitable legal means to give concrete expression to that logically prior disagreement about the nature / content of Union law relative to national law; only as a consequence of and as a vehicle for operationalising their concerns, might a national court eventually resist the purported primacy of the disputed Union act and propose to restrict availability of the remedy of disapplication.

So these are “primacy disputes” only incidentally and by necessity: the core problems are neither caused by the principle of primacy per se; nor attributable to the specific workings of its remedy of disapplication; and the controversy over primacy is effectively a proxy for debating the fullness of Union membership. And it is worth stressing that such national challenges to the authority of Union law are so significant precisely because they are so infrequent. That is partly due to the restraint of the domestic courts themselves: the latter never purport systematically to reject either the overall obligations deriving from Union membership or the general proposition that those obligations should ordinarily take priority in the event of incompatibility with purely national law.[[41]](#footnote-41) But the only-intermittent nature of these “primacy disputes” can also be credited to the Court’s own methodology for responding to them. In particular, the Court seeks to “internalise” many of the substantive concerns raised by the national courts into the very values, structures and processes of Union law itself. The goal of internalisation is to neutralise domestic objections to particular Union obligations, by reassuring the domestic judges that their reservations are shared and adequately respected by the Court in its interpretation of the Treaties: in many cases, a provocative state of incompatibility between Union and national law can be entirely avoided; in other situations, the domestic judges can at least be invited to trust that the Court will manage relations and potential tensions responsibly and authoritatively.

The Court’s technique of refining Union law in the light of legitimate national concerns is now effectively woven into the very fabric of the Treaties across multiple fields of activity: from promising effectively to scrutinise the validity of Union measures against the Union’s own constitutional requirements (say) concerning proper competence and fundamental rights;[[42]](#footnote-42) and creating a limited space for the application of higher national fundamental rights standards in cases involving Member State action falling within the scope of the Treaties;[[43]](#footnote-43) through balancing the expansive interpretation of primary Treaty provisions in fields such as free movement law with greater scope for the justification of potentially problematic national measures through the system of mandatory / imperative requirements;[[44]](#footnote-44) to recognising the importance of allowing Member States greater scope to interrogate the principle of mutual trust, and with it the obligation of mutual recognition, under Union legislation governing the Area of Freedom, Security and Justice.[[45]](#footnote-45) Where successful, the Court’s strategy of internalisation has the ultimate – but again, effectively incidental – consequence of eliminating the risk that domestic judges might eventually refuse to recognise the relevant Union provisions as a cognisable source of legal rights and obligations, capable of benefitting from the principle of primacy and its remedy of disapplication.[[46]](#footnote-46)

The second main category of national judicial challenges to the authority of Union law is distinct from our previous examples, insofar as the domestic judges are here expressing no particular objection to the substantive nature or content of the relevant Union act or obligation. The abstract finding of incompatibility or preclusion is established and nothing in the relevant Union obligation (its legitimate exercise of competence, its fundamental rights credentials, its impact on core national sensitivities) might persuade the national court to reach a different assessment on the merits of the dispute. And so the time has come to translate the abstract question of incompatibility or preclusion into its more practical consequences. But even if the national court accepts the relevant Union provision as a legally cognisable source of rights and obligations, the judges may well harbour direct and specific reservations about the appropriateness of resolving the conflict between Union and national law by reference to the principle of primacy and through the remedy of disapplication. Such reticence is almost invariably motivated by considerations of legal certainty: enforcing the principle of primacy through the remedy of disapplication might allow the relevant Union provisions (for example) to produce retrospective regulatory effects that confound our legitimate understanding of what the law really required at the relevant time; or to call into question the validity of previous administrative or judicial decisions which have already acquired definitive force under the law; or to upset settled legal relationships which should rightly be protected against the threat of indefinite litigation.[[47]](#footnote-47)

The Court’s primary means of addressing such challenges is to impose or recognise certain limitations on the potential disapplication of national law: one accepts the existence of some state of incompatibility / preclusion between Union and national law; that the dispute cannot be avoided by means of consistent interpretation alone; and that the relevant Union provisions are capable in principle of acting as a directly effective source of legally cognisable rights and obligations within the domestic legal system; but one falls short of then insisting that the principle of primacy must lead inexorably to the setting aside of national law or suppression of the latter’s full legal effects. In that sense, this group of legal certainty disputes constitute the “real” challenge to the principle of primacy: resistance to the remedy of disapplication is not merely the ultimate consequence of some logically prior objection to the very nature / content of the relevant Union act; the desire to temper or even defy the logic of primacy, arising only and right at the very moment when that principle should be poised to fulfil its specific vocation under Union law, provides the entire focus of the national court’s concerns.

**4. Managing legal certainty and the retrospective impacts of disapplication: centralised and decentralised jurisdictions**

When it comes to limiting the specific effects of primacy, for the sake of concerns about legal certainty and allegedly improper retrospective effects, the Court recognises two main types of jurisdiction: centralised, whereby the Court itself introduces and / or defines various mandatory limits on the remedy of disapplication, directly as a matter of and under conditions prescribed by Union law; and decentralised, whereby the national courts may impose certain limits on the remedy of disapplication, as and when authorised to do so under their own domestic law – but only by default, in the absence of a centralised solution from the Court; and only subject to scrutiny under Union law, particularly through the principles of equivalence and effectiveness.[[48]](#footnote-48)

*4.1. Centralised jurisdiction*

The Court is willing to impose certain mandatory qualifications to the remedy of disapplication directly and as a matter of Union law: particularly where the Union is itself somehow responsible for the problems of legal certainty which would allegedly arise from the full enforcement of the relevant Union acts; but more importantly, where Union law (as interpreted by the Court) appears capable of offering a single, workable solution to the legal certainty challenges arising before the national courts. Needless to say, such centralised solutions facilitate the uniform and effective application of the Treaties across and within the Member States based on the articulation of Union-wide standards of administrative and judicial enforcement.[[49]](#footnote-49)

For present purposes, the pertinent caselaw can be organised into several standardised categories. In the first place, the Court enjoys central and indeed sole jurisdiction to impose a general temporal limitation on the retrospective effects of its own interpretation of Union law as delivered in the context of a preliminary ruling – thereby creating an exception to the general principle that an interpretation via Article 267 TFEU clarifies and defines the meaning and scope of Union law as it must be, or ought to have been, understood and applied from the time of its coming into force and as it should therefore be applied by the national courts even to legal relationships created before the Court’s judgment.[[50]](#footnote-50) Similar powers had long been expressly provided for under the Treaties in respect of the Court’s jurisdiction to annul Union regulations,[[51]](#footnote-51) with the Court subsequently extending those powers to cover the annulment of other Union acts,[[52]](#footnote-52) and indeed rulings on the invalidity of Union measures delivered in the course of preliminary reference proceedings.[[53]](#footnote-53) In *Defrenne*, the Court established definitively that it (alone) could also impose a general limit on natural and legal persons relying on the legal effects of a preliminary ruling, concerning the interpretation and application of Union law, as regards facts pre-dating the relevant judgment.[[54]](#footnote-54) The basic criteria for exercise of this centralised and sole jurisdiction are now well-established: there must be uncertainty as to the correct meaning of the relevant Union obligations; any request to qualify the retroactive effects of a preliminary ruling must be justified by overriding concerns of legal certainty affecting all the interests involved (public and private); any temporal limitation must be imposed in the relevant preliminary ruling (not during the course of subsequent judicial proceedings); and the Court will generally acknowledge an exception in favour of the claimant and other natural or legal persons who have already initiated their own litigation by the relevant date.[[55]](#footnote-55)

In the second place, the Court also exercises a general power to limit the enforceability of Union acts as a result of non- or inadequate publication in the Official Journal – covering situations where the relevant defect either affects the entire Union (in the case of general non-publication);[[56]](#footnote-56) or impacts only upon certain Member States (in the case of non-publication in specific official languages).[[57]](#footnote-57) In such cases, overriding considerations of legal certainty, directly linked to the rule of law, require that the principle of primacy – i.e. availability of the remedy of disapplication – must effectively be suspended until full and proper publication of the disputed Union act.[[58]](#footnote-58) In these circumstances, moreover, the Court is not prepared to exercise its aforementioned jurisdiction to impose general temporal limitations on the retrospective effects of preliminary rulings: that would have the effect of neutralising the finding of defective publication, by restricting the ability of individuals to resist the full domestic enforcement of the disputed Union measures. Instead, the Court is only prepared to afford Member States the possibility of upholding the finality of specific administrative or judicial decisions already adopted on the basis of the relevant Union measure – unless this would in itself lead to a breach of fundamental rights protected under the Treaties.[[59]](#footnote-59)

In the third place, the Court has laid down the general rule that Union law cannot of itself provide a basis for the retrospective aggravation of an individual’s criminal liability under national law. That general rule has been articulated primarily in the context of the duty of consistent interpretation insofar as it applies to criminal litigation involving a potential conflict between Union and national law;[[60]](#footnote-60) but the same approach is required also in situations where aggravated criminal liability would be the result of the simple disapplication of incompatible national law based on the direct effect and primacy of any given Union measure.[[61]](#footnote-61) As before, the Court has been called upon to explore and explain the more detailed implications of this centrally imposed exception to the standard techniques for enforcing Union law within the domestic legal system: for example, by drawing a (much criticised) distinction between substantive and procedural criminal law provisions, with the latter apparently still amenable to the full implications of both the duty of consistent interpretation and (assuming cognisability of the relevant Union measure through its direct effect) the principle of primacy.[[62]](#footnote-62)

In the fourth place, there are disputes where the national authorities are duly involved in the implementation of Union law within the Member State, but engage in specific conduct which is alleged to breach the legitimate expectations of (or otherwise generate an intolerable state of legal uncertainty for) natural or legal persons: for example, by making specific promises about how the relevant authorities intend to exercise their discretionary powers under Union law, on the basis of which the claimant then determined their conduct, only to find that the Member State now seeks to renege upon its previous assurances. Since the national authorities are acting within the scope of the Treaties, they are directly bound by the provisions of the Charter as well as the general principles of Union law – including the full array of Union-wide administrative law principles which have been developed by the Court and should be applied by the national judges so as to protect against the abuse of executive power and to improve standards of good governance.[[63]](#footnote-63)

*4.2. Decentralised jurisdiction*

Beyond those standardised categories of centralised jurisdiction, purported restrictions on the remedy of disapplication, on the basis of concerns over legal certainty and undue retrospective effects, are instead to be determined in accordance with national rules adopted in exercise of the Member State’s own procedural autonomy – but subject to oversight and scrutiny under Union law on the basis of the familiar principles of equivalence and effectiveness. Decentralised jurisdiction to limit the temporal scope of the principle of primacy is only to be exercised (to begin with) in the absence of Union-wide standards of protection as interpreted and sanctioned by the Court and (in any event) insofar as the national courts are offered the necessary competence under their own domestic legal system. This “mixed model” for managing the challenges posed by the remedy of disapplication to the principle of legal certainty reflects the Union’s inescapable dependence upon the national systems – particularly in situations where the Court could not realistically hope to provide a centralised solution of its own. At the same time, Union scrutiny over the detailed conditions for national law to withhold the remedy of disapplication at least provides a minimum level of protection for the uniform and effective application of Union law across and within the Member States.

Again, it is possible to organise the relevant caselaw into recurrent categories. For example: the Court has delivered a vast jurisprudence concerning the imposition of national limitation periods for the commencement of proceedings based on Union law;[[64]](#footnote-64) including an extensive body of rulings exploring how particular rules (say) concerning the duration, commencement, interruption or suspension of domestic time limits are to be evaluated in accordance with the principles of equivalence and effectiveness.[[65]](#footnote-65) Underpinning that caselaw, however, is the Court’s basic acceptance that limitation periods serve a legitimate public interest in promoting legal certainty and protecting against indefinite liability; that, in the absence of centrally harmonised rules, the Union must defer to national procedural autonomy as regards judicial time limits; and that, for those purposes, non-discriminatory limitation periods of reasonable duration should (in principle) be regarded as compatible with Union law – even if their application leads to the enforcement of national rules which are clearly incompatible with directly effective Union acts and allows the domestic judges to withhold the remedy of disapplication which would otherwise be expected thanks to the principle of primacy.[[66]](#footnote-66)

Or again: the Court has been called upon to evaluate the compatibility with Union law of domestic rules governing the finality of administrative acts; as well as application of the principle of *res judicata* in respect of judicial decisions. The Court’s initial approach raised questions about whether such domestic rules might be treated as subject to a special regime of scrutiny under Union law;[[67]](#footnote-67) but subsequent caselaw has confirmed that restrictions on the enforcement of Union rights and obligations based either on the principle of administrative finality or respect for *res judicata* will indeed be governed by the standard requirements of equivalence and effectiveness.[[68]](#footnote-68) Again, the assumption underpinning the Court’s approach is that rules on finality / *res judicata* reflect a legitimate general interest in promoting legal certainty for both public and private actors; lacking any centralised regime of its own, Union law must proceed on the basis of scrutinising the choices made by each Member State in the exercise of its own procedural autonomy – even if that leads to the legal protection of decisions or judgments adopted in breach of directly effective and theoretically supreme provisions of Union law.[[69]](#footnote-69)

Beyond those two principal categories of decentralised jurisdiction to limit availability of the remedy of disapplication on grounds of legal certainty, the Court appears suspicious or even hostile towards Member State attempts to impose generalised restrictions on availability of the remedy of disapplication – supposedly justified on the grounds of protecting legal and natural persons against the undue retrospective effects of Union law – particularly where such national rules appear to contradict or even undermine the levels of judicial protection already established by or reserved to the Court itself in the exercise of its centralised jurisdiction. For example, *Gutiérrez Naranjo* concerned certain contractual terms found to be unfair and which should thus be considered not binding on the consumer in accordance with the regime established under Directive 93/13.[[70]](#footnote-70) However, the Spanish Supreme Court ruled that, for reasons of legal certainty, that finding should affect neither situations in respect of which a judgment with the force of *res judicata*had already been delivered nor contractual payments which had already been made before the date of the relevant national judgment. The Court was prepared to accept the compatibility with Union law of national restrictions on the full legal effects of Directive 93/13 based on respect for the principle of *res judicata* or indeed the imposition of reasonable limitation periods. But such domestic restrictions were to be distinguished from the imposition of a general temporal limitation on the legal effects of an interpretation of Union law: such competence was vested in the Court alone; the Spanish Supreme Court’s ruling offered only incomplete and insufficient judicial protection of the rights conferred by Directive 93/13 and should itself be disapplied by the competent domestic courts.[[71]](#footnote-71)

In some instances, the Court’s determination to protect the principle of primacy and the remedy of disapplication against undue or unjustified domestic procedural restrictions risks provoking a more serious confrontation with the domestic courts. The *Taricco* litigation illustrates how avoiding such confrontation can make demands on the logic and consistency of the caselaw. In *Taricco* itself, the Court found that certain Italian rules governing the limitation periods applicable to criminal offences failed to comply with the Member State’s duty to provide effective and dissuasive penalties for the enforcement of Union law (in casu, for protection of the Union’s financial interests); such national rules should therefore be disapplied – a result which would not infringe the principle of legality under Union law, since when it came to the retroactive aggravation of criminal liability, the setting aside of mere procedural rules was fundamentally different from that of substantive penal law.[[72]](#footnote-72) However, faced with strong objections and potentially outright resistance from the senior Italian judiciary, the Court in *M.A.S.* subsequently revised its interpretation: it now emerged that the relevant limitation periods were classified, under Italian rules adopted in the legitimate exercise of that Member State’s competence, as pertaining to substantive (not merely procedural) criminal law and were thus also subject to the fundamental principle that offences and penalties should be defined by law; if disapplication of the offending Italian limitation periods would conflict with that fundamental principle (in particular) by breaching the requirements of foreseeability, precision and non-retroactivity, then the domestic judges would not be obliged to order such disapplication – even if the latter course of action would have allowed the Italian courts to remedy a situation incompatible with Union law, without waiting for action by the Italian legislature.[[73]](#footnote-73)

But in other situations, judicial friction does indeed prove unavoidable – thereby effectively transforming a “second category” dispute concerning the practical consequences of a finding of incompatibility between Union and national law, focused on finding an appropriate balance between the demands of primacy and the needs of legal certainty; instead into a “first category” conflict about the very authority of Union law within the national legal system, having regard to domestic “red lines” over the limits of Union competence, the protection of fundamental rights or respect for core tenets of Member State identity. That was effectively the story of *Dansk Industri / Ajos*. Having affirmed its existing caselaw to the effect that the general principle of non-discrimination on grounds of age can be relied upon in litigation between private parties so as to disapply national legislation which cannot be interpreted consistently with Union law, the Court robustly rejected the Danish Supreme Court’s suggestion that the principle of legal certainty or legitimate expectations should nevertheless protect private employers who had acted in accordance with that national legislation: as in *Gutiérrez Naranjo*, such an approach would amount to the improper imposition of a general temporal limitation on the effects of a preliminary ruling, when the Court itself had not exercised its (centralised, monopoly) jurisdiction to do so at the point of interpreting the relevant provisions of Union law.[[74]](#footnote-74) However, that reply did not satisfy the Danish Supreme Court:[[75]](#footnote-75) by insisting that the general principles of Union law could lead to the disapplication of national legislation even in litigation between two private parties, the Court was effectively exceeding the scope of the powers conferred upon the Union as a matter of Danish constitutional law, since the latter did not provide any authorisation for those unwritten principles to produce such binding effects within the national legal order (a finding which effectively invited the Danish government and parliament to rectify the situation by revising the domestic Accession Act).[[76]](#footnote-76) If most “primacy disputes” are only incidentally about the principle of primacy per se, even a dispute about the principle of primacy *stricto sensu* can quickly escalate into a more familiar challenge to the substantive vires, legitimacy and authority of Union law.

**5. A new challenge to primacy? Concerns about the prospective effects of disapplication and the creation of “legal vacuums”**

In short: direct challenges to the very principle of primacy have been inspired almost entirely by concerns about legal certainty and particularly as regards the proper retrospective effects of the disapplication of national rules found to be incompatible with Union law – concerns which the Court addresses through a “mixed model” that combines both centralised and decentralised jurisdictions, with the latter essentially serving a default function and subject to relatively clear limits and scrutiny under Union law. Needless to say: the variety of temporal limitations which may be imposed upon the full retrospective effects of the principle of primacy, in exercise of those centralised and decentralised jurisdictions, do not extend to future situations, decisions, relationships or disputes.[[77]](#footnote-77) And yet in recent years, important developments have taken place regarding the potential limits which Union and / or national law might impose upon the full legal effects of the principle of primacy, this time on the grounds that even the *prospective* disapplication of national legislation found to be incompatible with Union law could create a legal vacuum capable of damaging the public interest.

The risk of legal vacuums has long been a familiar issue in the context of challenges to the validity of Union acts. When it comes to actions for annulment under Article 263 TFEU, the Court has the express power under Article 264 TFEU to state which of the effects of a Union act which has been declared void should nevertheless be considered as definitive – thus allowing the Court to uphold the legal effects of defective Union measures not only retrospectively but also prospectively, until the act is subsequently replaced by the competent Union institution/s.[[78]](#footnote-78) The Court is prepared to exercise a similar power when Union acts are declared invalid within the framework of a preliminary reference under Article 267 TFEU.[[79]](#footnote-79) In such situations, the Court is concerned less with the problem of legal certainty in the sense of the impact of voidness / invalidity upon existing decisions or relationships; and more about the prevention of a legal vacuum, be it legislative or administrative in character, that could jeopardise ongoing or future public interest objectives (for example) by depriving the authorities of valuable regulatory powers, allowing potentially harmful conduct to proceed unchecked, or interrupting the provision of significant public funding.[[80]](#footnote-80)

How far should we be concerned about the corresponding problem in situations where national law is found to be incompatible with legally binding and enforceable provisions of Union law? In particular: to what degree is the threat of creating some damaging legal vacuum to be considered a genuine practical risk resulting from the prospective setting aside of national law thanks to the principle of primacy? The answers to those questions will help inform subsequent discussion (in Section 6) about how far Union law should create or recognise a legal space for refining or limiting the remedy of disapplication as regards future decisions or actions; whether that legal space should be constructed around the exercise of a centralised and / or a decentralised jurisdiction; and in any case, according to which criteria, and subject to what limits, such jurisdiction(s) should be exercised in practice.

*5.1. Delimiting the scope of the legal vacuums problem*

Where national law is found to be incompatible with Union law, the Member State is under an obligation to bring its domestic law into full compliance with its Treaty obligations.[[81]](#footnote-81) The primary responsibility for responding to a situation of incompatibility will generally fall upon the national parliament or other competent regulatory authority.[[82]](#footnote-82) But in the meantime, during the period between a finding of incompatibility and restoration of full legal compliance, it falls upon the executive as well as the courts to provide an interim solution not only for past decisions or acts but also as regards newly created legal relationships. As we have seen, the remedy of disapplication plays a central role in that interim solution, by obliging the executive and judicial authorities to set aside the incompatible national rules.[[83]](#footnote-83) That might sound like a recipe for the widespread creation of numerous legal vacuums capable of endangering the public interest – but in fact, how far a problem actually arises depends on a range of factors, including the nature of the relevant Union obligation, the underlying framework of national law, and the precise character of the Member State’s incompatibility.

In certain situations, the risk of a damaging legal vacuum will be low or even non-existent. For example, we have seen how the relevant Union obligation might simply lack the capacity to produce its own direct effect – in which case, there is no question of an abstract finding of incompatibility ever leading to disapplication of the relevant national law and therefore no risk of ever creating a legal vacuum.[[84]](#footnote-84) Alternatively: Union law might itself contain the substantive rules required to define and protect the relevant public interests, drafted in sufficient detail that those rules are capable of having direct effect and being enforced on their own terms, in place of and substitution for the incompatible national legislation which should thenceforth be set aside.[[85]](#footnote-85) As the Court has regularly found: that possibility is viable, even where the relevant Union legislation offers the Member State various discretionary options and derogations: the fact that the competent legislature may chose to avail itself of such choices when bringing national law into full compliance for the future, does not affect the obligation of the competent executive and judicial authorities to recognise and enforce the general regulatory standards that can be extracted from the applicable Union legislation in the interim.[[86]](#footnote-86) Or again, consider the Court’s approach to the practical consequences that should be drawn from national infringements of various Union obligations based on the principle of equal treatment: if national law provides a tangible reference point for the restoration of compliance with the principle of equal treatment, the principle of primacy and remedy of disapplication entail that the victims of unlawful discrimination should thenceforth be treated in accordance with that reference point;[[87]](#footnote-87) at least unless and until the Member State decides to adopt an alternative reference point, on a non-discriminatory basis, into the future.[[88]](#footnote-88)

In other situations, the Court seems prepared to avoid any serious risk that the remedy of disapplication will create a damaging legal vacuum as regards the treatment of future situations, by calling upon the national courts to exercise some margin of judicial creativity in designing and enforcing replacement regulatory standards or legal solutions that will restore full (interim or indeed long term) compliance with Union law. That seems to be particularly true of disputes involving “lawyers’ law” such as rules of procedure or the provision of remedies: it may well be true that neither the applicable Union measure nor the underlying national legal framework provide a clear reference point capable of directly serving in lieu of the defective domestic rules which are due to be disapplied; yet the subject matter of the dispute is nevertheless sufficiently “judicial” – in the sense of falling comfortably within the training, competence and experience of expert legal practitioners – that the national court can still be expected to rescue the situation by crafting suitable substitute provisions (at least pending alternative legislative choices that also restore full compliance). Consider the ruling in *Kolev*: having found that various provisions of Bulgarian law were capable of impeding the effective enforcement of Union customs legislation in cases involving serious fraud and illegality, the Court discussed the various procedural means the national court could and should employ to ensure that – notwithstanding disapplication of the incompatible Bulgarian rules – the relevant prosecutions could still proceed appropriately (having due regard also to the rights of the defence).[[89]](#footnote-89)

However, that still leaves a number of situations in which the risk of a damaging legal vacuum does indeed appear to be of more pressing and genuine concern. That is particularly true where Union law provides a relatively focused and limited standard of judicial review in respect of the exercise of discretionary national competences. Such Union provisions may well be sufficiently clear, precise and unconditional as to produce direct effect and thence attract the principle of primacy – but Union law is merely ruling out certain domestic choices about how to regulate in the public interest; it does not purport to provide any alternative free-standing regulatory regime to replace the incompatible national rules. Even if the Member State’s current choice has been found wanting, that might say little about the legitimate desire or indeed pressing need for some form of legislative regime in order to protect the public interest, and might leave open to the competent authorities a wide range of other options concerning the appropriate standard or form of regulation, any one of which would prove capable of serving the relevant desire / need, in full conformity with Union law, for the future.[[90]](#footnote-90) But in the meantime: it is perfectly arguable that simple disapplication of the existing national rules, without any default or replacement regime based on Union or national law, could indeed lead to a legal vacuum capable of endangering the relevant public interests.

Consider, for example, the operation of the free movement rules (whether for goods, services or capital). Once a national rule meets the relatively broad definition of a prima facie barrier to cross-border trade, the burden falls upon the Member State to justify its current regulatory choice. But few national rules are found incompatible with the Treaties on the grounds that they simply fail in principle to serve any legitimate public interest such as human health, public safety, consumer or environmental protection. Most free movement challenges ultimately focus on more detailed questions about proportionality and (increasingly) the need to find an appropriate accommodation for / between competing fundamental rights – and within that context, many national rules will be found wanting on relatively limited grounds: for example, by not including all relevant market actors within their scope; by failing to make their criteria sufficiently objective and transparent; by lacking a sufficiently developed scientific or other evidential basis; or by omitting to include an appropriate transitional regime to allow private operators to adjust to the new regulatory standards.[[91]](#footnote-91) In other words: incompatibility with the free movement rules certainly does not signal that the market should be entirely deregulated; indeed, the Member State’s current legislative choices might even be brought into full compliance with Union law through relatively technical or marginal adjustments.[[92]](#footnote-92) But the orthodox position remains: unless and until the Member State adopts the necessary measures, national executive and judicial actors are required to disapply domestic rules found to be in breach of the directly effective free movement provisions.[[93]](#footnote-93) But what if that means an interim period when the national legal system would lack any (or at least any adequate) protection for the relevant public interests?

Another category of situation in which there seems to be a more substantial risk, that the prospective disapplication of incompatible national rules might lead to a damaging legal vacuum, concerns Union obligations which are primarily of a procedural (rather than substantive) nature. Myriad Union measures require the Member States to comply with certain processes of review, notification, consultation or discussion before proceeding with the definitive adoption of a legal act. True: many such procedural obligations are treated by the Court as essentially inter-institutional in nature, thus rendered incapable of producing direct effect within the national legal systems, and therefore of leading to the disapplication of any non-compliant domestic act.[[94]](#footnote-94) However, the Court does insist that other procedural obligations are capable of full enforcement before the national courts – of which the best known is probably (what is now) Directive 2015/1535 laying down the requirement for Member States to notify to the Commission, then hold in abeyance, draft technical regulations.[[95]](#footnote-95) The Court insists that breach of either the initial duty to notify, or the subsequent standstill obligation, constitutes a substantial procedural defect which requires the national courts to disapply the relevant national measure.[[96]](#footnote-96) Directive 2015/1535 itself does offer a limited cushion against the risk that non-compliance and therefore disapplication might ultimately endanger the public interest: it contains an “urgency” exception from the duty to hold in abeyance (though not the initial duty to notify); but restricted to specific policy objectives (excluding more general grounds such as consumer or environmental protection); and based only on “serious and unforeseeable circumstances” (or “serious circumstances” in the case of financial services).[[97]](#footnote-97) That all leaves plenty of scope for the Member State still to commit a substantial procedural defect which – by itself and without any further investigation of the objectives, merits or proportionality of the defective national regulations – will lead to the latter’s disapplication and thus the potential for a legal vacuum in respect of the relevant public interests.[[98]](#footnote-98)

*5.2. Responding to the legal vacuums problem as a matter of principle*

In principle, there are two main competing responses to the problem of legal vacuums which might arise (in particular circumstances) from the disapplication of national rules found to be incompatible with legally binding and enforceable provisions of Union law.

In the first place, one could argue that priority should be given to upholding national regulations, even where they are flawed as a matter of substantive or procedural Union law, at least on a temporary basis until replacement legislation is adopted in full compliance with the Treaties, where the alternative is to risk a legal vacuum in which public or private actors would be free to engage in conduct which is even more damaging to the general interest. After all, the Treaties themselves explicitly instruct the Union institutions to further a much wider range of values and objectives than (say) cross-border economic integration alone: refining the full force of the principle of primacy, in duly justified circumstances where prospective enforcement of the remedy of disapplication would risk inflicting more harm than it would do good, could be viewed as a legitimate legal response that reflects the full spectrum of the Union’s constitutional responsibilities.[[99]](#footnote-99)

Another argument in favour of recognising jurisdiction to grant incompatible national rules a temporary “stay of execution” draws upon concerns about respecting the limits of legal competence and avoiding accusations of improper judicial activism. As we have seen, there may well be circumstances where the subject matter of a dispute is sufficiently close to the core of legal expertise that a situation of incompatibility can be “corrected”, and a damaging legal vacuum avoided, whether as an interim measure or even on a more permanent basis, through constructive judicial interpretation.[[100]](#footnote-100) But in many other situations, the nature and degree of national discretion involved in protecting a legitimate public interest while acting in full compliance with the Treaties, will be sufficiently complex and far-removed from the lawyer’s proper domain, that the domestic judges will be faced with a difficult choice between two equally uncomfortable outcomes: enforce the standard expectation of primacy and disapplication; or step into the shoes of the legislature and impose an alternative (even if only temporary) policy solution. Exactly that dilemma was highlighted by the UK Supreme Court in *Chester*: assuming that the UK’s blanket ban on prisoners being able to vote constituted a beach of Union law, insofar as that ban applied also to European Parliamentary elections and should be considered disproportionate by reason of its absolute character,[[101]](#footnote-101) the courts could not reasonably be expected, under the principle of primacy, simply to disapply the relevant UK legislation.[[102]](#footnote-102) In particular, simple disapplication would lead to all prisoners becoming eligible to vote – and yet it was inevitable that Parliament would never enact legislation to that effect. Nor was such an extreme outcome required in order to restore full compliance with Union law – but it would be equally impossible and indeed beyond the proper role of the courts to devise their own alternative system of voter eligibility.[[103]](#footnote-103) In such circumstances, the courts should merely grant a declaration to the effect that the disputed national legislation was incompatible with the Treaties – an analysis which certainly avoids any danger of a legal vacuum, but which the UK Supreme Court did not feel obliged to share or verify with the Court itself via Article 267 TFEU.

Similar considerations of proper legal competence could well apply in the case of executive bodies. Consider the dispute in *Stanleybet International*.[[104]](#footnote-104) Having noted that certain Greek rules on the regulation of commercial gambling were incompatible with the Treaty free movement provisions, recalled that the national courts and administrative authorities must disapply those defective national provisions, and ruled out any possibility of Union law permitting a transitional period during which the full effects of the principle of primacy could be suspended, the Court then insisted that this analysis need not mean that the Member State is obliged to liberalise the market in commercial gambling within its territory or that the competent authorities are simply obliged to approve all future applications from economic actors. On the contrary: Greece remained free to reform its existing regulatory system, in conformity with the Treaties, according to its preferred level of consumer protection and for the preservation of public order. That conclusion may well sound reassuring – but it presupposes that the national legislature will respond to the finding of incompatibility with remarkable promptness, or at least that the relevant executive bodies enjoy the necessary competence and capacity to do so for themselves.[[105]](#footnote-105)

In short, the argument runs as follows: in situations where neither Union law nor the existing national legal framework are capable of providing a directly applicable substitute arrangement, while the national courts and / or executive authorities cannot reasonably be expected to devise and enforce an alternative regulatory scheme of their own, yet simple disapplication in accordance with the principle of primacy would genuinely risk creating a legal vacuum capable of harming the general interest, Union law should recognise the possibly – in principle – that the relevant national rules could be maintained on a temporary basis, notwithstanding their accepted incompatibility with the Treaties, pending their imminent replacement (in full conformity with Union law) by the competent legislative body. If so, the real questions concern which institution should be entrusted with exercising the necessary jurisdiction; and on what precise grounds, according to exactly which criteria, and subject to which clear limits.

In the second place, however, there is a competing argument that Union law should uphold the overriding imperative to safeguard the principle of primacy and insist upon the duty of national courts to disapply incompatible national rules. To recognise the possibility that a Member State can breach its Treaty obligations, yet the offending measures could still be upheld and enforced even after their incompatibility has been formally established, would both seriously undermine the uniform and effective application of Union law across and within the Member States, and challenge the effective judicial protection of individual rights created by and under the Treaties. Indeed, it was precisely on those grounds that Advocate General Bot in *Winner Wetten* argued that judicial limitations on the full temporal effects of a finding of incompatibility should be possible only as regards past situations (on grounds of legal certainty) and never as regards future disputes (on grounds of legal vacuums).[[106]](#footnote-106) Even as a matter of principle, the Advocate General opposed the suggestion that the Court should recognise a power to limit or qualify the remedy of disapplication with prospective legal effects.[[107]](#footnote-107)

As with so many debates about the appropriate evolution of constitutional principles, the choice between those two viewpoints is as much as matter of preference as of logic – ultimately open to legitimate differences of opinion about how best to strike an appropriate balance between the wide range of legal and policy factors at stake. Nevertheless, we can offer some perhaps useful observations on the arguments highlighted by Advocate General Bot.

Let’s begin with the argument based on the uniformity and effectiveness of Union law. Needless to say: those values are absolutely central to and omnipresent throughout the entire construction and operation of the legal relationship between the Union and its Member States. But they are not absolute values: there are plenty of situations where the uniform and effective application of Union law must, by necessity but also often for just cause, be compromised during the process of translation into each national legal order. It may well be true that – when it comes to national concerns about the full implications of the principle of primacy – the existing caselaw has mostly engaged with issues of legal certainty and undue retrospective effects.[[108]](#footnote-108) But that is certainly not the only area where the Court has struggled to reconcile the values of uniformity and effectiveness with the realities of mutual interdependence between the Union and national legal orders.[[109]](#footnote-109) And having already established that the principle of primacy is not totally unyielding, it seems difficult to reject – simply as a matter of principle – the case for recognising and accommodating another category of situation in which availability of the remedy of disapplication might be restricted for sufficiently compelling reasons.

It would seem fairer to admit that the persuasiveness of the argument based on uniformity and effectiveness hinges less on the point of principle and more on the detailed choices that remain to be made about how the problem of legal vacuums might be identified and managed in practice. Consider the question of institutional competences. The Court might insist upon exercising its own centralised jurisdiction to respond to potentially damaging legal vacuums – obliging the national courts to seek positive and specific authorisation from the Court in order to refrain from disapplying incompatible domestic legislation. Or the Court might sanction the exercise of a more decentralised judicial competence to respond to the problem of prospective legal vacuums – allowing the national courts to reach their own conclusions about whether to withhold the remedy of disapplication on a temporary basis. In the latter case, there is a further choice to be made about whether the domestic judges should act as delegates of a devolved Union competence to be exercised according to criteria derived entirely from the Court’s caselaw; or might instead call upon a competence created unilaterally under national law but subject to Union scrutiny (for example) in accordance with the principles of equivalence and effectiveness. Needless to say, the more centralised the jurisdiction and / or the stricter the criteria for its valid exercise, the less of a risk to uniformity and effectiveness that would be posed by any power to permit “stays of execution” for incompatible national rules.

Let’s move on to the argument based on effective judicial protection. Again, it has to be said that the point is less compelling or at least absolute that might first appear. It is true that, in cases concerning temporal limits on the retrospective effects of annulment or invalidity of Union acts, or on the incompatibility of national measures, the Court usually makes an exception for the claimant who initiated the relevant litigation and comparable cases already pending before the courts.[[110]](#footnote-110) But the approach is often different in cases involving challenges to the legality of Union action in which the Court decides to exercise its power to maintain the prospective legal effects of the relevant measure pending the adoption of a lawful alternative by the competent Union institutions.[[111]](#footnote-111) Here, it seems that the principle of effective judicial protection offers legitimate space for the general interest to prevail over the rights or interests of the individual claimant, i.e. when it comes to the specific legal consequences of an infringement of the public authority’s constitutional or administrative law obligations and regardless of how correct their action proved to be on its own particular merits.[[112]](#footnote-112)

Moreover, the requirements of effective judicial protection need to be viewed within their broader context. In the first place, it is important to clarify the nature and content of the Union law rights at stake in cases which might involve a judicially sanctioned deferral of the remedy of disapplication so as to avoid a potentially damaging legal vacuum. Take the Treaty free movement rights as an example: their precise scope and extent meets its limit where Union law in fact permits the Member State to regulate the domestic market (notwithstanding any negative consequences that may have for cross-border trade) – an evaluation which (as we have seen) usually requires the reconciliation of competing public and private interests and whose outcome will often hinge upon a detailed proportionality assessment.[[113]](#footnote-113) The principle of primacy and the expectation of disapplication risk giving the impression that the right to free movement is more extensive and potent than it actually is. But strictly speaking, Union law creates a right to cross-border commerce only under conditions which are properly regulated in the public interest; for their part, disgruntled traders are entitled to feel aggrieved only to the extent that the Member State has overstepped the boundaries of legitimate market management.[[114]](#footnote-114)

In the second place, the fact that a competent court might decide to uphold the prospective legal effects of a measure which is admittedly flawed by breach of a higher legal obligation, does not mean that the claimant who is vindicated on the merits of their case is nevertheless left empty-handed when it comes to the possibility of effective judicial protection. The latter imperative can still be served by alternative avenues of redress: for example, by seeking reparation from the competent authority in respect of losses suffered through the infringement of its constitutional or administrative law obligations under the applicable regime on non-contractual liability. For present purposes, that means balancing the recognition of any jurisdiction temporarily to withhold the remedy of disapplication in respect of incompatible national measures, against the possibility of the claimant still being entitled bringing a *Francovich* action against the Member State.[[115]](#footnote-115) Of course, interesting questions would need to be addressed: for example, about whether the grant of any “stay of execution” for incompatible national rules should be treated as a relevant factor in establishing liability and whether such relevance should make access to reparation more or less likely. But the underlying point remains the same. The requirements of effective judicial protection under Union law can and often are satisfied other than by insisting that a national court must grant the remedy of disapplication.[[116]](#footnote-116) If that is true in other situations, then the need to protect individual rights under Union law hardly creates an insuperable obstacle to recognising an additional limit on the full effects of the principle of primacy for the sake of preventing a damaging legal vacuum.

**6. Managing the prospective impacts of disapplication: centralised and decentralised jurisdictions**

How has the Court responded to this debate over the relative merits and dangers of permitting limits to the full prospective effects of primacy? Would the Court do nothing, reject even the possibility of granting a “stay of execution” to incompatible national rules otherwise facing disapplication, and perhaps risk certain domestic judges one day opening another channel of disquiet about the principle of primacy and its specific impacts within the national legal system? Or would the Court accept that legal vacuums are a legitimate source of concern, best addressed by internalising the problem into the structures and processes of Union law itself, and expanding the jurisdiction (whether centralised or decentralised) to withhold the remedy of disapplication?

The Court’s caselaw remains in its infancy and we should be wary of reading too much into the available resources. Rather unhelpfully, the first two major rulings – in *Winner Wetten*[[117]](#footnote-117) and *Inter-Environnement Wallonie*,[[118]](#footnote-118) both from the Grand Chamber – suggested very different approaches whose mutual relationship and respective implications were open to several competing explanations.[[119]](#footnote-119) But in its subsequent (First Chamber) judgment in *Association France Nature Environnement*,[[120]](#footnote-120) the Court seems to have plumped for a solution: what is already true of judicial competence to balance the demands of primacy against the needs of legal certainty, should also apply when it comes to addressing the problem of legal vacuums; Union law provides for a “mixed model”, combining elements of both a centralised jurisdiction (whereby the Court itself might suspend the prospective disapplication of incompatible national rules) and a decentralised jurisdiction (allowing the domestic courts to exercise their own power to “restructure” some of the usual consequences of the primacy of Union over national law).

*6.1. Centralised jurisdiction*

In *Winner Wetten*, several Member States argued that the Court should recognise its own jurisdiction (analogous to that available as regards unlawful Union acts) to determine which of the legal effects of an incompatible national measure should be declared definitive – including the possibility of maintaining such measures in place on an interim basis in order to avoid a legal vacuum.[[121]](#footnote-121) In response, the Court held:

“even assuming that [similar considerations as those which apply in respect of Union acts] were capable of leading, by analogy and by way of exception, to a provisional suspension of the ousting effect which a directly-applicable rule of Union law has on national law that is contrary thereto, such a suspension, the conditions of which could be determined solely by the Court of Justice, must be excluded from the outset in [the factual and legal context of] this case…”.[[122]](#footnote-122)

But having left open even the question of principle in *Winner Wetten*,[[123]](#footnote-123) by the time of the judgment in *Association France,* the Court seems to have taken for granted that its own centralised jurisdiction does indeed exist:

“it is apparent from [the ruling in *Winner Wetten*] that the Court alone may, exceptionally and for overriding considerations of legal certainty, grant a provisional suspension of the ousting effect which a rule of EU law has on national law that is contrary thereto. If national courts had the power to give national provisions primacy in relation to EU law contrary to those national provisions, even provisionally, the uniform application of EU law would be damaged”.[[124]](#footnote-124)

Et voilà: the problem of legal vacuums is to be internalised within the structures and processes of Union law itself, through the Court’s own centralised jurisdiction to authorise suspension of the remedy of disapplication at the request of a national court.

Having refused to authorise non-disapplication in *Winner Wetten*, the Court in *Association France* also found it unnecessary to decide for itself on the temporary maintenance of the disputed domestic rules – preferring (as we shall see) to leave the dispute to the national courts in the exercise of the latter’s decentralised competence. But even if the Court’s own jurisdiction has yet to be exercised in a concrete case, the fact that the Court explicitly draws an analogy with its existing powers in respect of unlawful Union acts under Article 264 TFEU allows us to identify certain core principles to underpin the law here. Thus: the power to maintain prospective legal effects is of an exceptional nature, available to the Court on a discretionary basis, to be exercised on a case-by-case footing.[[125]](#footnote-125) Its purpose is to prevent a legal vacuum from arising before replacement of the defective act with a new measure.[[126]](#footnote-126) Its exercise may be justified where overriding considerations of legal certainty involving all the relevant interests, public as well as private, are at stake.[[127]](#footnote-127) Its duration is for the period of time necessary in order to allow the relevant incompatibility to be remedied.[[128]](#footnote-128)

Within the basic legal framework provided by those core principles, we shall now focus in greater detail upon several particular facets of the Court’s newfound jurisdiction, taking account various cues and clues scattered across the rulings in *Winner Wetten* and *Association France* themselves.

In the first place, the range of public interest objectives capable of justifying temporary suspension of the remedy of disapplication appears to be open-ended: *Winner Wetten* itself concerned objectives long familiar in the field of gambling regulation (public order and consumer protection); while *Association France* involved the maintenance of environmental protection. That is presumably subject to the usual proviso that the Member State may not (for example) rely simply and entirely on the adverse financial consequences of its own (non-)compliance with Union law.[[129]](#footnote-129) Otherwise, the proposition that any legitimate public interest should be capable of activating the Court’s centralised jurisdiction appears eminently sound: after all, the risk of a damaging legal vacuum seems just as possible as regards public health or workers’ rights as it does for consumer or environmental protection. It might be objected that such a potentially wide-ranging power risks offering delinquent Member States a “second bite at the cherry” – in effect, of recognising specific grounds for the non-disapplication of incompatible national rules which were not contemplated (indeed, may well have been deliberately ruled out) by the Union legislature when adopting the relevant Union regulatory regime.[[130]](#footnote-130) But that is surely a factor which can be taken into account by the Court, as and when appropriate, in its discretionary evaluation of each individual request; bearing in mind that the purpose of this jurisdiction is not to deny the binding nature of the relevant Union obligation, the proven incompatibility of the defective domestic rules, or the duty of the Member State to adopt fully compliant alternative legislation – only to determine whether some pressing public interest justifies a temporary limit on access to the specific remedy of disapplication for the benefit of individual claimants.

In the second place, the Court seems (thus far) not to have placed any particular weight on the nature of the relevant Union obligation. For example: *Winner Wetten* concerned application of the primary Treaty provisions on freedom of establishment and the freedom to provide services; while *Association France* involved a finding of incompatibility between national law and a Union environmental law directive. Similarly, the Union obligations engaged in *Winner Wetten* placed substantive limits on the Member State’s competence to regulate the market in gambling services; whereas the Union provisions at stake in *Association France* were concerned with essentially procedural duties relating to the conduct of environmental impact assessments. Once again, such an approach seems entirely appropriate: given that the principle of primacy is capable of benefiting all Union measures, and of applying as against all Member State acts, regardless of their legal character or place in the hierarchy of norms, it would be wrong to rule out, simply as a matter of principle, the idea of a damaging legal vacuum arising from incompatibility as much (say) with a Union administrative decision as with a primary Treaty provision. Yet the precise nature of the relevant Union obligation may well be relevant in any given dispute. For example: the Court may decide that the temporary maintenance of defective national rules is more readily justified where the source of incompatibility with Union law is breach of a purely procedural obligation (to notify, consult or respond) – at least in circumstances where the available evidence suggests that full compliance would be unlikely to make any substantial difference to the final decision or action.[[131]](#footnote-131)

In the third place, it remains unclear how far the nature and extent of the Member State’s own misconduct and non-compliance will colour the Court’s evaluation of a national court’s request for non-disapplication. For example, in *Winner Wetten*, the primary reason why the Court was not prepared even to consider authorising temporary maintenance of the defective German rules resided in the fact that the latter failed to restrict commercial gaming activities in a consistent and systematic manner *so that* it followed from established caselaw that such legislation could not be justified by the imperative requirement of controlling gambling.[[132]](#footnote-132) What broader lessons might we draw from that (admittedly rather terse) reasoning?

On the one hand, perhaps the ruling in *Winner Wetten* is thus suggesting that, if the disputed national rules cannot be objectively justified in accordance with the relevant Treaty free movement provisions, that in itself amounts to an insuperable obstacle against exercise of the Court’s centralised jurisdiction to authorise non-disapplication.[[133]](#footnote-133) If so, that would surely amount to an unduly restrictive requirement. After all: the only reason the Court might be called upon to exercise this exceptional jurisdiction in the first place, is precisely *because* the Member State’s action has been found incompatible with its Union law obligations; otherwise, the national rules would be perfectly valid and no issue of preclusion or disapplication would even arise. As we have seen: in the case of the Treaty free movement provisions, a finding of incompatibility will usually be attributable precisely to defects identified through the judicial proportionality assessment; indeed, the failure to pursue a legitimate policy objective with the fullest possible rigour and coherence in practice is virtually a standard Member State shortcoming.[[134]](#footnote-134) In *Winner Wetten* itself, the Court may have been influenced by the degree to which the disputed German rules failed to achieve their own policy objectives in a consistent and systematic manner: after all, Advocate General Bot described the regime as “in reality, only a discriminatory, or at least a protectionist, measure”.[[135]](#footnote-135) But in and of itself, the existence of a state of incompatibility tells us little (for example) about whether disapplication might still risk creating a damaging legal vacuum through the absence of any (even flawed) public regulation; or whether the defective national regime might be brought into full compliance with Union law through only relatively minor adjustments and improvements.

On the other hand, perhaps the Court in *Winner Wetten* intended to place particular emphasis on the fact, not merely that the German rules were incompatible with the Treaty free movement provisions, but that such incompatibility should already have been obvious from the Court’s existing and indeed extensive caselaw on evaluating the lawfulness of Member State restrictions on commercial gambling activities.[[136]](#footnote-136) Such an approach would certainly have its merits. After all, if the Court has already delivered preliminary rulings which provide the Member States with a binding interpretation of Union law, as it should be understood and applied from its entry into force and without relevant temporal restriction, then for the Court to agree to a subsequent request from a domestic court to limit the prospective effects of a finding of incompatibility, could have the effect, both of circumventing the general principle that temporal restrictions on the interpretation of Union law should only be imposed in that very ruling,[[137]](#footnote-137) and of reducing the incentive for Member States to assess the implications of the Court’s caselaw for their existing national legislation and take the necessary steps in good time to ensure full compliance with their Treaty obligations.[[138]](#footnote-138)

To that extent, the Court may be speaking very precisely and deliberately when it phrases its new jurisdiction as much in terms of protecting legal certainty as about preventing legal vacuums: after all, the existence of a state of genuine uncertainty about the true meaning and requirements of Union law is (as we have seen) a crucial factor when the Court is called upon to exercise its existing powers to limit the retroactive effects of the principle of primacy.[[139]](#footnote-139) But in this rather different context, it might once again prove unwise to treat any single consideration as decisive rather then merely relevant or even persuasive. After all, it is perfectly possible to imagine a situation (say) in which a preliminary ruling from one Member State clarifies the implications of Union law without relevant temporal restriction, immediately prompting another Member State to begin the process of reviewing and revising its own corresponding regulatory regime, but in the meantime, still leaving the latter amenable to judicial challenge on the basis of Union law, in circumstances where fully prospective disapplication could risk creating a damaging legal vacuum.

*6.2. Decentralised jurisdiction*

At the same time as affirming *Winner Wetten* as the fountainhead of the Court’s centralised jurisdiction to order the temporary non-disapplication of incompatible national rules at the request of a domestic court, the Court in *Association France* treated the previous ruling in *Inter-Environnement Wallonie* as authority for recognising also the existence of a decentralised jurisdiction allowing the national judges to grant their own “stay of execution” in respect of domestic measures adopted in breach of the Treaties, *in casu*, various requirements contained in Union legislation concerning the conduct of environmental impact assessments.[[140]](#footnote-140)

As before, the Court thereby seeks to internalise the problem of legal vacuums – and neutralise any potential domestic challenge to the authority of Union law that might be prompted by the Court’s own reluctance to furnish an adequate response to legitimate concerns. But here, the possibility of suspending the full effects of the principle of primacy is available directly to the national judges and without the need to seek specific authorisation from the Court itself. In *Association France*, the Court seeks to rationalise that possibility in three main ways. First, the Court avoids any suggestion that the national courts are seeking or indeed being allowed (let alone encouraged) simply to defy the principle of primacy and / or to do so for the sake of upholding national legal values that might be considered directly incompatible with those of the Union itself. Instead, the Court regards the national courts as being engaged merely in a process to “restructure” the effects of a finding of incompatibility between Union and domestic legislation.[[141]](#footnote-141) Secondly, the possibility to engage in such a process of restructuring the consequences of primacy and disapplication is not derived from or conferred by Union law but depends on the national courts being offered such competence under the framework of their own domestic legal system.[[142]](#footnote-142) Thirdly, while the origin and availability of the power to restructure might be national, the conditions under which the domestic court might decide to maintain the legal effects of measures found incompatible with the Treaties are to be determined, not in accordance with the presumption of Member State procedural autonomy and subject to scrutiny via the usual principles of equivalence and effectiveness,[[143]](#footnote-143) but instead under conditions precisely and strictly laid down by the Court itself as a matter of Union law.[[144]](#footnote-144)

The main challenge which arises from the ruling in *Association France* is to identify the dividing line and inter-relationship between (on the one hand) the Court’s centralised jurisdiction directly to suspend disapplication for the sake of preventing a legal vacuum and (on the other hand) the national court’s decentralised jurisdiction to restructure the legal effects of incompatibility under conditions laid down by Union law. Before addressing that challenge, of course, it is necessary to establish in greater detail exactly what the Court’s caselaw reveals about the national court’s power to restructure – for which purpose, the judgments in *Inter-Environnement Wallonie* and *Association France* at least furnish us with two concrete examples to work with.

To begin with, the Court stresses that the power to maintain certain of the effects of an incompatible national measure is to be treated as exceptional in nature and can only be exercised on a case-by-case basis (not generally or abstractly) in the light of the specific circumstances of the pending dispute.[[145]](#footnote-145) Crucially, the Court stresses that any decentralised jurisdiction to suspend disapplication is to be exercised only on the basis of overriding considerations linked to environmental protection.[[146]](#footnote-146) Indeed, the purpose of any national power to restructure the practical consequences of primacy is to reconcile the principles of legality and primacy of Union law with the necessity of protecting the environment as mandated under the Treaties themselves and (in particular) by Article 3(3) TEU and Article 191 TFEU which together oblige the Union to ensure a high level of environmental protection.[[147]](#footnote-147)

To that end, the national court must establish that four mandatory conditions are satisfied.[[148]](#footnote-148) In effect: the domestic act which is incompatible with one provision of Union law must nevertheless correctly transpose another Union measure relating to environmental protection;[[149]](#footnote-149) the subsequent adoption of a fully compliant national act must not make it possible to avoid the damaging environmental effects of disapplication of the existing domestic legislation; it must be established that disapplication would create a legal vacuum concerning the transposition of Union environmental law which would be more damaging to the environment, i.e. would result in lesser protection and thus run counter to the essential objective of Union law; and the restructuring effects ordered by the domestic court must last only so long as is strictly necessary for the adoption of fully compliant national legislation.[[150]](#footnote-150) Having verified those four mandatory conditions, the national court should determine whether disapplication of the incompatible national measure would give rise to adverse environmental impacts that would compromise the objectives of the relevant Union law – taking into account the objective and content of the incompatible national act and its effects on other provisions relating to environmental protection.[[151]](#footnote-151)

*6.3. Relationship between the two jurisdictions*

At first glance, the recognition in *Association France* of both a centralised and a decentralised jurisdiction for addressing the potentially adverse prospective effects of the remedy of disapplication mirrors the Court’s familiar methodology for managing the retrospective effects of the principle of primacy. But in this more novel context, the available caselaw suggests that the Court is distinguishing between the two types of jurisdiction by rather different criteria and (in addition) is subjecting the national courts to very different tools of scrutiny and control.

On the one hand, the dividing line between centralised and decentralised jurisdiction is not here being drawn on the basis that, since Union law itself can and does provide a uniform solution to the problem of legal vacuums, there is no real need and indeed should be little remaining scope for the exercise of national autonomy in respect of the same category of problem. Instead, the Court seems willing to recognise that, alongside its centralised jurisdiction, the national courts might exercise their own discretionary power not to disapply, potentially in respect of the same type of dispute: decentralised jurisdiction is not merely a default, but an optional extra.[[152]](#footnote-152) On the other hand, Union scrutiny over the exercise of that decentralised jurisdiction is not here conducted through the medium of the standard principles of equivalence and effectiveness, which would have offered significant latitude to the Member States when it comes to the precise conditions as well as the very possibility of non-disapplication. Instead, the power of the national courts to refrain from enforcing the principle of primacy is closely controlled by the Court under conditions directly and precisely defined by Union law: an optional extra, but within that framework, one which offers little scope for divergence.

In itself, of course, there is nothing problematic or objectionable in the fact that the Court has chosen to divide centralised from decentralised jurisdiction by different criteria and subject to different limits in the case of legal certainty and retrospective limits as compared to legal vacuums and prospective limits. Instead, the real question is: does the approach in *Association France* create a pair of jurisdictions which are coherent, not so much each on its own terms, but rather as regards their mutual inter-relationship? Or does the co-existence of a centralised jurisdiction vested in the Court, alongside an optional but much more limited decentralised jurisdiction available to each Member State, create the potential for arbitrary distinctions or even inconsistent outcomes? For now, that remains a difficult question to answer, primarily because the Court has not yet fully revealed its understanding of the precise relationship between the two jurisdictions identified and rationalised in *Association France.* But it is possible to identify two main possibilities, each with various advantages but also certain challenges.

The first possibility is that the competence available to national judges might indeed be allowed to exist and be exercised parallel to that of the Court. If so, it becomes especially important to ensure that the domestic courts exercise their powers in a way which complements rather than contradicts the Court’s own jurisdiction – for which purpose, one would indeed expect the conditions governing national competence to be more narrowly defined and strictly controlled. It would matter less whether the governing criteria managed to create a decentralised jurisdiction that could be described as coherent on its own terms; the primary goal would be to constrain the exercise of that jurisdiction sufficiently as to avoid it potentially undermining the operation of the Court’s centralised power.

And indeed, that feels like a fair reading of the available caselaw and the Court’s likely intentions. After all: while both types of jurisdiction are to be treated as exceptional and exercised only on a case-by-case basis, the potential scope to adopt decentralised decisions on non-disapplication is curtailed considerably as compared to the potential breadth of the Court’s own competence. Consider the relevance to be attached, under each jurisdiction, to the nature of the public interest which would allegedly be endangered by prospective disapplication and, in particular, the fact that the only policy objective relevant to the exercise of national (not Union) power consists of environmental protection. Taken in isolation, that would hardly provide the basis for a coherent jurisdiction to tackle damaging legal vacuums: the latter are not limited to environmental concerns alone; while environmental protection is only one of the Union’s core objectives and explicit responsibilities.[[153]](#footnote-153) But viewed in context, the Court’s choice is much more persuasive: limiting the exercise of national jurisdiction to a single category of public interest challenge acts as an immediate differentiator from the Court’s own general power to suspend the remedy of disapplication. Similarly, consider the relevance to be attached, under each jurisdiction, to the nature of the Member State’s non-compliance with Union law and, in particular, the fact that the domestic (not Union) judges must be satisfied that the disputed national measure may breach one Treaty obligation yet still and at the same time serves to discharge another. Again, taken in isolation, that should hardly be a crucial factor in safeguarding against damaging legal vacuums: the latter are just as capable of arising where the public interest is currently safeguarded by national regulation as by Union legislation. But again, viewed in its broader context, the mandatory condition laid down in *Association France* makes greater sense: it helps allay fears that the national courts are somehow being allowed to “defy” or “reject” the principle of primacy, if the possibility of non-disapplication is actually reserved for situations in which the disputed domestic rules in fact serve to implement another Union obligation;[[154]](#footnote-154) but it also acts significantly to limit the range of situations in which decentralised competence might genuinely overlap with the Court’s own centralised jurisdiction.

If this is indeed the Court’s intended model, then it has to be said: there is still room for the caselaw to deliver greater clarity and consistency. For example: should the Court also have emphasised more clearly and indeed decisively that both *Inter-Environnement Wallonie* and *Association France* concerned the incompatibility of national rules with Union legislation (i.e. on environmental impact assessments) which created essentially procedural obligations for the Member State? After all, that could offer another useful criterion by which to limit the scope of decentralised competence as compared to the Court’s centralised jurisdiction: we saw above how the latter is available also in respect of non-compliance with substantive, not just procedural, Union obligations.[[155]](#footnote-155)

Another example: in contrast to the position set out in *Winner Wetten* as regards exercise of the Court’s own centralised jurisdiction, the ruling in *Association France* attached no significance to the fact that the Member State’s infringement should already have been evident from the Court’s existing caselaw. Indeed, the disputed national rules appear to have been adopted only after a previous preliminary ruling which made clear they would prove incompatible with Union law.[[156]](#footnote-156) Does the Court intend this to be another relevant dividing line between its own competence and that of the national courts? If so, it is a less obviously useful criterion, given that it could make non-disapplication through recourse to domestic rules more readily available than via the Court itself, opening up precisely the possibility that a request to “restructure” the consequences of incompatibility manages to succeed before the national courts when it would have been doomed to failure under Union law per se.

The second main possibility, when it comes to the future evolution of the caselaw, is that the decentralised jurisdiction as described in *Association France* changes from being an optional extra which sits alongside the Court’s own competence, to act instead as a simple delegation of power from the Union to the national courts, allowing the latter to adjudicate directly over requests for non-disapplication in respect of specific categories of situation. That would entail a rather different relationship between the two jurisdictions than the one currently suggested by the Court – but such a model could bring distinct benefits. For example, to declare that the national courts are exercising a delegated Union power in particular fields would immediately eliminate any overlap with the Court’s own functions (and thus any potential for the domestic judges to offer assessments or reach conclusions capable of contradicting or undermining the Court). Moreover, a model based on delegated Union competence would be capable of gradual expansion, in the light of greater experience and mutual trust, so as to cover broader public interests than environmental protection alone and / or wider situations than those involving incidental compliance by the Member State with another Union obligation.

But if this proves to be the Court’s preferred direction for the future evolution of the caselaw on limits to primacy and disapplication in the case of damaging legal vacuums, then there would again be certain questions and potential inconsistencies to address. For example: it would no longer seem appropriate for the Court to leave it to each individual Member State to decide whether or not its courts should enjoy the competence to grant a “stay of execution” in respect of incompatible national rules: if this really is a delegated Union power, intended to serve a valid public interest, then the uniformity and effectiveness of Union law would be better served by declaring that all national courts are entitled to exercise the same decentralised jurisdiction as regards the same categories of dispute and under the same conditions.[[157]](#footnote-157)

Similarly, to regard both the Court and the domestic judges as exercising the same essential competence, albeit through different and complementary institutional frameworks, would increase the pressure for the criteria governing non-disapplication to be harmonised across each jurisdiction. Should the Court also explicitly take into account factors (inspired from *Inter-Environnement Wallonie* and *Association France*) such as whether the subsequent adoption of fully compliant measures would be sufficient to undo the harmful impacts of immediate disapplication of the existing national rules? But equally: should the national courts be able to suspend the full prospective effects of primacy when the Court itself would refuse to do so, because the current state incompatibility was entirely obvious from existing caselaw and the latter had not been subject to any relevant temporal limitation?

In any case, regardless of whether the Court decides to continue treating the two jurisdictions as substantively distinct and institutionally parallel, or instead begins to treat them as institutionally separate but substantively unitary, future caselaw will surely have to explore various common issues which remain as yet lacking in sufficient clarity. For example: how far should it be possible, and how far would it be appropriate, for the Court and / or the national judges to explore alternative solutions to the risk of a damaging legal vacuum, such as the potential severance and disapplication only of the defective elements of any given national regulatory regime, whilst leaving the remainder both intact and fully operational?[[158]](#footnote-158)

Or again: how might the competence to suspend full disapplication be fruitfully combined with the duty of sincere cooperation, so as to limit the associated risks to the uniformity and effectiveness of Union law? As regards the national courts, the basic position is already fairly clear: if a domestic judge wishes to avail of the Court’s centralised jurisdiction, that will require a preliminary reference, not dissimilar to the position as regards challenges to the validity of Union acts since the ruling in *Foto-Frost*;[[159]](#footnote-159) whereas if a national court is minded to exercise its own decentralised jurisdiction, then a preliminary reference is required only under the usual conditions laid down in Article 267 TFEU as interpreted by the Court.[[160]](#footnote-160) But the implications of loyal cooperation in situations of non-disapplication are much less clear when it comes to the conduct and obligations of the other branches of Member State power. How long should any judicial “stay of execution” last, in order for the national legislature to replace the disputed rules with fully compliant measures?[[161]](#footnote-161) What adjustments in terms of decision-making priorities and / or procedures should the government and / or parliament be expected to make, in order to expedite the Member State’s response to a judicial “stay of execution”? And what should be the consequences, if the competent regulatory authorities eventually fail to act within the time prescribed by the Court / national judge?[[162]](#footnote-162)

Or again: what should be the implications of a judicial decision to refrain from ordering the ordinary disapplication of incompatible national rules, when it comes to the effective judicial protection of either the current claimant or those natural and legal persons potentially affected by the future consequences of that decision? Might the Court decide that the requirements of effective judicial protection under Union law are exhausted by the very act of balancing the needs of the public against the private interests of the claimant under the *Winner Wetten* / *Association France* test? Or will aggrieved individuals be encouraged to seek reparation from the Member State, in respect of losses attributable to the incompatible national measures, notwithstanding or indeed even because of the latter’s temporary maintenance in force?

The response to all of those questions lies primarily with the Court to explore and articulate in its future caselaw. But the national judges will also have an important role to play – not least in highlighting concrete disputes (for example) that illustrate how the jurisdictional constraints imposed under the *Winner Wetten* / *Association France* model in fact fail to provide satisfactory safeguards against the genuine risk of potentially damaging legal vacuums. Otherwise, we might continue to see each Member State – exemplified by the UK Supreme Court in *Chester* and arguably continued by the French Conseil d’État in *ANODE* – designing and implementing its own idiosyncratic version of what primacy supposedly means and what disapplication should actually entail.[[163]](#footnote-163)

**7. Conclusions**

It is a long-standing and understandable tendency of EU lawyers to discuss the principle of primacy largely, sometimes almost exclusively, in terms of competing claims to constitutional authority, their impact on the sovereignty of the Member States and the (re)location of ultimate constituent power in Europe. Yet many of our most iconic “primacy disputes” are essentially about particular national courts sporadically expressing specific reservations over particular substantive choices embodied in specific Union acts; resistance to the “primacy of Union law” within the domestic legal system is merely the ultimate consequence or incidental manifestation of that logically prior domestic disagreement. The principle of primacy itself is better understood as an essentially practical device – one mechanical element in the complex system for organising relations between the Union and national legal systems, in fulfilment of the obligations which Member States voluntarily assumed through their sovereign decision to form or accede to the Union. Above all, primacy is a tool of conflict resolution at the disposal of the national courts when faced with an irreconcilable mismatch between legally cognisable provisions of Union and national law – inseparable from the remedy of disapplication which is the primary means and consequence of that conflict resolution.

Viewed in that light, the category of “primacy disputes” which have actually focused on the principle of primacy and its remedy of disapplication per se are generally less incendiary in character or flamboyant in profile than our standard discourse might suggest. Most have concerned a reasonable desire to balance the full effects of primacy against the needs of legal certainty having regard to the retrospective impacts of disapplication upon settled acts, decisions or relationships. In response, the Court has overseen the development of a complex but largely successful and generally cooperative “mixed model” whereby Union law itself provides certain centralised solutions to various legal certainty problems; in default of which the Member States may exercise their own national procedural autonomy, subject to the familiar principles of equivalence and effectiveness.

More recently, a new category of “primacy dispute” has vied for greater judicial attention: challenges to the principle of primacy motivated by a reasonable desire to balance the full effects of disapplication against the risk of creating a legal vacuum, capable of endangering legitimate public interest objectives, pending the adoption of fully compliant replacement measures by the Member State. In response, the Court has instigated the development of another “mixed model”, again combining centralised and decentralised competence, this time to authorise the temporary suspension of primacy and the interim maintenance of incompatible domestic legislation. But the dividing line and inter-relationship between those two jurisdictions, as well as the more precise legal criteria governing their detailed exercise, remains in need of further elaboration and clarification – not least when it comes to the choice between recognising distinct and parallel competences (which should necessarily imply a limited role as well as strict controls over national discretion) or a unitary albeit shared judicial power (which could then be allowed to evolve in a rather different direction). Either way, one should resist the temptation of viewing greater legal nuance, qualification and compromise in the operationalisation of the principle of primacy as some sort of existential threat to the uniform and effective functioning of the Union legal system: after all, primacy, it’s only a remedy.

1. \* University of Liverpool. I am indebted to the reviewers at CMLRev for their insightful and invaluable comments and suggestions.

 E.g. Opinion 1/17, EU:C:2019:341, paras 109-110. Similarly, e.g. Opinion 1/09, EU:C:2011:123; Opinion 2/13, EU:C:2014:2454; Case C-621/18, *Wightman*, EU:C:2018:999. [↑](#footnote-ref-1)
2. All the way, of course, since Case 6/64, *Costa* v. *ENEL*, EU:C:1964:66. [↑](#footnote-ref-2)
3. Having last done so during the debates surrounding the Treaty establishing a Constitution for Europe and, in particular, about whether / how to codify “primacy” in written primary law – the ultimate outcome of which (via the Lisbon Treaty) is now Declaration No 17. [↑](#footnote-ref-3)
4. The extreme example, of course, being the UK’s debate over membership and withdrawal in which the slogan “take back control” was central to the Leave campaign. [↑](#footnote-ref-4)
5. For a nice recent example, consider explanation of the supposedly “problematic” ruling in Case C-129/94, *Ruiz Bernáldez*, EU:C:1996:143 by the Court in Case C-122/17, *Smith*, EU:C:2018:631. [↑](#footnote-ref-5)
6. E.g. Case 106/77, *Simmenthal*, EU:C:1978:49. [↑](#footnote-ref-6)
7. E.g. Cases C-10/97 to C-22/97, *IN.CO.GE.’90*, EU:C:1998:498; Case C-66/13, *Green Network*, EU:C:2014:2399. See further, e.g. Schütze, “Primacy Without Pre-Emption: The Very Slowly Emergent Doctrine of Community Pre-Emption”, 43 CML Rev. (2006), 1023. [↑](#footnote-ref-7)
8. E.g. Case C-282/10, *Dominguez*, EU:C:2012:33; Case C-97/11, *Amia*, EU:C:2012:306; Case C-306/12, *Avanssur*, EU:C:2013:650. [↑](#footnote-ref-8)
9. As established in Case 14/83, *von Colson,* EU:C:1984:153 and Case C-106/89, *Marleasing,* EU:C:1990:395. [↑](#footnote-ref-9)
10. E.g. Case C-200/91, *Coloroll Pension Trustees*, EU:C:1994:348; Case C-262/97, *Engelbrecht*, EU:C:2000:492; Case C-8/02, *Leichtle*, EU:C:2004:161; Case C-208/05, *ITC Innovative Technology Centre*, EU:C:2007:16; Case C-357/06, *Frigerio Luigi*, EU:C:2007:818; Case C-115/08, *ČEZ*, EU:C:2009:660; Cases C-395/08 and C-396/08, *Bruno*, EU:C:2010:329; Case C-142/12, *Marinov*, EU:C:2013:292. [↑](#footnote-ref-10)
11. See the restatement of relevant principles by the Grand Chamber in Case C-573/17, *Popławski*, EU:C:2019:530. [↑](#footnote-ref-11)
12. E.g. Case C-97/11, *Amia*, EU:C:2012:306; Case C-619/16, *Kreuziger*, EU:C:2018:872. [↑](#footnote-ref-12)
13. Case C-573/17, *Popławski*, EU:C:2019:530, para 60; also para 68. [↑](#footnote-ref-13)
14. E.g. Case C-282/10, *Dominguez*, EU:C:2012:33; Case C-176/12, *AMS*, EU:C:2014:2; Case C-122/17, *Smith*, EU:C:2018:631. Consider also judgments concerning ex-Third Pillar framework decisions which (by nature) lack direct effect, e.g. Case C-42/11, *Lopes Da Silva Jorge*, EU:C:2012:517; Case C-579/15, *Popławski*, EU:C:2017:503; Case C-573/17, *Popławski*, EU:C:2019:530. [↑](#footnote-ref-14)
15. E.g. Case C-111/97, *EvoBus Austria*, EU:C:1998:434; Case C-316/13, *Fenoll*, EU:C:2015:200. Without prejudice to the possibility of complaining to the Commission, in the hope it might initiate enforcement proceedings under Art 258 TFEU. [↑](#footnote-ref-15)
16. The Court uses a variety of phrases besides “disapplication”, e.g. “set aside” (Case C-213/89, *Factortame*, EU:C:1990:257), “refrain from applying” (Case 103/88, *Fratelli Costanzo*, EU:C:1989:256) and “leave unapplied” (Case C-347/96, *Solred*, EU:C:1998:87. [↑](#footnote-ref-16)
17. E.g. Cases C-10/97 to C-22/97, *IN.CO.GE.’90*, EU:C:1998:498; Case C-314/08, *Filipiak*, EU:C:2009:719; Case C-378/17, *Minister for Justice and Equality*, EU:C:2018:979. Though note the wholly exceptional legal framework under consideration in Cases C-202/18 & C-238/18, *ECB* v. *Latvia*, EU:C:2019:139. [↑](#footnote-ref-17)
18. E.g. Case C-264/96, *ICI*, EU:C:1998:370; Case C-310/10, *Agafiţei*, EU:C:2011:467. [↑](#footnote-ref-18)
19. E.g. Case 34/67, *Lück*, EU:C:1968:24; Case C-226/97, *Lemmens*, EU:C:1998:296. [↑](#footnote-ref-19)
20. E.g. Case C-378/17, *Minister for Justice and Equality*, EU:C:2018:979. [↑](#footnote-ref-20)
21. E.g. Case 167/73, *Commission* v. *France*, EU:C:1974:35; Case 96/81, *Commission* v. *Netherlands*, EU:C:1982:192; Case C-354/98, *Commission* v. *France*, EU:C:1999:63; Case C-367/98, *Commission* v. *Portugal*, EU:C:2002:326; Case C-475/08, *Commission* v. *Belgium*, EU:C:2009:751. Similarly: failure to seek disapplication through judicial action cannot in itself be treated as a breach of the duty to mitigate one’s losses within the context of a claim for Member State liability, e.g. Cases C-397/98 and C-410/98, *Metallgesellschaft*, EU:C:2001:134. [↑](#footnote-ref-21)
22. E.g. Case C-337/91, *van Gemert-Derks*, EU:C:1993:856; Cases C-10/97 to C-22/97, *IN.CO.GE.’90*, EU:C:1998:498; Case C-314/08, *Filipiak*, EU:C:2009:719; Case C-591/10, *Littlewoods Retail*, EU:C:2012:478; Case C-628/15, *The Trustees of the BT Pension Scheme*, EU:C:2017:687. [↑](#footnote-ref-22)
23. E.g. Case C-226/07, *Flughafen Köln/Bonn*, EU:C:2008:429. [↑](#footnote-ref-23)
24. E.g. Cases C-46/93 & C-48/93, *Brasserie du Pêcheur* and *Factortame III*, EU:C:1996:79. [↑](#footnote-ref-24)
25. Consider rulings such as Case C-237/07, *Janecek*, EU:C:2008:447; Case C-404/13, *ClientEarth*, EU:C:2014:2382; Case C-723/17, *Craeynest*, EU:C:2019:533. [↑](#footnote-ref-25)
26. E.g. Case 157/86, *Murphy* v. *Bord Telecom Eireann*, EU:C:1988:62; Case C-18/11, *Philips Electronics*, EU:C:2012:532. [↑](#footnote-ref-26)
27. E.g. Case 102/88, *Ruzius-Wilbrink*, EU:C:1989:639; Case C-595/12, *Napoli*, EU:C:2014:128. [↑](#footnote-ref-27)
28. E.g. Case 249/85, *Albako* v. *BALM*, EU:C:1987:245. [↑](#footnote-ref-28)
29. E.g. Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, EU:C:2017:987; Case C-414/16, *Egenberger*, EU:C:2018:257; Case C-68/17, *IR*, EU:C:2018:696. [↑](#footnote-ref-29)
30. E.g. Case C-144/04, *Mangold*, EU:C:2005:709. [↑](#footnote-ref-30)
31. E.g. Case C-265/03, *Simutenkov*, EU:C:2005:213; Case C-485/07, *Akdas*, EU:C:2011:346; Case C-476/10, *projektart*, EU:C:2011:422. [↑](#footnote-ref-31)
32. E.g. Case 11/70, *Internationale Handelsgesellschaft*, EU:C:1970:114; Case C-224/97, *Ciola*, EU:C:1999:212; Case C-399/11, *Melloni*, EU:C:2013:107. [↑](#footnote-ref-32)
33. E.g. Case 106/77, *Simmenthal*, EU:C:1978:49; Case C-432/05, *Unibet*, EU:C:2007:163; Cases C-188/10 and C-189/10, *Melki*, EU:C:2010:363; Case C-173/09, *Elchinov*, EU:C:2010:581; Case C-416/10, *Križan*, EU:C:2013:8; Case C-112/13, *A*, EU:C:2014:2195; Case C-614/14, *Ognyanov*, EU:C:2016:514; Case C-589/16, *Filippi*, EU:C:2018:417. [↑](#footnote-ref-33)
34. E.g. Case 103/88, *Fratelli Costanzo*, EU:C:1989:256; Case C-198/01, *CIF*, EU:C:2003:430; Case C-341/08, *Petersen*, EU:C:2010:4; Case C-243/09, *Fuβ*, EU:C:2010:609; Case C-378/17, *Minister for Justice and Equality*, EU:C:2018:979. [↑](#footnote-ref-34)
35. As the Court itself suggests in Case C-573/17, *Popławski*, EU:C:2019:530, paras 52-58. [↑](#footnote-ref-35)
36. See further, e.g. Dougan, “When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Primacy”, 44 CML Rev. (2007), 931. [↑](#footnote-ref-36)
37. Such as the “exclusionary effects” sometimes attributed to primacy (independent of the “substitutionary effects” supposedly reserved to direct effect): see further, e.g. Lenz, Sif Tynes and Young, “Horizontal What? Back to Basics”, 25 EL Rev. (2000), 509; Tridimas, “Black, White and Shades of Grey: Horizontality of Directives Revisited”, 21 YEL (2002), 327; Lenaerts and Corthaut, “Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law”, 31 EL Rev. (2006), 287. [↑](#footnote-ref-37)
38. See further, e.g. Alter, *Establishing the Primacy of European Law* (OUP, 2001); Claes, *The National Courts’ Mandate in the European Constitution* (Hart, 2006); Besselink, *A Composite European Constitution* (Europa Law, 2007). [↑](#footnote-ref-38)
39. In particular, the “classic” BVerfG rulings in *Solange II* [1987] 3 CMLR 225; *Brunner* [1994] 1 CMLR 57; and *Lisbon Treaty* (Judgment of 30 June 2009) – as well as subsequent caselaw such as the *Honeywell* and *Gauweiler* litigation. [↑](#footnote-ref-39)
40. See further, e.g. Herdegen, “Maastricht and the German Constitutional Court: Constitutional Restraints for an ‘Ever Closer Union’”, 31 CML Rev. (1994), 235; Thym, “In the Name of Sovereign Statehood: A Critical Introduction to the *Lisbon* Judgment of the German Constitutional Court”, 46 CML Rev. (2009), 1795; Doukas, “The Verdict of the German Federal Constitutional Court on the Lisbon Treaty: Not Guilty, But Don’t Do It Again!”, 34 EL Rev. (2009), 866; Payandeh, “Constitutional Review of EU Law After *Honeywell*: Contextualising the Relationship Between the German Constitutional Court and the EU Court of Justice”, 48 CML Rev. (2011), 9; Pliakos and Anagnostaras, “Who is the ultimate arbiter? The battle over judicial primacy in EU law”, 36 EL Rev. (2011), 109; Borger, “Outright Monetary Transactions and the Stability Mandate of the ECB: *Gauweiler*”, 53 CML Rev. (2016), 139; Lang, “*Ultra vires* review of the ECB’s policy of quantitative easing: An analysis of the German Constitutional Court’s preliminary reference order in the *PSPP* case”, 55 CML Rev. (2018), 923. And more broadly, e.g. MacCormick, “The Maastricht-Urteil: Sovereignty Now”, 1 ELJ (1995), 259; Baquero Cruz, “The Legacy of the Maastricht-Urteil and the Pluralist Movement”, 14 ELJ (2008), 389; Tuominen, “Aspects of Constitutional Pluralism in the Light of the *Gauweiler* Saga”, 43 EL Rev. (2018), 186. [↑](#footnote-ref-40)
41. Though nor should one overlook the potential frequency with which national courts do simply bypass their obligations under Union law – including the obligation to submit preliminary references under Art 267 TFEU: for a recent example, consider O’Brien, “Acte Cryptique? *Zambrano*, Welfare Rights and Underclass Citizenship in the Tale of the Missing Preliminary Reference” (forthcoming in CMLRev). [↑](#footnote-ref-41)
42. E.g. Case C-376/98, *Germany* v. *European Parliament and Council*, EU:C:2000:544; Case 11/70, *Internationale Handelsgesellschaft*, EU:C:1970:114. [↑](#footnote-ref-42)
43. E.g. Case C-399/11, *Melloni*, EU:C:2013:107; Case C-617/10, *Fransson*, EU:C:2013:105. [↑](#footnote-ref-43)
44. E.g. Case 120/78, *“Cassis de Dijon”*, EU:C:1979:42. [↑](#footnote-ref-44)
45. E.g. Cases C‑404/15 & C‑659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198; Case C-220/18 PPU, *ML*, EU:C:2018:589. [↑](#footnote-ref-45)
46. If such efforts fail, there remains little option but for individuals to consider the possibility of seeking reparations against the Member State; and / or for the Commission to contemplate enforcement proceedings. See further, e.g. Taborowski, “Infringement Proceedings and Non-Compliant National Courts”, 49 CML Rev. (2012), 1881; Varga, “National remedies in the case of violation of EU law by Member State courts”, 54 CML Rev. (2017), 51. [↑](#footnote-ref-46)
47. See the extensive study undertaken by Sowery, *The Relationship between the Primary Sources of EU Law: Is there a hierarchy of norms within Union primary law?* (PhD thesis, University of Liverpool, 2018). [↑](#footnote-ref-47)
48. As derived from Case 33/76, *Rewe-Zentralfinanz*, EU:C:1976:188 and Case 45/76, *Comet,* EU:C:1976:191. [↑](#footnote-ref-48)
49. For a critical view on the Court’s understanding of legal certainty: Van Meerbeeck, “The principle of legal certainty in the caselaw of the European Court of Justice: from certainty to trust”, 41 EL Rev. (2016), 275. [↑](#footnote-ref-49)
50. E.g. Case 61/79, *Denkavit Italiana*, EU:C:1980:100. Note also caselaw concerning the entry into force of Union measures and their application to existing situations, e.g. Case 21/81, *Bout*, EU:C:1982:47; Case C-162/00, *Pokrzeptowicz-Meyer*, EU:C:2002:57. [↑](#footnote-ref-50)
51. Under what is now Art 264 TFEU. [↑](#footnote-ref-51)
52. E.g. Case C-295/90, *Parliament* v. *Council*, EU:C:1992:294. [↑](#footnote-ref-52)
53. E.g. Case 4/79, *Providence Agricole de la Champagne*, EU:C:1980:232; Cases C-38/90 and C-151/90, *Lomas*, EU:C:1992:116; Case C-228/92, *Roquette Frères*, EU:C:1994:168. [↑](#footnote-ref-53)
54. Case 43/75, *Defrenne* v. *Sabena*, EU:C:1976:56. On the possibility of general temporal limitations on findings that national law is incompatible with Union law in the context of enforcement proceedings under Art 258 / 259 TFEU, e.g. Case C-178/05, *Commission* v. *Greece*, EU:C:2007:317; Case C-475/07, *Commission* v. *Poland*, EU:C:2009:86; Case C-82/10, *Commission* v. *Ireland*, EU:C:2011:621; Case C-387/11, *Commission* v. *Belgium*, EU:C:2012:670. [↑](#footnote-ref-54)
55. E.g. Case 24/86, *Blaizot*, EU:C:1988:43; Case 106/77, *Barra*, EU:C:1988:42; Case C-262/88, *Barber*, EU:C:1990:209; Case C-163/90, *Legros*, EU:C:1992:326; Case C-415/93, *Bosman*, EU:C:1995:463; Case C-262/96, *Sürül*, EU:C:1999:228; Case C-437/97, *Evangelischer Krankenhausverein Wien*, EU:C:2000:110. See further, e.g. Waldhoff, “Recent Developments Relating to the Retroactive Effect of Decisions of the ECJ”, 46 CML Rev. (2009), 173. [↑](#footnote-ref-55)
56. E.g. Case 98/78, *Racke*, EU:C:1979:14; Case C-108/01, *Asda Stores*, EU:C:2003:296. [↑](#footnote-ref-56)
57. E.g. Case C-228/99, *Silos e Mangimi Martini*, EU:C:2001:599; Case C-161/06, *Skoma-Lux*, EU:C:2007:773. Note also, e.g. Case 160/84, *Oryzomyli Kavallas*, EU:C:1986:205; Case C-370/96, *Covita*, EU:C:1998:567. See further, e.g. Lasiński-Sulecki and Morawski, “Late Publication of EC Law in languages of new Member States and its effects: Obligations on individuals following the Court’s judgment in *Skoma-Lux*”, 45 CML Rev. (2008), 705. [↑](#footnote-ref-57)
58. Not just the enforceability of the non-published Union act, but also that of national implementing measures, must be suspended: e.g. Case C-345/06, *Heinrich*, EU:C:2009:140. [↑](#footnote-ref-58)
59. Case C-161/06, *Skoma-Lux*, EU:C:2007:773. [↑](#footnote-ref-59)
60. E.g. Case 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431; Case C-573/17, *Popławski*, EU:C:2019:530. [↑](#footnote-ref-60)
61. E.g. Case C-60/02, *X*, EU:C:2004:10; Cases C-387/02, C-391/02 and C-403/02, *Berlusconi*, EU:C:2005:270. [↑](#footnote-ref-61)
62. E.g. Case C-105/03, *Pupino*, EU:C:2005:386; Case C-554/14, *Ognyanov*, EU:C:2016:835. See further, e.g. Spaventa, “Opening Pandora’s Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*”, 3 EuConst (2006), 5. [↑](#footnote-ref-62)
63. E.g. Case C-198/01, *CIF*, EU:C:2003:430; Case C-495/00, *Azienda Agricola Giorgio, Giovanni e Luciano Visentin*, EU:C:2004:180; Case C-158/06, *ROM-projecten*, EU:C:2007:370; Case C-606/10, *ANAFE*, EU:C:2012:348. [↑](#footnote-ref-63)
64. Starting with Case 33/76, *Rewe-Zentralfinanz*, EU:C:1976:188; Case 45/76, *Comet,* EU:C:1976:191. [↑](#footnote-ref-64)
65. E.g. Case C-261/95, *Palmisani*, EU:C:1997:351; Case C-231/96, *Edis*, EU:C:1998:401; Case C-78/98, *Preston*, EU:C:2000:247; Case C-327/00, *Santex*, EU:C:2003:109; Case C-542/08, *Barth*, EU:C:2010:193; Case C-387/17, *Fallimento Traghetti del Mediterraneo*, EU:C:2019:51. [↑](#footnote-ref-65)
66. E.g. Case C-2/06, *Willy Kempter*, EU:C:2008:78. [↑](#footnote-ref-66)
67. Particularly in light of Case C-453/00, *Kühne & Heitz*, EU:C:2004:17 (finality for administrative decisions) and Case C-234/04, *Kapferer*, EU:C:2006:178 (*res judicata* for judicial decisions). See further, e.g. Becker, “Application of Community Law by Member States’ Public Authorities: Between Autonomy and Effectiveness”, 44 CML Rev. (2007), 1035; Kornezov, “*Res judicata* of national judgments incompatible with EU Law: Time for a major rethink?”, 51 CML Rev. (2014), 809. [↑](#footnote-ref-67)
68. E.g. Cases C-392/04 and C-422/04, *i-21 Germany*, EU:C:2006:586; Case C-2/06, *Willy Kempter*, EU:C:2008:78; Case C-40/08, *Asturcom Telecommunicaciones*, EU:C:2009:615; Case C-249/11, *Byankov*, EU:C:2012:608; Case C-69/14, *Târşia*, EU:C:2015:662; Case C-421/14, *Banco Primus*, EU:C:2017:60; Case C-234/17, *XC*, EU:C:2018:853. However, the Court continues to identify certain disputes subject to particular requirements as regards *res judicata*: consider, e.g. Case C-119/05, *Lucchini*, EU:C:2007:434; cf. subsequent rulings, e.g. Case C-2/08, *Fallimento Olimpiclub*, EU:C:2009:506; Case C-507/08, *Commission* v. *Slovakia*, EU:C:2010:802; Case C-505/14, *Klausner Holz Niedersachsen*, EU:C:2015:742. [↑](#footnote-ref-68)
69. E.g. Case C-126/97, *Eco Swiss China Time*, EU:C:1999:269; Case C-213/13, *Impresa Pizzarotti*, EU:C:2014:2067. [↑](#footnote-ref-69)
70. O.J. 1993, L 95/29. [↑](#footnote-ref-70)
71. Cases C-154/15, C-307/15 and C-308/15, *Gutiérrez Naranjo*, EU:C:2016:980. See further, e.g. Leskinen and de Elizalde, “The control of terms that define the essential obligations of the parties under the Unfair Contract Terms Directive: *Gutiérrez Naranjo”*, 55 CML Rev. (2018), 1595. Consider also, e.g. Case 106/77, *Barra*, EU:C:1988:42. Contrast with, e.g. Case C-231/96, *Edis*, EU:C:1998:401; Case C-50/96, *Schröder*, EU:C:2000:72. [↑](#footnote-ref-71)
72. Case C-105/14, *Taricco*, EU:C:2015:555. See further, e.g. Timmerman, “Balancing effective criminal sanctions with effective fundamental rights protection in cases of VAT fraud: *Taricco*”, 53 CML Rev. (2016), 779. [↑](#footnote-ref-72)
73. Case C-42/17, *M.A.S.*, EU:C:2017:936. Consider also, e.g. Case C-310/16, *Dzivev*, EU:C:2019:30. See further, e.g. Rauchegger, “National constitutional rights and the primacy of EU law: *M.A.S.*”, 55 CML Rev. (2018), 1521. [↑](#footnote-ref-73)
74. Case C-441/14, *DI acting on behalf of Ajos*, EU:C:2016:278. [↑](#footnote-ref-74)
75. Judgment of the Danish Supreme Court in Case 15/2014 *DI acting on behalf of Ajos,* 6 December 2016. See further, e.g. Maciejewski and Theilen, “Temporal aspects of the interaction between national and EU law: reintroducing the protection of legitimate expectation”, 42 EL Rev. (2017), 706. [↑](#footnote-ref-75)
76. See further: Holdgaard, Elkan and Krohn Schaldemose, “From cooperation to collision: The ECJ’s *Ajos* ruling and the Danish Supreme Court’s refusal to comply”, 55 CML Rev. (2018), 17. [↑](#footnote-ref-76)
77. E.g. Case C-262/88, *Barber*, EU:C:1990:209. [↑](#footnote-ref-77)
78. E.g. Case 81/72, *Commission* v. *Council*, EU:C:1973:60; Case 59/81, *Commission* v. *Council*, EU:C:1982:332; Cases C-402/05 and C-415/05, *Kadi*, EU:C:2008:461; Case C-166/07, *Parliament* v. *Council*, EU:C:2009:499. [↑](#footnote-ref-78)
79. E.g. Case C-333/07, *Société Régie Networks*, EU:C:2008:764. [↑](#footnote-ref-79)
80. See, e.g. Case C-157/02, *Rieser Internationale Transporte*, EU:C:2004:76. [↑](#footnote-ref-80)
81. E.g. Cases C-213/06 to C-233/06, *Jonkman*, EU:C:2007:373. [↑](#footnote-ref-81)
82. E.g. Cases C-186/11 and C-209/11, *Stanleybet International*, EU:C:2013:33; Case C-612/15, *Kolev*, EU:C:2018:392; Case C-310/16, *Dzivev*, EU:C:2019:30. [↑](#footnote-ref-82)
83. E.g. Case C-147/08, *Römer*, EU:C:2011:286. [↑](#footnote-ref-83)
84. See Section 2 (above). Note also Case C-533/13, *AKT*, EU:C:2015:173 (on inter-institutional obligations to review national law which are not directly enforceable against allegedly incompatible domestic provisions). [↑](#footnote-ref-84)
85. Indeed: national law, shorn of its specific non-compliant elements, might itself provide a fully operational legal regime in conformity with the Treaties, e.g. Case C-462/99, *Connect Austria*, EU:C:2003:297. [↑](#footnote-ref-85)
86. E.g. Cases C-453/02 and C-462/02, *Linneweber*, EU:C:2005:92; Case C-243/09, *Fuβ*, EU:C:2010:609; Cases C-621/10 and C-129/11, *Balkan and Sea Properties*, EU:C:2012:248; Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, EU:C:2018:874. [↑](#footnote-ref-86)
87. Treaty / legislative regimes on equal treatment, e.g. Case C-184/89, *Nimz*, EU:C:1991:50; Case C-200/91, *Coloroll Pension Trustees*, EU:C:1994:348; Case C-187/15, *Pöpperl*, EU:C:2016:550). General principles of Union law / Charter of Fundamental Rights, e.g. Case C-442/00, *Rodríguez Caballero*, EU:C:2002:752; Case C-81/05, *Cordero Alonso*, EU:C:2006:529. However, the requirement to “level up” does not apply where there is no valid reference point, e.g. Cases C-501/12 to C-506/12, C-540/12 and C-541/12, *Specht*, EU:C:2014:2005. Moreover, “levelling up” may be prohibited where it would extend or amplify a breach of Union law, e.g. Case C-28/99, *Verdonck*, EU:C:2001:238; Case C-368/04, *Transalpine Ölleitung in Österreich*, EU:C:2006:644. [↑](#footnote-ref-87)
88. E.g. Case C-408/92, *Avdel Systems*, EU:C:1994:349; Case C-193/17, *Cresco Investigation*, EU:C:2019:43; Case C-396/17, *Leitner*, EU:C:2019:375. [↑](#footnote-ref-88)
89. E.g. Case C-612/15, *Kolev*, EU:C:2018:392. Also, e.g. Cases C-213/06 to C-233/06, *Jonkman*, EU:C:2007:373; Case C-174/16, *H* v. *Land Berlin*, EU:C:2017:637. [↑](#footnote-ref-89)
90. E.g. Cases C-186/11 and C-209/11, *Stanleybet International*, EU:C:2013:33. [↑](#footnote-ref-90)
91. E.g. Case C-112/00, *Schmidberger*, EU:C:2003:333; Case C-309/02, *Radberger Getränkegesellschaft*, EU:C:2004:799; Case C-320/03, *Commission* v. *Austria*, EU:C:2005:684; Case C-73/08, *Bressol*, EU:C:2010:181; Case C-98/14, *Berlington Hungary*, EU:C:2015:386; Case C-333/14, *Scotch Whisky Association,* EU:C:2015:845. See further, e.g. Barnard, “Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?” in Barnard and Odudu (eds), *The Outer Limits of European Union Law* (Hart, 2009); Mathisen, “Consistency and coherence as conditions for justification of Member State measures restricting free movement”, 47 CML Rev. (2010), 1021; Nic Shuibhne and Maci, “Proving Public Interest: The Growing Impact of Evidence in Free Movement Caselaw”, 50 CML Rev. (2013), 965. [↑](#footnote-ref-91)
92. E.g. *Stanleybet International*. [↑](#footnote-ref-92)
93. E.g. Cases C-13/91 and C-113/91, *Debus*, EU:C:1992:247. [↑](#footnote-ref-93)
94. E.g. Case 380/87, *Enichem Base*, EU:C:1989:318; Case C-533/13, *AKT*, EU:C:2015:173. [↑](#footnote-ref-94)
95. O.J. 2015, L 241/1. Previously Directive 98/34, O.J. 1998, L 204/37; Directive 83/189, O.J. 1983, L 109/8. [↑](#footnote-ref-95)
96. E.g. Case C-194/94, *CIA Security,* EU:C:1996:172; Case C-443/98, *Unilever Italia*, EU:C:2000:496. [↑](#footnote-ref-96)
97. See Art 6(7). [↑](#footnote-ref-97)
98. See further, e.g. Dougan,40 CML Rev. (2003), 193. [↑](#footnote-ref-98)
99. See, in particular, Arts 2 and 3 TEU and Arts 7-17 TFEU. [↑](#footnote-ref-99)
100. See Section 5.1 (above). [↑](#footnote-ref-100)
101. Cp. Case C-650/13, *Delvigne*, EU:C:2015:648. [↑](#footnote-ref-101)
102. [2013] UKSC 63. [↑](#footnote-ref-102)
103. Ibid, paras 69-74. [↑](#footnote-ref-103)
104. Cases C-186/11 and C-209/11, *Stanleybet International*, EU:C:2013:33. [↑](#footnote-ref-104)
105. On the issue of judicial and / or administrative activism in substituting replacement solutions for incompatible national rules pending the latter’s replacement by the legislature, consider also the (rather peculiar) ruling in Case C-384/17, *Dooel Uvoz-Izvoz Skopje Link Logistic*, EU:C:2018:810. [↑](#footnote-ref-105)
106. The only exception, according to AG Bot, being the grant of interim relief against allegedly invalid Union acts under conditions laid down by the Court analogous to those applicable in the case of direct actions for annulment: see Case C-409/06, *Winner Wetten*, EU:C:2010:38, para 88. [↑](#footnote-ref-106)
107. Ibid, paras 94-109. [↑](#footnote-ref-107)
108. See Section 4 (above). [↑](#footnote-ref-108)
109. The broader question of EU scrutiny over national autonomy as regards remedies and procedural rules obviously provides a wealth of examples. [↑](#footnote-ref-109)
110. E.g. Case 41/84, *Pinna*, EU:C:1986:1. [↑](#footnote-ref-110)
111. Under Art 264 TFEU (or the equivalent powers available in respect of Art 267 TFEU). [↑](#footnote-ref-111)
112. E.g. Cases C-402/05 and C-415/05, *Kadi*, EU:C:2008:461. [↑](#footnote-ref-112)
113. See Section 5.1 (above). [↑](#footnote-ref-113)
114. See further, e.g. Dougan, “Addressing Issues of Protective Scope within the *Francovich* Right to Reparation”, 13 EUConst (2017), 124. [↑](#footnote-ref-114)
115. Cases C-6/90 & C-9/90, *Francovich*, EU:C:1991:428. [↑](#footnote-ref-115)
116. Indeed: that is true in all situations where the intended beneficiaries of Union law are unable to rely on its direct effect and thence primacy, e.g. Cases C-6/90 & C-9/90, *Francovich*, EU:C:1991:428; Case C-91/92, *Faccini Dori*, EU:C:1994:292. [↑](#footnote-ref-116)
117. Case C-409/06, *Winner Wetten*, EU:C:2010:503. See further, e.g. Beukers, 48 CML Rev. (2011), 1985. [↑](#footnote-ref-117)
118. Case C-41/11, *Inter-Environnement Wallonie*, EU:C:2012:103. See further, e.g. Lock,50 CML Rev. (2013), 217. [↑](#footnote-ref-118)
119. The Court in *Inter-Environnement Wallonie* did not even refer to its previous ruling in *Winner Wetten*. However, potential differences in approach / interpretation were explicitly considered / suggested by AG Kokott in both *Inter-Environnement Wallonie*, EU:C:2011:822 and *Association France Nature Environnement*, EU:C:2016:309. [↑](#footnote-ref-119)
120. Case C-379/15, *Association France Nature Environnement*, EU:C:2016:603. See further, e.g. Sowery,54 CML Rev. (2017), 1157. [↑](#footnote-ref-120)
121. *Winner Wetten*, para 63. See also AG Bot in *Winner Wetten*, paras 79-82 Opinion. [↑](#footnote-ref-121)
122. *Winner Wetten*, para 67. [↑](#footnote-ref-122)
123. Note AG Kokott in *Inter-Environnement Wallonie*, paras 20-21 Opinion. Consider also the ruling in

*Stanleybet International*: the national court’s suggestion to suspend disapplication on a temporary basis was dismissed out of hand by the Court; but without further consideration of the possibility that the Court itself might directly authorise a “stay of execution” for the disputed national rules. [↑](#footnote-ref-123)
124. *Association France Nature Environnement*, para 33. [↑](#footnote-ref-124)
125. *Winner Wetten*, paras 64 and 67. Also *Association France Nature Environnement*, para 33 [↑](#footnote-ref-125)
126. *Winner Wetten*, paras 65 and 66. [↑](#footnote-ref-126)
127. Ibid, paras 66 and 67. Also *Association France Nature Environnement*, para 33. [↑](#footnote-ref-127)
128. *Winner Wetten*, paras 65 and 66. Also *Association France Nature Environnement*, para 33. [↑](#footnote-ref-128)
129. E.g. Case C-137/94, *Richardson*, EU:C:1995:342. [↑](#footnote-ref-129)
130. On the Court’s general scepticism towards national policy claims not already accommodated within the relevant Union regulatory regime, e.g. Case C-184/12, *Unamar*, EU:C:2013:663; Case C-273/15, *ZS Ezernieki*, EU:C:2016:364. [↑](#footnote-ref-130)
131. Though note AG Kokott in *Inter-Environnement Wallonie*, paras 37-38 Opinion: many procedural obligations exist precisely on the assumption that compliance could make a difference to the final outcome. [↑](#footnote-ref-131)
132. *Winner Wetten*, para 68. [↑](#footnote-ref-132)
133. An interpretation which might also be reflected in the Court’s conclusion: see *Winner Wetten*, para 69. The same conclusion was replicated in *Stanleybet International*, paras 37-39 – but this should be handled with care, since the Court did not explicitly engage with the question of its own centralised jurisdiction to authorise temporary maintenance of incompatible national rules. [↑](#footnote-ref-133)
134. See Section 5.1 (above). [↑](#footnote-ref-134)
135. *Winner Wetten*, para 113. [↑](#footnote-ref-135)
136. A factor also stressed by AG Bot: *Winner Wetten*, para 114 Opinion. [↑](#footnote-ref-136)
137. E.G. Case C-292/04, *Meilicke*, EU:C:2007:132. [↑](#footnote-ref-137)
138. See also AG Bot in *Winner Wetten*, paras 116-119 Opinion. [↑](#footnote-ref-138)
139. E.g. Cases C-367/93 to C-377/93, *Roders*, EU:C:1995:261; Case C-104/98, *Buchner*, EU:C:2000:276; Case C-347/00, *Barreira Pérez*, EU:C:2002:560. [↑](#footnote-ref-139)
140. Note that the Court in both *Inter-Environnement Wallonie* and *Association France Nature Environnement* talks about the “annulment” of non-compliant national rules. That reflects the fact that the relevant Union and national legal frameworks together provided for the annulment of measures adopted in breach of the obligation to conduct an environmental impact assessment. However, the general principles developed in both rulings should be equally applicable to situations involving the mere disapplication of incompatible national measures as is usually expected / required under Union law per se. On the general legal effects of non-compliance with Union requirements relating to environmental impact assessments, see Case C-201/02, *Wells*, EU:C:2004:12. [↑](#footnote-ref-140)
141. *Association France Nature Environnement*, para 34. [↑](#footnote-ref-141)
142. Ibid, paras 34 and 43. The same was true in *Inter-Environnement Wallonie*: see paras 39, 48, 58 and 63. [↑](#footnote-ref-142)
143. As suggested by AG Kokott in *Inter-Environnement Wallonie*, paras 27-43 Opinion. [↑](#footnote-ref-143)
144. *Association France Nature Environnement*, paras 34-43. [↑](#footnote-ref-144)
145. Ibid, paras 34, 37, 40 and 43. [↑](#footnote-ref-145)
146. Ibid, paras 34 and 43. [↑](#footnote-ref-146)
147. Ibid, paras 35-36. [↑](#footnote-ref-147)
148. Ibid, paras 34, 37, 41 and 43. [↑](#footnote-ref-148)
149. Note that *Inter-Environnement Wallonie* had concerned, and was phrased in terms limited to, correct implementation of the Nitrates Directive 91/676, O.J. 1991, L 375/1. However, the Court in *Association France Nature Environnement* expanded this condition to cover any measure of Union environmental legislation: see para 39. Note the more cautious advice of AG Kokott in *Association France Nature Environnement*, paras 51-57 Opinion. [↑](#footnote-ref-149)
150. *Association France Nature Environnement*, , paras 38-39 and 43. [↑](#footnote-ref-150)
151. Ibid, paras 41 and 42. [↑](#footnote-ref-151)
152. In *Association France* itself*,* it is arguable that the dispute could have been resolved through the exercise of either centralised or decentralised jurisdiction. [↑](#footnote-ref-152)
153. See further, e.g. Lock,50 CML Rev. (2013), 217; Sowery, 54 CML Rev. (2017), 1157. [↑](#footnote-ref-153)
154. A factor highlighted also by AG Kokott in *Inter-Environnement Wallonie*, para 25 Opinion. [↑](#footnote-ref-154)
155. Note that AG Kokott in *Inter-Environnement Wallonie* seemed to place particular emphasis on the substantive-procedural distinction (paras 23-24 Opinion); and in *Association France Nature Environnement* emphasised that the national court’s power to suspend disapplication should be limited to procedural obligations (para 37 Opinion). [↑](#footnote-ref-155)
156. See *Association France Nature Environnement*, paras 24-26. Contrast with the emphasis attached to this factor by AG Kokott at paras 34-36 Opinion. [↑](#footnote-ref-156)
157. Note that AG Kokott in *Inter-Environnement Wallonie* (at para 44 Opinion) explicitly left open the question whether Union law should positively require the national courts to enjoy a power to suspend disapplication. [↑](#footnote-ref-157)
158. In which regard, note *Inter-Environnement Wallonie*, para 53. Cp. caselaw from other fields concerning the scope for judicial intervention in the event of partial incompatibility with Union law, e.g. Case C-377/14, *Radlinger*, EU:C:2016:283; Case C-421/14, *Banco Primus*, EU:C:2017:60. [↑](#footnote-ref-158)
159. Case 314/85, *Foto-Frost*, EU:C:1987:452. [↑](#footnote-ref-159)
160. Though for which purpose, the Court in *Association France Nature Environnement* stressed the exceptional nature of the domestic judicial power, and the relative scarcity of relevant Union caselaw, as relevant factors to be taken into account by courts against whose decisions there is no longer any remedy: see paras 44-53 and especially paras 51-52. However, note the judgment of the Conseil d’État in *ANODE* (ECLI:FR:CEASS:2017:370321.20170719). [↑](#footnote-ref-160)
161. In which context, note that the Court has been unwilling to impose any fixed time limit for the Union institutions to act, where the prospective effects of annulment / invalidity are suspended in the case of Union measures, e.g. Case C-21/94, *Parliament* v. *Council*, EU:C:1995:220; though consider also, e.g. Case C-333/07, *Société Régie Networks*, EU:C:2008:764. [↑](#footnote-ref-161)
162. A question raised and left hanging by AG Kokott in *Inter-Environnement Wallonie*, para 45 Opinion. [↑](#footnote-ref-162)
163. Judgment of the Conseil d’État in *ANODE*, ECLI:FR:CEASS:2017:370321.20170719. [↑](#footnote-ref-163)